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REPORTS

OF

CASES DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

FROM

NOVEMBER TERM, 1855, TO JUNE TERM, 1856.

BOTH INCLUSIVE.

VOL. 4.

BY E. PECK,

COUNSELOR AT LAW.

VOLUME XVII.

WITH REFERENCES BY

HON. W. H. UNDERWOOD.

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JUDGES OF THE SUPREME COURT.

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CHIEF JUSTICE,

WALTER B. SCATES.

ASSOCIATE JUSTICES,

JOHN D. CATON.

ONIAS C. SKINNER.

RULE

ADOPTED BY

THE SUPREME COURT

AT

OTTAWA, JUNE TERM. 1856.

In case the Appellant or Plaintiff in Error shall neglect to file an abstract in compliance with the rules of this Court, the opposite party may file the abstract and prepare the cause for a hearing *ex parte*, and have the costs taxed therefor, provided the Appellant or Plaintiff in Error would have been entitled to have the cause heard at the same term.

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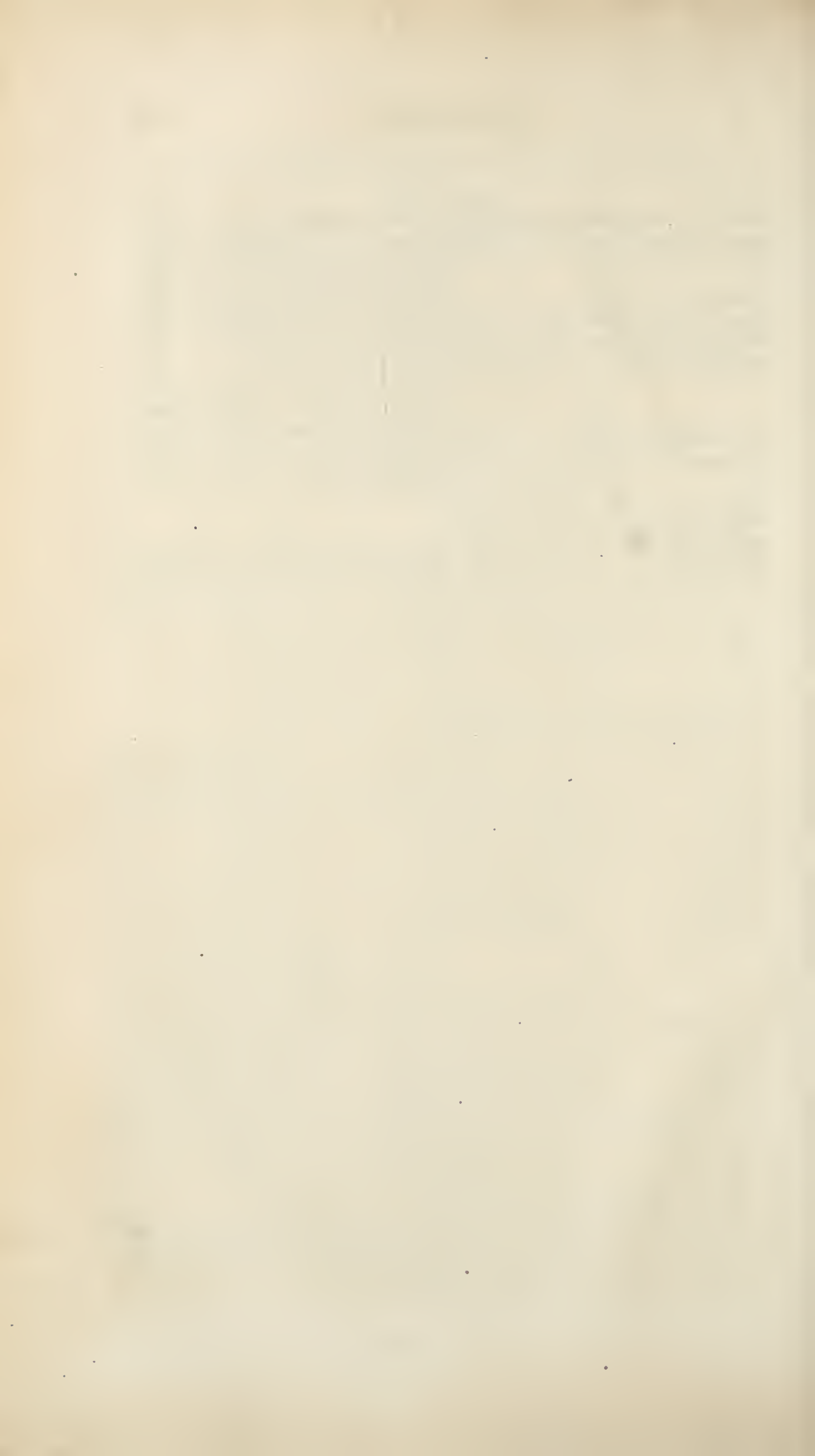

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

NOVEMBER TERM, 1855, AT MOUNT VERNON.

HUGH R. STARKEY, Plaintiff in Error, *v.* THE PEOPLE.

ERROR TO GALLATIN.

Dying declarations are such as are made, relating to the facts of an injury of which the party afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance and without hope of escaping the impending danger (*a*).

The court should determine upon the admissibility of such declarations upon hearing proof of the condition of mind of the deceased at the time they were made. Which proofs, it is advised, should not be taken in the hearing of the jury impanneled to try the accused.

The substance of dying declarations may be given in evidence to the jury; and, if necessary, through interpreters.

If dying declarations are permitted to go to the jury, then also may they hear the whole evidence as to the condition of mind of the deceased and other circumstances at the time they were made, and pass upon their credibility and weight.

THIS indictment was tried before BAUGH, Judge, and a Jury, at December term, 1854, of the Gallatin Circuit Court.

N. L. FREEMAN, for Plaintiff in Error.

J. S. ROBINSON, for The People.

SKINNER, J. Starkey was indicted in the Gallatin Circuit Court for the murder of Pohlman.

He was found guilty of murder and sentenced by the court. A motion for a new trial was overruled. A writ of error was sued out and a supersedeas awarded.

(*a*) Such declarations are admitted only in public prosecution for felonious homicide. The Chicago and Great Eastern Railway company et al. *vs.* Marshall, Ill. Supreme Court, April term, 1869.

The several assignments of error will be noticed in their order. The first assignment questions the decision of the court in admitting the statements of the deceased made to Lawrence, Izerman, as to the infliction of the wound causing his death as dying declarations.

The testimony upon which the court admitted these declarations was substantially as follows:

Lawrence Izerman testified that he saw the deceased on the evening of the day he was hurt; that the deceased sent for him, as they were both Germans, and there were no Germans where the deceased then was; that the deceased showed his wound to witness, and said he was very bad and could not get through his life with it; that he must die.

The witness did not say the deceased said he must die, until the court had twice decided that the declarations were inadmissible, and after repeated questions by the prosecuting attorney and the court, the witness, who was a German and spoke through an interpreter, said deceased told him he had a dangerous wound and must die for it; the witness understood English imperfectly. He stated that deceased was in bed, calm, and spoke slowly, that the deceased did not ask for any thing to be done for him, but the persons about the house were dressing his wound.

Dr. Corwin testified that he was a physician, and on the Saturday afternoon after the deceased was wounded, witness went to visit a boy next door to where deceased was, and was called in to see deceased, and examined the wound externally, but did not probe the wound to ascertain its depth.

Could not say whether the wound entered the cavity. The wound was on the left breast just above the nipple. There are two symptoms to show that the cavity is entered, neither of which symptoms existed in this case, so far as witness ascertained. When witness then went to see deceased, he, the deceased, came down the stairs to the witness; the deceased could not speak English, and witness told him through an interpreter to remain quiet, and not move about. Witness did not think at that time that the probabilities were against the recovery of the patient; that he did not then think the wound mortal, if by mortal wound is meant that the stronger probabilities were against a recovery. Witness did not at any time communicate to the deceased that he would die.

Witness called again to see the deceased on the Sunday after the Saturday mentioned, when the deceased went out on the porch for witness to see him; witness upbraided deceased for not keeping quiet.

On the next day, Monday, witness saw deceased again—and gaain on the Wednesday following, at which last time deceased

came into the next house where witness was attending on the boy mentioned. Witness understood that on the day before, which was Tuesday, the deceased had ridden to Shawneetown, seven miles, and back, on a mule.

The wound mentioned was in a dangerous place, but witness did not communicate to the deceased any thing about it, except to caution him to keep quiet. The weather at the time was very warm, and the deceased was very imprudent in riding to Shawneetown as he did.

Peter Baker testified before the court, that on the Tuesday following the Thursday on which the deceased was wounded, he, the deceased, rode on a mule from the Saline mines to Shawneetown, a distance of six or seven miles, and back again. This was in July or August, 1854. The deceased then told the witness that he had come up to testify against the prisoner, so that if he should die, it would be known who hurt him. The deceased then stated to Baker the circumstances of his injury and that he feared he should not recover.

Mrs. Day testified that the deceased was a German working at the Saline mines, and boarded at her house; that the deceased came home to her house wounded on the Thursday night as mentioned; that he lived eight days, and died on the next Thursday night, late in the night. That witness was from home most of the day on the Thursday the deceased died, but got back before supper. The deceased was at supper and ate very heartily. She saw nothing very unusual in his appearance then—he went up stairs to bed in a room by himself, as he had done for several nights before. Witness put a cup of water by his bed, and then retired for the night. The deceased made no request, but during the night she heard him walking about up stairs as he had done before since he was wounded. Witness always gave deceased what he wanted during his illness. Witness said that she noticed the mind of deceased to change on the Monday before he died, but he had his senses and talked well enough after Monday night. On that Monday night the deceased came down the stairs and passed through the room where witness was, without saying any thing, and went out of doors; he soon returned with a neighbor, who asked what was the matter, and witness remarked, nothing. The neighbor then said Pohlman, the deceased, was raving; that he, the deceased, had imagined he saw two men coming across the hill with a lantern to beat him. Witness then told the deceased that there was nothing the matter and to go to bed.

The second assignment of error questions the decision of the court in admitting, as dying declarations, statements made to Joseph Eick, by the deceased, on the afternoon of the day pre-

vious to his death. The evidence upon which these statements were admitted was substantially the same as that upon which the statements made to Izerman were admitted, with the addition of the evidence of Eick, which was substantially as follows:

Joseph Eick, a German, and who could not speak English, testified, through an interpreter, that he had a conversation with the deceased about three, o'clock on the Thursday afternoon before he died; that he died the next morning about three or four o'clock; that deceased then told him he had a dangerous wound and must die; that deceased was much frightened at the time, and told witness that nothing could help him. He did not say he wished to tell witness anything, but did tell witness about his hurt; that the conversation took place at witness' house, about thirty yards from where deceased boarded; that deceased did not appear to be in his senses, but was only nervous and short breathed; that he was in a good deal of fright, and said he came for a kind of relief; that deceased walked to witness' house by himself and stayed there about half an hour; that when deceased left he shook hands with witness and said: brother, we shall not meet any more, but did not say when he expected to die.

This testimony was given through interpeters who some times differed in the words used by the witness, and the witness, before he testified, was told by the court to give the exact words of deceased, if he could, and if he could not, to give the substance of what he said.

These two assignments of error may be considered and disposed of together. The statements of the deceased as to the cause of the injury from which death finally results, when dying declarations within the meaning of the law, are admitted in evidence on the ground of necessity, and the rule under which they are admitted, forms an exception in the law of evidence. The accused, under the rule has not the benefit of "meeting the witness against him face to face;" a constitutional right in all criminal trials with this solitary exception. He is deprived of the security of an oath attended with consequences of temporal punishment for perjury. He is deprived of the great safeguard against misrepresentation and misapprehension—the power of cross-examination. The evidence is hearsay in its character; the statements are liable to be misunderstood and to be misrepeated upon the trial, and the evidence goes to the jury with surroundings tending to produce upon the mind emotions of deep sympathy for the deceased, and of involuntary resentment against the accused.

It is vain to attempt to disguise the infirmities and imperfections of the human mind, and its susceptibility to false impres-

sions, under circumstances touching the heart and exciting the sympathies; and the law has wisely, in case of dying declarations, required all the guaranties of truth the nature of the case admits of. The principle upon which such declarations are admitted is thatt hey are made in a condition so solemn and awful as to exclude the supposition that the party making them could have been inflnenced by malice, revenge, or any concievable motive to misrepresent, and when every inducement, emotion and motive is to speak the truth. In other words, in view of *impending* death and under the sanctions of a moral sense of certain and just retribution.

Dying declarations are, therefore, such as are made by the party, relating to the facts of the injury of which he afterwards dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportuninity for repentance, and in the absence of all hope of avoidance; when he has despaired of life and looks to death as inevitable and at hand. 1 Phillips' Ev. 235; Roscoe's Cr. Ev. 29, 30, 31; 2 Starkie's Ev. 262; 1 Chitty's Cr. Law 569; 2 Russ on Cr. 683, 684; 1 Greenleaf's Ev. 156 and 158; Swift's Ev. 124; McNally's Ev. 384; Wharton's Cr. Law 308; Montgomery against The State, 11 Ohio 424; State v. Moody, 2 Haywood 189; Smith v. The State, 9 Humphrey 17; Rex v. Van Butchell, 3 Car. & Payne 495; Nelson v. The State, 7 Humphrey 583; McDaniel v. The State, 8 Smedes and Marsh. 415; Hill's case, 2 Grattan 608; Campbeli v. The State, 11 Geo. 374; The People v. Knickerbocker, 1 Parker's Cr. R. 306; The sam e v. Green, Ibid 11.

It is for the court in the first instance to determine upon the admissibility of the declarations, upon proof of the condition of mind of the deceased at the time they were made; and if the proof does not satisfy the court beyond reasonable doubt, that they were made in *extremity*, and that they are dying declarations within the law, they should not be permitted to go to the jury. There can be no question that, tested by the principles here laid down, the declarations made by deceased Izerman are not dying declarations, and we proceed directly to examine as to the declarations made to Eick.

Taking the words of the deceased, that he "had a dangerous wound and must die," and the remark, on parting with Eick, "that they would never meet again," without looking to the attending facts and circumstances we should unhesitatingly conclude that the impression was upon his mind that he soon should die.

The mere declarations or statements of the deceased as to his condition and expectation are not the only test from which to ascertain his true state of mind in this respect, but the court

should look not only to his language but to all the facts existing and surrounding the party at the time, before and after the declarations were made, forming the *res gestæ* and tending to show his true state of mind.

Words alone are too uncertain and unreliable, and recourse must be had for more satisfactory elucidation, to the attending facts and circumstances. These are : that the deceased had received the wound eight days previous to his death; that on the day he was wounded he stated that he must die; that he returned to his boarding place, and that some three days after a physician, being in attendance on a sick person near by, was called to see him ; that deceased came down stairs and met the physician; that the physician, some four days after the injury, again saw deceased, and again on the day before he died ; that the physician did not find the ordinary indications of a mortal wound, and did not regard the wound mortal ; that he did not inform deceased that his wound was dangerous, but upbraided him for imprudence in going about ; that deceased, on the Tuesday preceding the Thursday on which he died, rode on a mule in very warm weather some seven miles and back, and then stated to Baker that he feared he should not recover ; that during his illness he was accustomed to walk about; that on the day before he died he walked to Eick's and returned the same way ; that the evening before he died, and after being at Eick's, he went to supper with the family and ate very heartily ; that he stated to Izerman, on the day of the injury, that he must die, when all the attending circumstances exclude the idea that he then was without hope of recovery ; that he attempted no known preparation for death, and made no arrangements concerning family, friends, or property, although he had abundant opportunity.

From all this we do not doubt that the deceased, at the time he made the statements to Eick, had serious fears that he would not recover, but that he regarded himself a dying man and was without hope of recovery, we are not satisfied ; nor do e think the proof justified their admission as dying declarations.

The danger of sacrificing innocence to too great credulity where the human sympathies are wrought upon, and where the evidence, in its very nature, must be without the most reliable guaranties of truth, admonishes us that it is better to err in favor of than against life. The third assignment of erorr challenges the decision of the Circuit Court in permitting witnesses to state the substance of what the deceased said as to his apprehensions of death, and in admitting the same through interperters who sometimes differed in their rendition of German words into English. In this we find no error.

A denial of testimony through the medium of interpreters where the witness cannot speak the language of the court, or to require the witness to give the exact words of another, would often be equivalent to a denial of justice. However desirable in a case like this it may be to obtain the very words of the deceased, and to obtain them directly from the witness who heard them spoken, to avoid misapprehension and perversion, yet such a requisition would assume a perfection in the administration of justice unattainable by human tribunals.

A conscientious witness will rarely undertake, under oath, to give the exact words of another spoken at another time and on a different and remote occasion. The substance of the words, if the exact words cannot be given, is all the law requires. Montgomery *v.* The State, 11 Ohio 424; Nelson *v.* The State, 13 Smedes and Marsh. 500.

And this is consistent with the analogies of the law in proof of admissions and confessions. Iglehart *v.* Jernegan, 16 Ill. 513. The Circuit Court refused to allow the prisoner to prove to the jury the statements of the deceased as to his apprehension of death, and also prove his conduct aud state of mind at the time of making the declarations, held by the court to be dying declarations. And upon this decision arises the fourth assignment of error.

It is admitted that it is for the court, in the first instance, upon a preliminary examination, to decide upon the competency or admissibility of the declarations.

The declarations, however, being admitted, the whole evidence, including that heard by the court as to the condition of mind of the deceased at the time they were made, should then go to the jury, to enable them advisedly, and from all the lights the facts and circumstances afford, to determine upon the credibility, weight and force of the evidence.

The condition and state of mind of the deceased, with all attending circumstances bearing upon the question, are proper for their consideration; and there is no ground upon principle or authority for excluding from their consideration the statements of the deceased as to his apprehension of death, nor of the surrounding circumstances forming the *res gestæ* and tending to establish the existence or non-existence of that condition of mind which would constitute his statements as to the cause of the injury in law, dying declarations. 1 Greenleaf's Ev. 160; 1 Phillips' Ev. 238; 2 Starkie's Ev. 263; Roscoe's Cr. Ev. 34; Lambert *v.* The State, 23 Miss. R. 355; Nelson *v.* The State, 13 Smedes and Marsh. 506; State *v.* Thawley, 4 Harrington, 562.

It is a legal maxim, "that the law is for the court and the facts for the jury," and as a general rule, where the soeurity

involves both law and fact, the jury must determine the question upon the facts by them found, under the law as pronounced by the court, but subject of necessity, to the final judgment of the court on motion for a new trial.

From the province of the jury to determine upon the credibility, weight and effect of the whole, or any part of the evidence, it follows, that they may take into consideration the state of mind and actual condition of the deceased as to his apprehensions of impending dissolution, and give to the declarations such weight as to them they seem to deserve.

In England, as late as 1789, it was held that the question as to whether the declarations were dying declarations, was a mixed question of law and fact to be determined by the jury under the law as given them by the court, without a preliminary examination and decision by the court. Woodcock's Case, Leach's Crown Law 500. Afterwards it was held to be a question for the court and not for the jury, and to be determined as a mere question of competency. Melbourne's Case, 1 East's Pl. of the Crown 358.

The great caution sanctioned by the books in regard to this kind of evidence, would seem to demand a rule of practice uniform, free of embarrassment and nice distinction, and which in its operation will not deprive the jury of any fact or circum stance tending to enlighten them upon the main point of inquiry —the guilt or innocence of the accused. We are therefore inclined to adopt the rule laid down in Campbell *v.* The State of Georgia, 11 Geo. R. 353 ; The People *v.* Green , 1 Parker's Cr. R. 11 ; The State of Wisconsin *v.* Cameron, 3 Chandler's R. 172, and substantially recognized in many other cases, that the question of the competency of the alleged dying declarations as evidence, is in the first place to be determined by the court upon a preliminary examination, and the declarations being admitted to the jury, it is for them upon consideration of the whole evidence, including that heard by the court upon the question of competency, and in determining upon the guilt of the accused, to take into consideration the state of mind of the deceased as to his apprehension of death, and finally determine this, and consequently the force of the declaration as any other question of fact, under the law as given them by the court.[a]

It is also assigned for error, that the Circuit Court heard the evidence upon the preliminary examination as to the state of mind of the deceased, involving the admissibility of his declarations as to the injury, in the presence and hearing of the jury, and against the objection of the prisoner.

Upon this record we are not compelled to decide upon this ruling of the court ; but the impossibility of knowing what

(a) Murphy *vs.* People, 37 Ill. R. 456.

effect upon the minds of the jury the hearing of this examination might have, or what tinge or coloring it might in their minds give to other evidence against the accused, in case the declarations should not go to them finally as evidence, would suggest the propriety of sending the jury out in charge of a sworn officer, pending this examination.

And this practice has been approved wherever the question, to our knowledge, has arisen. Hill's case, 2 Grattan 611; Smith v. The State, 9 Humphrey 17.

Judgment reversed and cause remanded for a new trial.

Judgment reversed.

SCATES, C. J. I am of opinion that the evidence on the preliminary examination before the court was sufficient to show the competency of the statements of deceased last made, as dying declarations.

It is with great doubt and hesitancy that I concur in admitting the same facts, circumstances and declarations of the deceased, offered to the court, on the questions of competency to be again proven before the jury, for the purpose of impeaching the testimony of deceased, by showing the non existence of the very point determined by the court on the question of competency; that the deceased made them under the conscientiousness and apprehension of impending dissolution, which is in law, substituted for an oath. I regard the contrary doctrin to be supported by the current of authorities and general practice, but put my concurrence in the authorities cited, and the opinion of the court upon a tender regard for life.

OLIVER C. VANLANDINGHAM, Plaintiff in Error, v. EBENEZER Z. RYAN, Surviving Assignee, &c.

ERROR TO GALLATIN.

A plea of failure of consideration should set out what the consideration was, or in what particular it failed.

Whatever the parties choose to present in issue, by their pleadings and proofs, whether of law or fact, ought to conclude them from another suit, if such pleadings and proofs present the merits of the controversy.

A demurrer to a good plea in bar will estop a plaintiff from raising the same issue in another suit.

A judgment upon a demurrer, for defect in the pleadings, will not bar another action for the same cause.

When, by a defect in pleading, the merits of an action or defence were not presented, a plea of former recovery will not be a bar to a second action.

But if the cause of action is well set forth, and a judgment proceed upon the ground that the action will not lie, the party will be concluded and barred by the issue of laws raised by his pleading.

THIS cause was tried before BAUGH, Judge, without the intervention of a jury, at December term, 1854, of the Gallatin Circuit Court. Verdict and judgment for plaintiff in the court below. The defendant below brought the cause to this court and assigned errors.

N. L. FREEMAN and W. H. UNDERWOOD, for Plaintiff in Error.

W. THOMAS, for Defendant in Error.

This was an action of *debt*, commenced in the Gallatin Circuit Court, by foreign attachment, at the suit of Ryan, surviving assignee of the Bank of Illinois, against Vanlandingham, upon two promissory notes for $2,000 each.

The defendant below filed twelve pleas in bar. The fourth plea set forth that there was no consideration for the execution of the notes sued on. To which there was a demurrer overruled, and a replication, that the notes " were not made for no consideration." To this replication there was a demurrer.

The fifth plea set forth a suit on the same notes in the Circuit Court of Vanderburg county, Indiana, and a judgment therein in favor of the defendant below. To this plea there was a demurrer, which was sustained.

The seventh plea sets up the same matter as the fifth, which was also demurred to and the demurrer sustained.

The eighth plea sets up that the notes sued on were stock notes, and that they were no debts, nor causes of action existing, at the commencement of the suit, against the Bank or the assignees. To this plea there was a replication admitting that the notes were stock notes, but denying that they were on debts owing by the Bank or the assignees. To the replication there was a demurrer, which was carried back and sustained to the eighth plea.

The tenth plea sets up a former recovery upon the same notes in St. Clair county. To this plea two replications were filed — First, *nul tiel record*. Second, setting up specially that the St. Clair judgment was under foreign attachment levied on real estate, without service or appearance. To this last replication a demurrer was overruled.

The ninth plea sets up a prior suit on the same notes in the Circuit Court of Vanderburg county, Indiana, and judgment

therein in favor of defendant below. To this plea a demurrer was sustained.

The thirteenth plea sets up a prior suit upon the same notes, and shows a final judgment in favor of the defendant below upon demurrer. To this plea there was a demurrer which was overruled. The plaintiff below then filed two replications to the thirteenth plea. First, *nul tiel record*. Second, admitting the proceedings in the suit in Vanderburg county, Indiana, alleging that the decision was upon a special demurrer to the complaint of the plaintiff in that suit; that there was no issue of law or fact formed, nor any judgment or trial upon the question whether the defendant owed the debt. There was a demurrer to the two replications, and the demurrer overruled. The defendant below then filed rejoinders to said replications. To the first, that there was such a record, &c., and to the second replication reaffirming in general the thirteenth plea. To the rejoinder to said second replication there was a demurrer, and that demurrer was sustained. Said rejoinder was afterwards amended, and again a demurrer was sustained to it.

During the trial the plaintiff below offered in evidence a schedule of debts assigned by the Bank to A. G. Caldwell, which showed that the notes sued on were by that instrument assigned to said Caldwell alone, and his receipt is attached to the same, and the same is certified by the president and cashier. To this evidence the defendant objected, and the court overruled the objection and the defendant excepted.

The plaintiff below also offered in evidence two promissory notes made by Vanlandingham to the Bank upon which there was no assignment. The court received them against objection and the defendant excepted.

The plaintiff below offered in evidence a deed of assignment from the Bank to Caldwell and Ryan, bearing date on the same day with the schedule or transfer of the notes sued on, to Caldwell, which deed purports to assign to Caldwell and Ryan all the personal estate, rights and credits, notes, bonds, judgments, and debts of every kind due to said Bank at Shawneetown, and the branch at Lawrenceville. The court overruled the defendant's objection to said deed of assignment and allowed the same to be read in evidence, to which the defendant excepted.

SCATES, C. J. Of the twenty assignments of error, we shall only notice such as are deemed necessary to a determination of this case.

The first and second assignments of error are not sustainable, and were abandoned on the argument.

The questions raised upon the admissibility of the schedule

and assignment of the bank to assignees, we think were without foundation. The demurrer was properly sustaind to the sixth plea, for it alleged a failure of consideration, without setting forth what the consideration was, or in what particular it failed.

The principal question presented by the record is upon a former recovery ; and this is set up in five different pleas. The fifth, seventh, ninth and thirteenth set up a recovery by defendant, in a suit by attachment against him, in Vanderburg county, Indiana ; and the tenth a recovery against him by attachments, in St. Clair county, Illinois. The fifth, seventh and tenth pleas may be laid out of view, as there are not sufficient averments to present a good bar ; so, indeed, we may waive any consideration of the ninth, as the thirteenth embraces more, and the questions are more fully presented in it, and the replication thereto and rejoinder.

Upon this point the general maxim of law is, *expedit reip‘ıb-licæ ut fit finis litium*, and, therefore, *nemodebetbisvexaripro una et eadem causa*. One application of the first isfound in the limitation of actions ; and the last is enforced by holding judgments to bar a second suit for matters litigated and settled in the first. There is great uniformity in the adoption of the rule by the courts ; but more or less diversity in its application under different states of pleading, and to particular issues and the varying facts involved in their investigation.

There are a few cases in which the courts have taken nice distinctions, apparently to enable parties to investigate anew matters neglected in former trials. Such was the case of Seddon et al., *v.* Tulop, 6 Term R. 607, and in which Lord Kenyon admits " that it is a question of great delicacy. We must take care not to tempt persons to try experiments in the action, and when they fail, to suffer them to bring actions for the same demand." So in Smith *v.* Whithing, 11 Mass. R. 445, and Rave *v.* Farmer, 4 Term 146, and Golightly *v.* Jellicoe in note " a" of same case, where proofs were allowed to show that the matters apparent upon the face of the record and submissions, were really not investigated. But a stricter rule was applied in Markham *v.* Middleton, 2 Strange R. 1259 ; Outram *v.* Morewood, 3 East R. 346 ; The King, on the prosecution of Smith *v.* Taylor, 3 Barn. & Cress. R. 502, (10 Eng. C. L. R. 231 ;) Hess Exr. *v.* Heeble, 6 Serg. Raw R. 58 ; Loring *v.* Mansfield, 17 Mass. R. 394 ; Ramsey & Vather *v.* Herndon, 1 McLean R. 450. And this rule, in its greater strictness, seemed to be approved in Gray et al. *v.* Gillilan et al. 15 Ills. R. 454. But we do not sanction the technical distinction which makes a former recovery a bar only, when pleaded as an estoppel nor would we feel justified to follow Green *v.* Clark, 5 Denio R. 505, and

others of that class of decision, which would exclude parol evidence, not contradictory of the record, to show what was included within and investigated on the trial of the issue, or that the merits were not. In a great many cases the face of the record does not show the full and true state of the controversy and the matters investigated; Wood *v.* Jackson, 8 Wend. R. 35, 43 *et seq.*; and parol evidence, must be admitted to supply what is not shown, or the same matters might be litigated repeatedly. But when the whole is fully presented by the record and parol proofs, it is quite another view of it, to allow one of the parties to go on and show by parol, that a part of the case presented by the pleadings was not investigted, or that the verdict or judgment was found or rendered upon a particular portion of the facts, or one of the several issues of law or faet. In the above case of Wood *v.* Jackson, the Chancellor said: "The court will never go into an examination of the jurors in the former cause, to ascertain upon what ground their verdict was pronounced;" see also, Lawrence *v.* Hunt, 10 Wend. R. 86. And this, in principle, was applied to the oral examinatiou of the justice, as to what judgment he intended to enter. Zimmerman *v.* Zimmerman, 15 Ills. R. 84. This court, in that case, sanctioned the general doctrine that a former recovery will constitute a bar of the same causes, as between parties and privies, where the court had jurisdiction general or special. If, then, neither the judge nor jurors can be called to show what portion of the case constituted the ground of decision, neither should other witnesses. What parties choose to present in issue, of law or fact, by their pleadings and proofs, ought to conclude them from another suit. This is true of issues of law, upon demurrer, as well as of fact; Brickhead *v.* Brown, 5 Sandf. R. 147 *et seq.*; Lampen *v.* Hedgewin, 1 Mod. R. 207

Such is the gene.al doctrine, and the proper mode of presenting the question of identity. But when we come to inquire into what matters are barred, we find the bar confined to those issues and facts which present the merits of the controversy. Wilber *v.* Gilmore, 21 Pick. 253.

This presents another distinction as to how far particular issues of fact, and trials of them, may include the merits of the controvesy: And to what extent the bar will operate upon the subject of controversy when the pleadings present only certain issues of law, upon which judgment is rendered As the question is raised here as one of the latter kind, upon demurrer, I shall confine the investigation to the latter class of authorities.

Upon this point the authorities agree that a judgment upon a demurrer for defect in the pleadings will not bar another

action for the same cause. Lampen *v.* Hegdwni, 1 Mod. R. 207 ; Gilman *v.* Rives, 10 Pet. R. 301 ; Wilbur *v.* Gilmore, 21 Pick. R. 253.

So if the plaintiff be non-suited for want of proof, or because his *allegaa* and *probata* do not agree, or for any other cause, as by agreement after trial of the merits. Knox *v.* Waldo-borought, 5 Maine R. 185.

So if plaintiff mistake his cause of action—and for which cause a demurrer is sustained. 21 Pick. R. 253.

These decisions proceed upon the ground that the judgment was upon defects in the pleadings to present merits of the cause of action or defence ; and consequently such judgment will not bar an investigation of the true merits of the controversy in another action. But at the same time if a demurrer is put in to a good plea in bar, it will estop the plaintiff, although his declaration is defective—because his demurrer confesses the grounds of defence. 1 Mod. 207 ; 10 Pet. 301.

So under this last state of the pleadings it will depend upon the sufficiency of the plea, and not the declaration, whether the judgment will operate as a bar or estoppel.

But we are not to be understood as saying that a judgment upon a demurrer to the declaration, or sustained to the declaration, can in no case, operate, or be pleadable in bar as an estoppel. For itmay be that the cause of action is well set forth—and the judgment proceed upon the ground that the cause is not sufficient to sustain action. I should hold such judgment a bar to another action varying the statements and allegations —or changing even the form of the action. Such decision would be upon the merits, and very right set up—and may as well be determined, concluded and barred on an issue of law by demurrer, as upon an issue of fact.

Such seems to me to be the issues of law presented by the thirteenth plea, and the replication and rejoinder.

Although the suit was by foreign attachment and constructive service, the defendant subjected himself personally to the jurisdiction of the court by authorizing his appearance, and demurring to the declaration. So a general judgment *in personam* could have been rendered in that cause, against either party, and binding and conclusive of such matters as were presented. After showing this state of facts, the plea sets forth a demurrer to that action, with causes, a part of which, if true, show that the plaintiff had no cause of action, no right to sue upon the notes, because the notes were void ; and avers that the very right of action and merits were presented, tried and determined upon that issue. The plea seems to be sufficient, and plaintiff should have taken issue upon it. He, however,

replied that no issue was made or tried upon the fact of the indebtedness and detention of the debt. The rejoinder reasserts the allegations of the plea, and to this the demurrer was sustained. If all the allegations and averments of the plea are true, the demurrer in the former suit admitted the main facts, but presented the broad question that there could be no indebtedness under those facts, and that the court so held. Under this view of the facts put in issue by the plea, the plaintiff should have taken issue by *nul tiel record* alone, as in his first replication. His second replication was faulty, in mearly traversing a part of the facts of the plea, instead of denying the existence of such a record. The demurrer should have been sustained to the replication. In this the court erred. The eighth plea is good, and the demurrer was improperly carried back and sustained to it. The plea sets up as a defence that there were no debts or causes of action existing against the President, Directors & Co. of the Bank, or against the assi gnees at the commencement of this suit. The ninth section of Act of 1845, p. 247, contemplates a liability of the stockholders upon their stock notes and their coercive collection by the assignee as long as there may be liabilities of the bank to pay. If there be any such liabilities unpaid, whether it exist as a debt or cause of action against the president and directors, or the assignees, an action will lie. The board of directors was dissolved; they neither owe, nor can be sued as such; so the assignees may as such owe and be sued on many liabilities. And these liabilities may subsist as debts against the institution, and be entitled to payment out of its assets, including these stock notes. The assignee should therefore have taken issue upon the facts alleged in this plea.

Judgment reversed and cause remanded for further pleading.(*a*)

Judgment reversed.

LABAN G. RUSSELL, Plaintiff in Error, *v.* EDWARD PICKERING, Defendant in Error.

ERROR TO EDWARDS.

The application for a certiorari to take an appeal from a judgment rendered before a justice of the peace, must show the facts required by the statute; the allegations of the petitioner showing his conclusion will not be sufficient.

Clerks of the Circuit Court are not bound to take appeals on Sunday.

THE opinion of the court furnishes a statement of the case.

(*a*) Ryan Surv. assignee etc., *vs.* Vanlandingham et al. 25 Ill. R. 128.

The decision of the Circuit Court was made by MARSHALL, Judge, at September term, 1852.

C. H. CONSTABLE, for Plaintiff in Error.

R. S. NELSON, for Defendant in Error.

SKINNER, J. Pickering, on the 28th day of July, 1851, before a justice of the peace of Edwards county, recovered a judgment against Russell for sixteen dollars. Russell, after the expiration of twenty days from the rendition of the judgment, removed the cause into the Circuit Court by certiorari. The Circuit Court dismissed the certiorari for want of a sufficient petition.

To entitle a party to this mode of appeal, under the statute, the petition must set forth and show upon the oath of the applicant, that the judgment before the justice of the peace was not the result of negligence of the party; that the same is unjust and erroneous; and that it was not in the power of the party to take an appeal in the ordinary way. These three facts must be *shown* by the petition, not merely alleged, as a conclusion of the party. (*a*)

The petition in this case, does not attempt to show diligence in defending the suit before the justice, nor an excuse for not making such defence. The petition alleges as excuse for not taking an appeal in the ordinary way, that on the sixteenth day of August, 1851, petitioner went to the office of the justice and prayed an appeal to the Circuit Court, and tendered one Walker as his security; that said Walker was possessed of one wagon of the value of forty dollars, one horse of the value of seventy dollars, one horse of the value of forty dollars, cattle of the value of twenty dollars, sheep of the value of ten dollars, hogs of the value of forty dollars, together with farming implements, crops, and so forth, and of a very valuable farm; that the justice refused to approve the security offered, alleging for cause that the same was insufficient; that petitioner, on the 17th day of August, 1851, being Sunday, went to the clerk of the Circuit Court of Edwards county and prayed an appeal, and tendered one Rosevalt as his security, and that said clerk refused to do the business on Sunday. (*a*)

It is the duty of a justice of the peace, in case of application for appeal from judgments rendered by him, to require sufficient security in the appeal bond, and he is required to approve of such security as he receives. R. S. 324, sec. 60.

For aught that appears by the petition, Walker's property might not have been within the county, or state; or he may have been so largely indebted as to have rendered the security

(*a*) Clifford *vs.* Waldrop, 23 Ill. R. 336.

too precarious for official approval. Clerks of the circuit courts are not bound to take appeals on Sunday in the absence of statutory requisition.(*a*)

Judgment affirmed.

THOMAS S. RIDGWAY *et al.*, Plaintiffs in Error, *v.* JOB SMITH, Defendant in Error.

ERROR TO GALLATIN.

Where an affidavit for an attachment alleges that a defendant is about to remov his property from this State to the injury of the plaintiff, and this allegation i traversed by a plea in abatement, it is not error on the trial of such a plea to instruct, that unless the jury believe, from the evidence, that the defendant was at that time about to remove his property as alleged, that they should find for the defendant.

Such a plea should conclude to the country, and a common similiter forms the issue; the burden of proof is on the plaintiff to maintain the allegation of his affidavit; and if the verdict is for the defendant, the writ is quashed, and he is out of court

THE opinion of the court gives a statement of the case. The plea was tried before BAUGH, Judge, and a jury, at November term, 1854, of the Gallatin Circuit Court. The jury found for the defendant. The court awarded him costs, and quashed the writ of attachment. The plaintiffs below excepted and assigned errors.

THOMAS and OLNEY for Plaintiffs in Error.

NELSON and MARSHALL for Defendant in Error.

SKINNER, J. Peoples and Ridgway sued out of the Gallatin Circuit Court a writ of attachment against the estate of Smith. The writ was levied on a flatboat loaded with corn, and served on Smith by reading.

The affidavit alleged an indebtedness from Smith to People and Ridgway of $1350, and that Smith was about to remove his property from this State, to the injury of Peoples and Ridgway.

Smith appeared, and filed his plea in abatement, traversinsg the allegation of the affidavit, that he was about to remove his property from this State to their injury.

Upon this plea an issue to the country was formed, and the jury found the issue for the defendant, Smith.

(*a*) Metc. on Con. 254 &c ; Baxter *vs*. People, 3 Gil. R. 368 ; Johnson *vs*. People, 31 Ill. R. 472 ; McIntyre *vs*. People, 38 Ill. R. 521; Scammon *vs*. Chicago, 40 Id. 149.

The court refused to instruct the jury, at the request of Peoples and Ridgway, that unless they beleived, from the evidence, that Smith at the time of suing out the writ, was not about to remove his property from this State to the injury of Peoples and Ridgway, they should find for the plaintiffs. But at the request of Smith, the court instructed the jury that unless they believed from the evidence that at the time of suing out the writ, Smith *was* about to remove his property from this State to the injury of Peoples and Ridgway, they should find for the defendant.

The evidence preserved in the bill of exceptions shows that Smith had long resided in Gallatin county ; that he carried on the saddlery business, and was in the habit of trading for produce and taking the same to New Orleans for market ; that he was about to depart with his flatboat and cargo of corn for New Orleans, at the time of the issuing of the writ, with the intention of selling the same there and returning home with the proceeds ; that he was largely in debt, and that his property in Gallatin county, exclusive of the flatboat and cargo, was insufficient to pay his debts.

Peoples and Ridgway excepted to the uling of the court upon the instuctions, and moved for a new trial, which motion the court overruled, and rendered judgment against tn. plaintiffs for costs.

We think there is no error in the record. The statute provides, " that in case any plea in abatement traversing the facts in the affidavit shall be filed, and a trial shall be had thereon, if the issue shall be found for the defendant, the attachment shall be quashed. "

This plea traversing the facts in the affidavit alleged, should conclude to the country, and the common similiter only is required to form a complete issue of facts. The burden of proof upon this issue is on the plaintiffs ; and the court therefore did not err in refusing the instruction on the part of the plaintiffs below. (*a.*)

The motion for a new trial was properly overruled. It is not every removal of one's property from the State that will entitle the creditor to a writ of attachment. The intended removal must be to the injury of the creditor, and it did not follow that because Smith was about to remove his flatboat and cargo from the State for the purpose of sale, and with the intention of returning with the proceeds, that such removal was to the injury of Peoples and Ridgway. This might have been and probably was necessary to enable him to pay their debt ; and if so, could not be to their injury.

The statute should not be so construed as to interrupt or discourage the ordinary commerce of the country, or to enable one

(*a*) Eddy *vs*. Brady, 16 Ill. R. 307.

creditor, to the exclusion of others, to seize and appropriate to the satisfaction of his debt the effects of an honest but embarrassed and struggling debtor. This is the construction given the statute in the case of White et al., *v.* Wilson 5 Gil. 21, and we concur in the opinion of that case.

The plaintiffs, however, contend that the effect of the finding for the defendant on the issue was only to release the property attached, and that the defendant being in court should have answered to the declaration.

Such is not the law. The statute expressly provides that in such case the attachment shall be quashed, and the proper judgment, where the issue upon a plea in abatement is found for the defendant, always is, that the writ be quased. The defendant is then out of court. R. S. 65, Sec. 8. McKinstrey *v.* Pennoyer, 1 Scam. 320; Bradshaw *v.* Morehouse, 1 Gil. 395; Motherell *v.* Beaver, 2 Gil. 69. (*a*)

Judgment affirmed.

Abraham Biehl, Plaintiff in Error *v.* Benjamin Glick, Defendant in Error.

ERROR TO WABASH.

Where A. and B. owned adjoining premises and fixed a corner, as indicating the boundary between them, and A. afterwards built a house, which, if the corner agreed upon was the true one, would have been upon his own land, but a line was run by the county surveyor, which placed the house upon the land of B., whereupon A. bought the strip of land, so as to include his house; andt hen filed his bill to recover back his purchase money, and to rescind the sale alleging that the survey by the county surveyor was wrong, and that the cornes agreed upon in the first instance was the true boundary. *Held*, that this was not such a case of mistake of facts as would authorize a decree in favor of A., who was seeking an undue advantage by his bill.

This bill alleges that Glick is owner of north half of northeast quarter of section 7, T. 1 N., R. 13 W., and Biehl owner of west half of same section; that complainant and defendant agreed upon the half section corner between them, and insertde a stone many years ago, which was acquiesced in until the beginning of 1850, when the county surveyor established that corner five chains further east, whereby Glick's house and barn, &c., were thrown on the land of Biehl; that Glick paid Biehl $122 for a deed which was made, conveying the strip cut off by said survey; that Glick afterwards learned the survey was erroneous and that both he and defendandt had in the aforesaid purchase and

(*a*) Eddy et al. *vs.* Brady, 16 Ill. R. 306; Cushman *vs.* Savage, 20 Ill. R. 330.

conveyance acted under a mistake of facts. Bill prays that defendant be decreed to repay to complainant said sum of $125 with interest from date of payment, that the deed be canceled, and that a monument be placed at the true corner, to perpetuate to and for general relief.

The answer asserts that defendant knows nothing of Glick's title—admits that defendant is owner of east half of north-west quarter of Section 7, T. 1 N., R. 13 W.—admits that parties differed as to corner and did agree four or five years ago to plant a stone at a point agreed upon—states that witness' trees are not to be seen—admits that subsequently to planting stone a survey was made, which threw Glick's house upon Biehl's land —that Glick applied to Biehl to purchase a portion of said east half of north-west quarter of Section 7, and that Biehl did accordingly execute a deed for same to Glick, for consideration of $125, which was paid by said Glick, and that Glick has had uninterrupted possession thereof since—denies that deed conveyed any other lands than those to which Biehl had title—admits that Glick might have supposed that his dwelling hous was on respondents's land, and would not otherwise desire to purchase said ten acres and eighty-four hundreths, but expressly charges, that whether such dwelling was on respondent's land or not, Glick had as much knowledge on the subject as Biehl, and that there was no concealment or overreaching on part of respondent.

The Circuit Court of Wabash county, at September term, 1854, entered a decree rescinding the deed in question, directing Biehl to refund the money paid for the ten acres, and awarded cost against him. Whereupon Biehl brought the case to this court, by writ of error.

S. S. Marshall, for Plaintiff in Error.

E. Beecher and H. B. Montgomery, for Defendant in Error.

Caton, J. We think such a case is not made by this record as entitles the complainant to a decree. The parties owned adjoining premises, a corner was fixed by agreement, which was supposed to be correct. The complainant built his house at a place, which, if that corner was correct, was upon his own land. Afterwards a survey was made by the county surveyor, which located the corner a considerable distance east of the point selected by the parties, and so much so as to throw the complainant's house on to land owned by the defendant. On the supposition that this survey was correct, the complainant purchased of the defendant, for one hundred and twenty-five dollars,

a strip of land on the west side of the defendant's tract, sufficient to secure to him his house. This bill was filed to recover back the purchase money paid, and to rescind the sale, alleging that the survey by the county surveyor was wrong, and that the true corner is at the place originally agreed upon between the parties, and that the purchase was made under a misapprehension of the facts, by which he was induced to purchase his own land. There is no pretence of frand on the part of the defendant. The record contains considerable testimony as to the location of the original corner, and probably the weight of the evidence is that according to the original government survey, the complainant built his house upon his own land, but while this may be conceded, it is also undeniably true, that there is sufficient doubt about it to leave the matter open to dispute and controversy. The fact may be conceded that the complainant was induced to make the purchase in order to secure his house. By the purchase his solicitude was set at rest. But it is not a conceded fact that without the purchase, he owned the land on which his house stood. By first making the purchase and thus securing himself certainly against the loss of his house, and then filing this bill to set it aside and recover back the purchase money, he asks this court to try his title to the disputed premises, without the hazard which would have attended a trial at law, upon an ejectment brought against him. If upon this hearing the question of boundary is decided against him, he still is safe upon the purchase which he has made, without being subjected to the chances of a negotiation with the defendant, after a settlement of the question of title against him. He first negotiates with all the advantages which he could derive from the doubt as to the true line, and after securing the benefits of such a negotiation, he seeks to set it aside if he can show that the old line was the true one, but to maintain it if the new survey should prove to be correct. There is nothing to show that either party is now in possession of any facts which they did not know at the time he made the purchase. Nor did he even venture to offer to rescind the purchase, without a trial of the question as to the true boundary, but now only in fact seeks to rescind it, upon the judgment of this court, that the old line was the true one, and that he in fact owned the land before on which his house stood. He may well have thought it imprudent to give up the advanvantages of the purchase without the judgment of a court settling his right, and leave the defendant to try his right to the premises on which his house stood in an action of ejectment. This si a sharper practice than can meet with the sanction of this court. He bought his piece at a very reasonable price, and with as full a knowledge of all the facts

as he had at the time he filed his bill or now has, if we lay out of view the finding of the Circuit Court in his favor. We are very clearly of opinion that he should be held to his purchase. This is not such a case of mistake of facts as will authorize a court of chancery to rescind the purchase and refund the purchase money.

The decree of the Circuit Court must be reversed and the bill dismissed.

Decree reversed.

DAVIS BRIGHAM *et al.*, Plaintiffs in Error, *v.* JOHN HAWLEY, Defendant in Error.

ERROR TO MARION.

Mutual demands arising out of the same subject matter, although one arises *ex contractu* and the other *ex delicto*, capable of being balanced against each other, may be adjusted in one action.(*a*)

Where work is done under a special contract fixing the price to be paid, the contract will control the price whether it be reasonable or not. The contract must govern where it can be made to apply.

THE declaration in this case embraced three special counts on the contract, and the general counts for work and labor, and *quantum meruit.* The special counts averred that Hawley was to quarry stone for wages, after the rate of eighty cents per yard; that he excavated, grubbed and stripped the earth, pre paratory to quarrying, &c., and one of the counts stated the contract at length. The defendants below pleaded the general issue, with a notice that they should prove that Hawley had been overpaid; and that a large quantity of quarrying tools had been delivered to Hawley, which he was to re-deliver when he discontinued to work, which he had refused to do; and claiming damage the refer, which was specified in a bill of particulars.

The cause was heard before BAUGH, Judge, and a jury, at September term, 1854, of the Marion Circuit Court; verdict and judgment for plaintiff below, for $370.60 and costs. Motions for a new trial and in arrest of judgment were overruled. The defendants below brought the cause to this court by writ of error.

J. N. HAYNIE AND A. J. GALLAGHER, for Plaintiffs in Error.

R. S. NELSON AND HOUTS AND HAMILTON, for Defendant in Error.

(*a*) See Edward's et al. *vs.* Todd, 1 Scam. 462; Babcock *vs.* Tice, 18 Ill. R. 420; and notes.

CATON, J. This action was brought for the work and labor of opening a stone quarry, and for quarrying stone. It appears that a contract was made between the parties, that the plaintiff should quarry stone for the defendants, without specifying the quantity, for which he should receive a stipulated price per yard, the defendants to furnish tools, which, were to be kept in order by the plaintiff, who was also to load the stone on to the defendants' wagons. After the plaintiff had opened the quarry and had got out a considerable amount of stone, the defendants dismissed him and took possesion of the quarry themselves, alleging as a reason, that the plaintiff was not getting out the stone fast enough for their purposes. Some complaint is also made that the plaintiff did not load the stone when required.

Upon the trial it appeared that the plaintiff, when he quit the work, took away the defendants' tools and secreted them, and that they were not found for ten or twelve days. "The defendants then offered to prove damages sustained by the defendants, in hunting up tools after they were taken away, and the amount of money they were compelled to pay out to hands in their employ, and who were left idle on account of said tools having been taken away, for which said defendants had an account filed, but the court excluded said evidence and defendants excepted." In this we think the court erred. This doctrine of recoupment was examined and settled in the case of Stow *v.* Yarwood, 14 Ill. 424. This court there said, "The principle plainly deduceable from the adjudged cases is, that mutual demands arising out of the same subject matter, and capable of being balanced against each other, may be adjusted in one action." And this principle is applicable, although one demand arises *ex contractu*, and the other *ex delicto*. In that case the action was trover for wrongfully taking and converting a steam engine, and the defendant was allowed to recoup the amount of work which he had done for the plaintiff in repairing the engine. So, in principle, is this case. The plaintiff's demand arises *ex contractu* and the damages, which the defendants seek to recoup, arise from the wrongful act of the plaintiff in taking away and secreting the tools. But those tools were a subject matter of the contract out of which the plaintiff's demand arose. Under that contract he was entitled to the use of the tools while doing the work, and by virtue of the contract he had possession of them. When he ceased to use them for the purpose stipulated, it was his duty to return them to the defendants. This duty he violated, and the defendants are entitled to reduce the amount of his demand against them, growing out of the contract, by the amount of whatever damages they have sustained by reason of that wrongful act of the plaintiff. Had the two demands not been thus

connected together, as growing out of the same transactions, the rule would have been different. We think the court erred in excluding this evidence.

We also think the court erred in giving the fourth instruction for the plaintiff. That instruction was as follows: "That, even although the plaintiff failed to comply with the contract on his part, still defendants are bound to pay plaintiff for all the work done by him which was received by defendants, or appropriated to their use, at a reasonable price, or what it was reasonably worth." Where work is done under a special contract fixing the price, that must constitute the measure of compensation, whenever the party is entitled to recover at all, for the work done. Whether the price agreed upon be greater or less than the real value of the work, makes no difference; the contract must govern, wherever it can be made to apply. (*a*) What the work was reasonably worth, or whether the price agreed upon be reasonable or unreasonable, have nothing to do with such a case, and are entirely immaterial and irrelevant. This instruction, therefore, which permitted the jury to allow the plaintiff what his work was reasonably worth, irrespective of the contract price, was improper as to the work, the price of which was fixed by the contract, and should not have been given to the jury.

The judgment must be reversed and the cause remanded.

Judgment reversed.

EBENEZER Z. RYAN, surviving Assignee of the Bank of Illinois, Plaintiff in Error, *v.* JAMES DUNLAP *et al.*, Defendants in Error.

ERROR TO GALLATIN.

The cashier of a bank acting in conformity with the practice and rules of the institution, may release a debt secured by mortgage in its favor. Nor need such release be under seal.

A mortgagee being a banking institution by its agent and servants, may do all such acts in respect to the debt as usually may be done in money transactions, verbally or in writing, without regard to the mortgage security.

A transfer of a debt secured by mortgage, by assignment or delivery, would generally carry the mortgage in equity, and payment of the debt will discharge the lien. Payment of a debt secured by mortgage may be made otherwise than by the delivery of money, and the entry of satisfaction on the margin of the record of the mortgage is not required as prescribing a rule of evidence.

Under the act of 25th February, 1843, the officers of the Bank of Illinois had all necessary powers to settle up and close its affairs, by receiving and releasing debts due to it.

Corporations are presumed to have agents and servants acting for them in the usual course of dealing within their powers; and their acts should bind their principals.

(*a*) Mc'Lelelland *vs.* Snyder, 18 Ill. R. 58; Folliott *vs.* Hunt, 21 Ill. R. 654; Springdale Cemetery Association *vs.* Smith, 24 Ill. R. 482; Holmes *vs.* Summel, Id. 370; Evans *vs.* The Chicago and Rock Island Railroad Company, 26 Ill. R. 189; Walker *vs.* Brown, 28 Ill. R. 378; Stevens *vs.* Coffeen, et al. 30 Ill. R. 148.

THE following statement will exhibit in the principle fact involved in this controversy:

On the 19th day of February, 1840, John C. Stickney being seized in fee of lots 1111 and 1112, in Shawneetown, mortgaged the same to the Bank of Illinois, to secure debts then due by Stickney to the bank, and advances to be thereafter made by said bank to Stickney, for the purpose of enabling him to finish off a house then in process of construction upon said lots; the whole debt and advances not to exceed the sum of $12,000. A note was executed and delivered for that amount, and is recited in said mortgage. The mortgage was recorded March 10, 1840. On the 29th day of December, 1840, Stickney conveyed said lots in fee to E. H. Gatewood, and the deed was recorded January 12th, 1841. On the 16th day of June, 1842, Gatewood morgaged the same lots to James Dunlap, to indemnify him as surety, on a bail bond, which mortgage was recorded July 11th, 1842. On August 8th, 1842, the suit in which bail bond was given was compromised, and the notes of Gatewood taken in satisfaction with Dunlap as surety. In 1847 these notes were paid by Dun lap, and he claims indemnity under the mortgages. On July 1st, 1842, Gatewood mortgaged the same premises to Newcomb & Co., reciting the mortgage made by Stickney to the bank; this mortgage was recorded July 16th, 1842. On the 9th day of May, 1845, Newcomb & Co. assigned their mortgage to W. & C. Fellows, without recourse. May 4th, 1843, the bank, by Dunlap as president, gave a power of attorney to A. G. Caldwell to release mortgages when satisfied, which power was recorded May 22d, 1843. On the 19th day of August, 1843, Gatewood executed and delivered to the bank, James Dunlap being then president, his note for $15,280, the amount then due on the Stickney mortgage, and executed and delivered a mortgage on the same lots and other property previously mortgaged to the bank to secure the payment of the note; the Stickney note was surrendeed with an indorsement signed by John Siddall, cashier, but in Caldwell's hand-writing, stating that the note had been paid by Gatewood, and on the same day Siddall released the mortgage from Stickney to the bank. There was no payment in fact of the Stickney mortgage. On Febuary 25th, 1843, the act was passed to " put the Bank of Illinois in liquidation," to take effect March 3d, 1843. On the 25th February, 1843, a suplemental bill was passed and accepted by the bank, by virtue of which the prior act was suspended for four years, and by which the bank was to "*be finally wound up according to the rules and regulations hereby established;*" and the bank was prohibited from " loaning" any money, " but shall confine all its operations to winding up its affairs, *collecting* and

securing its debts." A supplemental act was passed February 28th, 1845, vesting the effects of the bank in assignees, &c., with power "to collect all debts due to said bank." Under this act Dunlap, as president, assigned the effects of the bank to Caldwell and Ryan. When the substitution of the Gatewood for the Stickney mortgage took place, Dunlap was president and Gatewood a director of the bank. John Crenshaw, who was a director of the bank swears that in 1843 the board voted the substitution and directed the surrender and release. It does not appear that there was any record of this vote. It is not shown that there was any by-law of the corporation which authorized Siddall, as cashier, to enter satisfaction of mortgages, though he had done so before the power was given to Caldwell; but there is no proof of any such releases since the record of Caldwell's power. The records of the board show no power in Siddall to release, nor does the charter vest any such power in the cashier. Gatewood died on February 27th, 1848. Dunlap and W. & C. Fellows & Co. file separate bills of foreclosure, and make the assignees of the bank parties defendant.

The indorsement on Stickney's note, made and signed by Siddall, the cashier of the bank, was as follows: "This note is paid and satisfied by E. H. Gatewood, this 19th August, 1843."

The decree in this case was ordered by MARSHALL, Judge, at August term, 1853, of the Gallatin Circuit Court, and directed the sale of the property in controversy, and the division of the proceeds; but did not recognize that Ryan as assignee had priority or preference, by virtue of the mortgage executed by Stickney in 1840, the notes which that mortgage was given to secure having been declared canceled by Siddall, the cashier of the Bank of Illinois.

W. THOMAS, for Plaintiff in Error.

S. S. MARSHALL and R. S. NELSON, for Defendants in Error.

SCATES, C. J. The only question presented is simply one of priority of mortgage lien. But its solution involves two other questions: first, whether the mortgage under which plaintiff claims that priority was paid and discharged. Second, the powers of the board of directors and cashier to discharge it, in the manner shown by the record.

We are of opinion with the defendants upon all these questions, and will state some of the principles and reasons which we think support that conclusion.

The mortgage debt is the principle thing and the mortgage a mere incident of it. Coffing et al. *v.* Taylor, 16 Ill. R. 472;

Warner et al. *v.* Helm et al., 1 Gil. R. 231; 1 Hilliard on Mortg., Cap. 11, pp. 163, 164; 1 Hilliard on Real Prop., Cap. 33, pp. 418, 419; Martin *v.* Mowlin, 2 Burr R. 969. (*a*)

The mortgage, and his agents and servants, may deal with and do such acts in respect to such debt as may be usually done in relation to money transactions, verbally or by writing, without regard to the mortgage security. A transfer of the debt by assignment, or delivery of the note, would generally carry the mortgage in equity and payment would discharge the mortgage lien. The necessity of acting under seal in relation to such a debt, depends upon the nature of the act as affecting the mortgage security or the title to the land, by assignment or release of the mortgage security. And this would be equally the ease with individuals as with corporations. But so far as power and mode of action is concerned in transferring or collecting the debt or the note given for it, I know of no difference between one secured by mortgage and one not so secured. Its transfer or payment is a mere question of fact and intention as if no mortgage existed, and the rules of law and evidence and the power of the parties the same. Its existence might assist in ex plaining and ascertaining their intention as evidenced by particular acts, but cannot vary or control their power or mode of dealing with or settling the debt. A formal release of this mortgage should be under seal, but such a release would not discharge the debt. On the contrary a verbal or written discharge of the debt by its payment in money, property or other securities, would discharge the mortgage, and without a release or satisfaction entered upon the mortgage itself or the margin of the record, as provided by Rev. Stat. p. 110, Sec. 37. The provision is made for the protection of mortgagees and others by the recording and preservation of evidence of satisfaction of it, on the same public record; and not as prescribing a rule of evidence.

What then may be alleged and sustained as payment? It is not a technical term importing the delivery of money. It may be made in property or other securities. It is a question of fact, of the meaning and intention, of the parties. The proofs here leave no question of the intention. It was Stickney, not Gatewood, who owed and was bound to the bank for this debt. Gatewood, it is true, had purchased subject to the bank lien, but he owed the bank nothing on it; he was bound to Stickney, not the bank. Stickney desired to be released by payment of his debt to the bank. The bank proposed to release Stickney if Gatewood would give his note for the debt and interest due from Stickney, with a mortgage on the same and other property.

(*a*) Lucas et al. *vs.* Harris, 20 Ill. R. 165; Vansant *vs.* Almon, 23 Ill. R. 31; Herring Impl. etc; et al. *vs.* Woodhull, 29 Ill. R. 92; Pardee *vs.* Lindley, 31 Ill. R. 174; White *vs.* W lker, Id. 422; Farwell Impl. etc. *vs.* Meyer, 39 Ill. R. 510.

This was agreed to and done, and Stickney's notes and mortgage receipted and delivered up to him, and satisfaction entered on the margin of its record in the recorder's office by the cashier of the bank.

The entries in the books of the bank and two of its directors prove the intention to comport with these acts, as a total discharge of Stickney's debt without any reservation of the mortgage securitiy to meet Gatewood's new liability secured by his mortgage of the same and other property.

It would require an express agreement to rebnt such clear proof of payment. The doctrine of the mere renewal of mortgage notes by the mortgagor or others, continuing under the mortgage security, is no answer to such facts as these.

I need not review the various cases of payment by giving higher or other securities by the debtor, or the bills or notes of third persons.(*a*) A satisfactory summary will be found in 2 Greenleaf Ev., Secs. 516 to 523, and well sustained by the references; 7 Mass. R. 286; 2 Metcalf R. 168; Allard *v.* Lane; 18 Maine R. 9; 21 Pick. R. 230; Cow. R. 301; Hilliard on Mortg. 306, 307, and notes, p. 310, paragh. 12; 12 Johnson R. 409; Barnes *v.* Carmack et. al., 1 Barb. S. C. R. 392. There is no proof of bad faith or false representations. If there was any mistake in canceling a prior and taking a junior lien to other incumbrancers, it was the fault and carelessness of the bank in not examiniug the records and title. They shall not be heard to allege this to the prejudice of Stickney and Gatewood.

The remaining question is as to the powers of the bank or agents and officers of the bank to make this agreement and cancellation of one debt and mortgage and take another in payment. It is needleess to discuss the general doctrine which cofines corporations strictly within the delegated powers, and to the objects and means within the charter.

The general powers of the bank for further transactions of general banking were suspended by the Act of 25th Feb., 1843, which declared that the bank should go into liquidation within thirty days from that date. Act 1843, p. 32, Sec. 6. The 7th Section declares that the bank should not exercise the usual banking powers, but should " confine all its operations to winding up its affairs, collecting and securing its debts, paying the debts of the bank, selling its real and personal estate, issuing the certificates for balances, provided for in the sixth Section of this Act, and to renewing the notes of its debtors from time to time, upon the payment of one-fifth part each time, and to suing and being sued, in relation to all its dealings," for which purpose alone its powers and charter were continued for a limited

(*a*) Lucas *vs.* Harris 29 Ill. R. 166.

time. There were other specific directions and details for the same object.

Theis Act seems to be now construed as converting the directors and officers of the bank into trustees of creditors and stockholders. I do not so regard it. They were no more of that character after this Act, in the exercise of the powers limited by it, than before, in the full exercise of their charter powers. They were still in the management of their own affairs for the purposes of settling their business. What they had power left to do was done in the same character, though for a single object, as the like acts before the restriction. The character of those who managed the settlement of the affairs of the bank was changed fully by the Act of 1845, when assignees were appointed in the nature of receivers of the effects of the bank.

It is true it appears by the evidence, that a loan of money was a part of this particular transaction for change of debtors and securities, and which they had no power to make. But they had power to make the arrangment to secure the debt by taking the note and mortgage of one for the debt, note and mortgage of another. And in doing so, to exercise their own best judgment of their interest. Circumstances and facts, known and apparent to them, dictated the policy and prudence of this arrangement. They acted very negligently in not examining the title, it is true; but there is no proof of fraud, design or overreaching in any one concerned, nor of any bad faith in Dunlap, who, though president, was not personally concerned as such, or present, or knowing of this transaction when made. The principles and doctrines contended for world render banking and other corporate acts of like general business transactions, wholly impracticable. Nor do we recognise the current of authorities at this day as sanctioning the ancient strictness which required corporations to act in most important transactions by seal and in writing. In the varied and multiplied transactions of banking, manufacturing, railroad, municipal, and other corporations, it will be found impossible to provide their agents with written or even express verbal powers and instructions for all their acts on behalf of their principals, or for those dealing with them, to wait to inspect such evidence of authority.

To a very great extent, like individuals who act through agents and servants, these corporations are held to presumed or implied agencies, authority and instruction, to those who are held out or permitted to act for them in their usual course of dealing within their charter powers, when not controlled specially by its provisions, the by-laws, or the nature and character of the contract or the subject matter of it. Angell and Ames

on Corp., 268 to 304 ; Paley on Agency, pp. 310 to 312, Sec. 2 ; Story on Agency, Secs. 52 to 56, and notes.

Although the English rule has not been relaxed to the same degree, in this respect, as the American, yet the courts have conformed to the wants and necessities of daily business transactions in a very great degree. Beverley *v.* The Lincoln Gas Light and Coke Co 6 Adol. and Ellis, R. 829 ; Church *v.* Imperial Gas Light and Coke Co., id. 846 ; Mayor of Ludlow *v.* Charlton, 6 Mees. and Welsb. R. 815.

The cashier is necessarily the general agent of the bank in dealings with customers in money, notes and bills, —the receipt, deposit, transfer and payment of them. It is indispensable to the interests of the corporations, and necessary to the protection and security of customers that he should exercise these powers, and that his acts should bind his employees. Angell and Ames on Corp. 293, (2) to 297 ; Story on Agency, Secs. 92 to 97, 114, 115.

The cashier acted in this instance within the general scope of his authority in endorsing receipts for payment upon the note, mortgage and record, as evidence of the agreement and discharge between the directors and Stickney, and in delivering them up as paid. Proof is made that he had been in the habit of entering satisfaction of mortgages in the mortgage record for four years previous. The power of attorney to Caldwell to do the same is no revocation of this authority in the cashier.

We do not think the objection sustainable, that the transaction is not proven by minutes of the proceedings of the board. The agreement may be shown by parol when no minute was made or kept, —and that although no formal meeting of the directory was had for the purpose. The transaction was known to them —they acquiesced in and acted upon it.

We are of opinion the mortgage and notes of Stickney to the bank were paid and discharged ; and the assignee is not entitled to revive the mortgage as a prior lien.

Decree is affirmed.

Decree affirmed.

HENRY McCLURE, Plaintiff in Error, v. JACOB ENGELHARDT, Defendant in Error.

ERROR TO ST. CLAIR.

The levy of an execution upon land in a different county from that in which the judgment was rendered, will operate as a lien; and a sale under it, would perfect the title, by relation back to the levy. (a)

If a certificate of a levy upon execution from a foreign county is not filed in the recorder's office, the levy will not take effect as a lien; and creditors of purchasers without notice, intervening between the levy and sale, may hold against the levy. But if a certificate of sale is filed, it will operate as a constructive notice from that date; and will pass to the pruchaser all the interest of the judgment debtor. (b)

In ejectment a defendant who holds under the same grantor with the plaintiff, cannot deny title in him, or set up an adverse title in himself or another.

A certificate of sale of lands is assignable, and title may pass under an assignment of it so defective as would not enable the holder to compel the officer to execute a deed, yet if he does execute one, it will be good.

THIS was an action of ejectment instituted by McClure against Engelhardt for the recovery of the north-west quarter of the south-west quarter, and south-east quarter of north-east quarter of Sec ion 5, in T. 2 N., R. 7 W., in St Clair county. Plea g neral issue. It was tried by the court at April term 1849. The court found for the defendant and rendered judgment against the plaintiff for costs. The plaintiff proved on the trial that the lands in question were entered at the proper land office on the 16th day of January, 1839, by William Cobb, and on the 8th of January, 1840, Cobb and wife conveyed the land by deed in fee simple to Jefferson Shores. The plaintiff then proved by transcript from the Madison Circuit Court, that on the 7th day of October, A. D. 1841, Hiram Chandler recovered a judgment against Thomas J. Shores, impleaded, &c., for $253.10 debt and damages and costs. On the 30th December, 1841, an execution on the said judgment was issued to the sheriff of St. Clair county, and returned by him—that on the 8th of January, 1842, he had levied the same on the lands in question, and afterwards made no sale for want of bidders. On the 30th day of November, 1842, a venditioni exponas was issued to the sheriff of St Clair, upon which he returned that he had sold the lands in question, on 4th of February, 1843, to Samuel G. Bailey, attorney for plaintiff, in due form of law for $246, and had filed a certificate of the sale in the recorder's office on 7th February, 1843. To admitting this record of judicial proceedings, defendant objected and excepted. Plaintiff then introduced the certificate of sale, filed in the recorder's office on the 7th day of February, 1843. The plaintiff then introduced a

(a) Reichert et al. vs. Mc'Lure, et al. 23 Ill. R. 516.
(b) Brown vs. Niles, 16 Ill. R. 388.

deed from the sheriff of St. Clair to him as assignee of said certificate under said judicial sale, dated September, 24th, 1847. The plaintiff then proved by one Hopkins, the officer who made the levy aforesaid, that he knew Jefferson Shores, who resided on the lot claimed by Engelhardt—that when witness got the execution against Thomas J. Shores, he went to the house of Jefferson Shores, by whom witness was told that his (Shores) proper name was Thomas Jefferson Shores. Hopkins further testified that Shores lived on the tract claimed by Engelhardt at the time of the levy of the execution aforesaid, and was present at Belleville at the time of the sale of said land under said execution, and that Engelhardt lived there at the time of the commencement of this ejectment suit. The defendant then proved by Hay, the recorder of St. Clair, that no certificate of the levy of the execution in question had ever been filed in his office, he having made diligent search; that he could not tell whether the letter "h" on the endorsement of the certificate of sale in said case was made by him (Hay) or not. The defendant then offered in evidence the original certificate of sale, given by the sheriff of St. Clair, to Bailey, attorney, for Hiram Chandler, plaintiff in execution, and proved by the sheriff that the transfer or assignment on the back of the same was the only assignment of said certificate ever produced to him, and was the one upon which he executed the sheriff's deed to plaintiff. The plaintiff then introduced a deed from De Wolf & Chickering to Shores for said north-west quarter of south-west quarter of sec. 5, dated Oct. 20, 1843, and recorded in St. Clair the 23d of the same month; to which defendant excepted. The plaintiff then introduced a deed from Shores and wife to Engelhardt, for the last described tract, dated October 20th, 1843, and recorded on the 23d of the same month. Plaintiff then proved by a witness, that at the time of the sale of the above tract by Shores to Engelhardt, that Shores moved out of the house and Engelhardt the same or the following day moved in and took possession of the premises. Plaintiff below moved for a new trial, because the finding was contrary to the law—contrary to evidence—and the court had admitted improper evidence, which motion was overruled.

The case is brought here by writ of error, and plaintiff assigns for error, that improper evidence was admitted on behalf of defendant below and in refusing to grant a new trial.

W. H. UNDERWOOD and P. FOUKE, for Plaintiff in Error.

G. KOERNER and G. TRUMBULL, for Defendant in Error.

SCATES, C. J. At the time of the levy of this execution Shores appears to have been in possession of the premises, and owned an equity of redemption—both of which were subject to levy and sale under it. Acts 1841, 171, Sec. 7; Rev. Stat. 1845, p. 300, Sec. 1. Switzer et al. *v.* Skiles et al., 3 Gil. R. 532, 533; Turney et al. *v.* Saunders et al., 4 Scam. R. 532; Jackson ex dem. Stone *v.* Scott, 18 John. R. 94; Jackson *v.* Parker, 9 Cow. R. 80, 84, 85. (*a*)

Judgments were not liens upon lands at the common law, because lands were not liable to sale, but levies were liens, upon such property as was liable to be taken and sold. By statute, the delivery of execution to the officer was made to operate as a lien. We have modified the English rule, by subjecting the land to sale, creating a judgment lien on that in the same county of the judgment, and adopting the English statute in relation to liens on personalty by delivery of the execution.

Lands in foreign counties to the judgment were subject to levy and sale, although the jugdment itself did not operate as a lien. Without assuming that the delivery of the execution to the officer of a foreign county, would, by analogy, operate as a lien on the land, like the personalty, because it was liable to be taken. We cannot question but that the *levy* would so operate from its date, and a sale in pursuance of such levy would perfect the title by relation back to the levy. Fair purchasers were liable to be overreached by these semi-secret leins, without any official mode of notice or of obtaining it.

To remedy this evil, the legislature provided that the certificate of levy and sale, should each be filed in the recorder's office of the county where the lands lay, and so also of levies of attachments. Rev. Stat. 1845, p. 302, Sec. 12, p. 305, Secs. 25, 26, 27; (see act 1845, p. 170, Sec. 24,) and in each case to, take effect as a lien from such filing, as to creditors and *bona fide* purchasers, without notice.

The certificate of levy in this case was not filed, and therefore took no effect as a lien by constructive notice, and creditors and subsequent purchasers, without actual notice, might have held the land against this levy. (b) But no such right intervened between the levy and sale. The certificate of sale was filed, and was constructive notice from that day. This was before any conveyance back to the judgment debtor by his mortgagees, and is sufficient to pass to the purchaser all the interest of the judgment debtor, and with notice of the levy and judgment as well as of the sale. We cannot construe the statute requiring the filing of the certificate of levy, as defeating the title acquired by the sale and certificate duly filed on account of a failure to make the levy a lien by recording it.

(*a*) Thomas *vs.* Bowman, 29 Ill. R. 426.
(*b*) White *vs.* Kibby, 42 Ill. R. 511.

The only effect of the failure would be to subject the levy be set aside, and a subsequent sale defeated, by an innocent intervening creditor or purchaser. But if none such intervene, the levy is not void, but is good to support the sale, and when that is duly made and certificate filed, it will take effect as an independent notice, and connection with the judgement through the unrecorded levy, as if the levy had never been required to be recorded. Such is the title set up and shown here, which appears to us sufficient to entitle the plaintiff to a verdict and judgment in this case, for anything shown in proof in this record.

It is contended that defendant claims under the same grantor, Shores, and is therefore estopped to deny title in him, or set up an adverse title in himself, or third person. So the rule is laid down, 2 Greenl. Ev. p. 306, Sec. 307; Bancroft *v.* White, 1 Caine Rep. 190, and note *a*; Jackson *ex dem.* Masten *v.* Bush, 10 John. R. 223; Jackson *ex dem.* Bowne *v.* Hinman, id 292; Ferguson *v.* Miles, 3 Gil. R. 365; McConnell *v.* Jackson, 2 Scam. R. 258. [*a*] But the fact seems to have been overlooked by the plaintiff, that he, and not the defendant, claimed title for defendant, and deduced it from Shores. Defendant offered to show title in the mortgagees, and there rested the question, contenting himself upon objections to plaintiff's title, and without setting up any in himself. We should, therefore, notice one or two more objections to plaintiff's title.

It is said the judgment was against one man, and the execution was levied upon the property of another. The answer is that the evidence of identity is sufficient and satisfactory.

Again, that the sale was to Bailey, the attorney of the judgment creditor, and the certificate of purchase was assigned by the latter. The proofs and circumstances satisfy us abundantly that the purchase was for and by the creditor, through his attorney of record. Upon these proofs the court would not feel authorized to render a judgment against Bailey as a purchaser, and compel him to pay the creditor for this land. This certificate was assignable by the statute.

The title might well pass, under such a defective assignment as would not enable the holder to compel the officer to execute a deed; yet he may do so, and it will be good. It is not a question in which the judgment debtor has any interest; having neglected to redeem, his title has passed; and, as to him it is not material as to whom it is conveyed. Wiley et al. *v.* Bean et al., 1 Gil. R. 305. See Garrett *v.* Wiggins, 1 Scam. R. 335; Voorhees *v.* The Bank U. States, 10 Pet. R. 478.

(*a*) Hollbrook *vs.* Brenner, et al. 31 Ill. R. 501; Pollok *vs.* Maison, 41 Id. 518; Davis *vs.* Mc'Vickers, 11 Ill. R. 427; Dickerman *vs.* Burges, 20 Ill. R. 260; Johnson *vs.* Adleman, 35 Ill. R. 280; Blair *vs.* Chamblin, 39 Ill. R. 527; Merritt *vs.* Hasbrook, 1 Wend. R. 47; Proctor *vs.* Farnan, 5 Paige C. R. 614; 7 Hill R. 91, 4 Denio R. 480.

It was contended that this doctrine would enable sheriffs to convey the land to whom they pleased, in fraud of those having right. When such an attempt is made, and shown to the court, a proper remedy and corrective will be found and applied. This does not present such an one. A very simple punctuation after the word attorney, will make it read plainly as the parties understood and acted upon it; that is, that the land was struck off to S. G. Bailey, attorney for plaintiff in execution. Accordingly he passed over the certificate to his client, as purchaser, and he assigned it to the plaintiff here, to whom the sheriff conveyed.

If the defendant has any title, he should have presented it. So far as any appears in the record, we are of opinion with the plaintiff.

Judgment reversed and cause remanded for new trial.

Judgment reversed.

SKINNER, J., DISSENTING. Judgment was obtained against Shores in Madison Circuit Court; on the 30th day of December, 1841, execution issued to the sheriff off St. Clair county, and was, on the 8th day of January, 1842, levied on the land in controversy as the property of Shores. No certificate of this levy was filed in the recorder's office of St Clair county, where the land levied upon is situated. On the 30th day of November, 1842, a *venditioni exponas* execution issued under which the land was sold, and the sheriff, on the 24th day of September, 1847, executed a deed to the plaintiff, as assignee of the purchaser. On the 7th day February, 1843, a duplicate of the certificate of purchase was filed by the sheriff in the recorder's office of St. Clair county, but the same was not recorded.

The defendant claimed title by deed from Shores, dated the 20th of October, 1843, and recorded the 23rd of the same month. The defendant, being a *bona fide* purchaser without actual notice, must take the title, unless he is affected by some lien of the judgment execution, levy, or sale, or by constructive notice from the filing in the recorder's office, of the duplicate of the certificate of purchase; and in my opinion no lien was created by either of them upon the land, nor would the defendant be constructively charged with notice of either execution, levy or sale.

The judgment of Madison Circuit Court was no lien upon land in St. Clair county, and no certificate of the *levy* was filed in the recorder's office of the county where the land is situated.

The act of 26th February, 1841, entitled "An act to enable purchasers of real estate to ascertain whether the same is free from encumbrances, and to prevent secret liens of attachments and executions," and now in force, requires the sheriff to whom execution, " from a foreign county is directed, upon levy of the

same on land, to file a certificate of such *levy* in the recorder's office of the county where the land lies; and declares that, "until the filing of such certificate, such levy shall not take effect as to creditors or *bona fide* purchasers without notice."

This act requires the recorder to file the certificate of levy, and to record the same in a book to be kept for that purpose. The execution, levy, sale, and filing in the recorder's office, by the sheriff, of a duplicate of the certificate of purchase, created no lien on the land, nor were they, or any of them, constructive notice to the defendant, who before the execution of the sheriff's deed, purchased of the execution debtor. As to the defendant, the levy did not take *effect*, and the subsequent proceedings under the execution, prior to his purchase, and without actual notice, did not affect his title under the execution debtor.

The act concerning judgments and executions, approved January 17, 1825, required sheriffs. on sale of lands under execution, "within ten days from such sale to file in the office of the clerk of the county a duplicate of such certificate" of purchase, and provided that "such certificate, or a certified copy thereof, should be taken and deemed evidence of the facts therein contained." The act of February 19th, 1841, amendatory of the act of 1825, and now in force in this respect, provides that "the duplicate copy of the certificate of purchase required by the act to which this is an amendment, to be filed in the office of the clerk of the county, shall in all cases hereafter be filed in the office of the recorder of the county in which the lands so sold under execution shall be situated."

This duplicate certificate of purchase the law requires to be so filed in *all* cases of sale of lands under execution. It is not filed for record, nor is it contemplated that it *should* be recorded. It constitutes no constructive notice. Its objects are to add to the security of the purchaser as evidence of his purchase, in case of loss of the original ; to afford a certain means of ascertaining the purchaser ; and to enable the debtor to redeem by paying the redemption money to such purchaser. See Real Estate Statutes 332, Secs. 10 and 11 ; ibid. 340, Sec, 4 ; ibid. 448, 449.

I think the intention of the act of February 26th, 1841, was as its title indicates, " to prevent secret liens of attachments and executions, " and that, where the execution comes from a foreign county and is levid on land, neither the execution, levy or sale, nor the filing of the duplicete of the certificate of purchase in the recorder's office by the sheriff, under the statue, will affect *bona fide* purchasers without notice, until the filing of the certificate of *levy* required by that act.

I thereupon dissent from the opinion of the majority of the court upon this question.

SAMUEL SONGER, Plaintiff in Error, *v.* The County Court of Gallatin County.

ERROR TO GALLATIN.

Under the act of 1852, in relation to the swamp lands, the right of a pre-empter is restricted to the several legal sub-divisions of forty acres each, portions of which are covered by his improvments, not exceeding a quarter section.

SONGER, on the 10th of April, 1855, made application to the county court of Gallatin, to establish a pre emption, at appraised value, of the west half of the north-east quarter, and the east half of the north-east quarter of Sec. 11 of T. 85 N., 8 E., being swamp lands, in pursuance of the act of the General Assembly to dispose of the swamp lands, "approved 22nd June 1852," and the act amendatory thereof, approved 4th March, 1854. The County Court allowed him to purchase the south-east quarter of the north-west quarter of section eleven, being the forty acres on which his improvements were located; and refused his application for the other lands.

From this order of the County Court Songer appealed, and took his application to the Circuit Court. At November term, 1855, of the Circuit Court, BAUGH, Judge, presiding, the judgment of the County Court was affirmed. Songer then sued out his writ of error, and brings his application to this court for review.

N. L. FREEMAN, for Plaintiff in Error.

J. OLNEY, for Defendant in Error.

CATON, J. The 28th section of the act of the 22nd of June, 1852, directing the disposition of the swamp lands, provides that persons owning improvements on swamps lands, "shall have the right to purchase, at the appraised value thereof, a quantity of land including his said improvement, to be bounded by the legal sub-divisions, not exceeding one quarter section, to consist of the quarter quarter, half quarter or quarter section." We are now called upon to construe that portion of the act above quoted, and the question is, whether a party having an improvement on swamp lands is entitled to take the whole quarter section on which his improvement is situated, although his improvement does not touch all of the forty acre tracts in the quarter, or whether his pre-emption right is confined to the several quarter quarter sections, portions of which are covered by his improvement. It seems to us very plain that it was the

intention of the legislature to confine the right of purchase to the forty acre lot or lots upon which the improvement stands—the right is given to a quantity of land to be bounded by the legal subdivisions not exceeding a quarter section, consisting of the forty, eighty, or one hundred and sixty acre tract, which shall embrace the improvement. A forty acre tract is here considered a legal subdivision, and that is what is meant by "a quantity of land," and he may take as many of these quarter quarter sections as his improvements encroach upon, not exceeding a quarter section. He cannot be compelled to take more than the forties upon which his improvement stands, nor has he the option to take more.

The decision of the Circuit Court must be affirmed.

Judgment affirmed.

Alvin Cross, Appellant, *v.* The Pinckneyville Mill Company, Appellee.

Zachariah Cross, Appellant, *v.* The same, Appellee.

APPEAL FROM PERRY

The manufacture of lumber, flour and meal is within the meaning of the act of 1849, authorizing "the formation of corporations for manufacturing, agricultural, mining or mechanical purposes."

A certificate of the Secretary of State to the effect that a duplicate of the certificate of organization of a company under the above act, had *not* been filed in his office, is not evidence. Nor does it seem that the omission to file such certificate would defeat the organization.

Payment of subscriptions to stock made before the organization of a company under the above act of 1849, will be enforced, if the organization is afterwards perfected.

This was an action of assumpsit, originally commenced by appellee, before a justice of the peace, to recover from appellant three installments of fifteen per cent. each on two shares of stock of $50 each, alleged to have been subscribed by appellant to said company. This cause was taken to Perry Circuit Court by appeal, and tried by the court, Breese, Judge, presiding, at October term, 1855. From the judgment of the court below, which was in favor of the company, an appeal is prosecuted to this court.

The subscription on which this suit is brought was signed by appellant about one month before any effort was made to incorporate the company.

The appellant insisted that there was no proof below of organization of said corporation, it not being shown, in addition to the certificate filed with the County Court, that a duplicate certificate of organization of said company was filed in the office of the Secretary of State, as required by the statute. See Laws of 1849, page 87.

HOSMER and WATTS, for Appellant.

UNDERWOOD and HAMILTON, for Appellee.

SCATES, C. J. The principal questions presented upon the argument, are, 1st—Whether the defendants have been fully organized under the act of 1849, pp. 87, 88, Secs. 1, 2, 3, 5; 2nd—Whether there is sufficient proof of that fact, Sec. 9; (*a*.) and 3rd—Whether the plaintiff is liable to the defendants upon calls made upon his subscription to the stock of the company; Secs. 6, 7, 10, 18.

We answer and resolve all these questions in the affirmative.

Upon the first we remark that the manufacture of lumber, flour and meal is within the meaning of the act; the number of incorporators is sufficient; three may, and here five have made, signed, acknowledged, and filed in the office of the clerk of the County Court a certificate of incorporation, containing the essential facts and information intended to be communicated and made public.

Secondly, This fact is established *prima facie*, by the kind and quantum of evidence provided by the ninth section, which makes a copy of the certificate filed with the clerk, duly certified by him "presumptive legal evidence of the facts therin stated." But the ground of objection under these proposition took a wider range, under a certificate from the Secretary of State, that a duplicate of the certificate of organization had not, on 29th September, 1854, or prior thereto, been filed in the office of Secretary of State, as required by the firis section.

I am not aware of any statute or rule of law that makes such a certificate evidence of any thing. The certificate of the Secretary will be sufficient to authenticate the laws of the United States, of other States, (Rev. Stat. p. 233, Sec. 6,) and "all laws acts, resolutions, (of our own State,) or other records, appertaining to his said office," id. p. 491, Sec. 5. But I deem it a misapprehension of the true object of such a certificate, when offered to prove what is not of record, or that this certificate is not of record. Any person who has examined offices or records who can, may swear and so prove that the matter is not there orof record. The Secretary may indirectly establish the

(*a*) See Stone *vs.* Great Western Oil Co. 41 Ill. R pp. 92 and 3 and cases there cited.

negative fact here offered in evidence by certifying to the *actual time* of such filing, and so, by fiximg the time, exclude any other time.

But as it was received without objection, we take the facts as stated, that is, that the duplicate certificate of organization had not been filed in the Secretary's office on or prior to that day, still the facts are unimportant to defeat the organization or rights growing out of it. We feel no disposition to explain away, excuse compliance, or dispense with, any requirements of statutes, especially those which may affect the rights of third persons or parties interested. There is, however, a well settled distinction between mandatory and directory pro visions. And these, like those of private contracts, are settled and enforced according to the *intention* and *true meaning* of the legislature, deduced from the act, and sometimes aided by other acts in *pari materia*, and extraneous circumstances.(*a*) The filing of this duplicate seems by the first section a secondary object, and we may only conjecture its uses, as multiplying the places of publicity, proofs, and the chances of preservation of the evidence from loss, accident, or destruction, This view is confirmed by the language of the second section in declaring that " when *the certificate* shall have been filed as aforesaid " the persons signing, and their successors, " shall be a body politic and corporate in *fact* and in name," and is further strengthened by the ninth section, declaring a *copy* of it, certified by the county clerk, "presumptive legal evidence of the facts therein stated." We should endeavor by construction to aid in carrying out the true intention and effectuating the object of the law Here it seems to be to encourage and aid in the establishment of such manufactures, &c., as will meet and supply the wants and demands of the people. We do not think these ends would be promoted by strict technical constructions, converting every direction and detail of powers into a mandatory pre-requisite of corporate existence. A similar precautionary direction, and of great utility to the public, is found in the general railroad act of 1849, special session, pp. 23, 32, Secs. 20, 43, in relation to filing maps and profiles of the road with the Secretary of State, and of parts relating to each county, with the county clerk and recorder. We give this as the true and apparent intent of the legislature upon the face of the law, and would by no means be understood as questioning the general doctrine as laid down and sustained by the current of authorities. Whatever is expressly or impliedly required to be done as essential to bring the corporation into existence must be done. Aug. and Am. on Corp. 67, Sec. 7 ; Fire Department of New York *v.* Klip, 10 Wend. R. 266.

(*a*) A. on Corp. See 635.

Third, The company thus organized, made and gave due notice of calls for installments upon plaintiff, among others, as a subscriber to the stock; and this is resisted upon the ground that his subscription was before the organization, and is therefore void or voidable for want of a promisee, consideration, or mutuality, he never having met, or acted with others in this subsequent organization, or recognized them as a corporation. This presents the broad ground of his obligation or liability on such preliminary subscription. We think it sustainable upon sensible distinctions, and by authority of adjudged cases. A distinction has been made between a mere subscription of stock, which could only be enforced by forfeiture or sale of the share, and those subscriptions which contained a promise to pay, upon which an action may lie. Salem Mill Dam Corporation *v.* Ropes, 6 Pick. R. 31. Held, in Bridgewater Academy *v.* Gilbert, 2 Pick. R. 580, that the action would not lie, where there was no such promise. Franklin Glass Co. *v.* White, 14 Mass. R. 286; Chester Glass Co. *v.* Dewey, 16 Mass. R. 94.

But another distinction was recognized as substituting an implied liability for money had and received or laid out and expended, when subscriber had paid part, and in faith of it, further expinditures had been incurred. Farmington Academy *v.* Allen, 14 Mass. R. 172; 2 Pick. 580.

Many decisions have supported the action upon an express promise to pay calls upon shares subscribed. Worcester Turnpike Corporation *v.* Willard, 5 Mass. R. 80; Andover and Medford Turnpike Corporation *v.* Gould, 6 Mass. R. 40; where, however, it appeared unauthorized and unaccepted by the corporation, it was not enforced. Essex Turnpike Corporation *v.* Collins, 8 Mass R. 292. In Phillips' Limeric Academy *v.* Davis, 11 Mass. R. 113, a subscription and agreement to pay towards the erection of an Academy, before an act of incorporation of the enterprise, the court held could not be enforced by the corporation for want of a promise and mutuality. The County Commissioners of Randolph County *v.* Jones, Breese 103; and Wallington Manufacturing Company *v.* Fox, 12 Vt. R. 304; stand upon the same grounds and Mayo *v.* Chenoweth, Breese R. 155, for want of a promisee. In The Scots Charitable Society *v.* Shaw, adm'r., 8 Mass. R. 532, a recovery was sustained while the court doubted the right of recovery. (*a*)

While this court has required all the pre-requisites of the charter to be complied with, it has upheld the power of the directory to require payment from the stockholders in incorporations for business purposes. Barret *v.* Alton and Sangamon Railroad Company, 13 Ill. R. 504. It has futher held, that the subscription is not invalidated by a failure to exact the advance

(*a*) A. on Corp. See 255.

payment, and the minutes and books of the company are evidence of its acts and proceedings, and such acts are Prima facie evidence of a compliance with the pre-requisites of their charter, and the regularity and legality of their proceedings. Ryder *v.* Alton and Sangamon Railroad Company, 13 Ill. R. 516.

The true and correct principle is laid down in Kidwelly Canal Company *v.* Roby, 2 Price R. 93, (1 Eng. Exch. R. 189;) where a subscriber, to an agreement among the parties to it, to promote a joint undertaking or common purpose, was held liable for his subscription as a shareholder to the corporation afterwards formed, under an act of Parliament subsequently obtained to carry out that undertaking and common object. [*a.*]

The same principle has been applied, and a subscription, before the association was organized under a general banking law of New York, was enforced at the suit of the President of the Company. Staunton, President of the Albany Exchange Bank, *v.* Wilson, 2 Hill R. 153.

Again, in The Hamilton and Deansville Plankroad Company *v.* Rice, 7 Barb. S. C. R. 157, it was applied under the general plankroad law of that State—and the court held not only the contemplated company, a promisee and the promise good to them as a third person, but that there was mutuality, and a sufficient consideration in the stock, dividends and general interests of the company to which the promisor became entitled.

The Covington, Coal Creek and Jacksonville Plankroad Company *v.* Moore, enforces the liability on like facts, 3 Indiana R. 510; which is also applied to insurances in Judah *v.* The American Live Stock Insurance Company, 4 Indiana 333. Tennessee adopts and enforces the same liability. Gleaves *v.* The Brick Church Turnpike Company, 1 Sneed R. 491. Tracy *v.* Yates, 18 Barb. S. C. R. 152, does not militate with this doctrine. It was an attempt to fix a liability for past debts of the company, personally upon a new and subsequent stockholder, who had *bona fide* paid in her subscription to an insolvent and sinking concern; which the court evidently seem to regard as a swindling adventure. The sacrifice was sought to be doubled by fixing the day of subscription, instead of the day of payment as the time when she became a stockholder, but the court held that she became such only on payment.

Parties should not be permitted to toy and trifle with the rights and interests of others, by agreeing and entering into such enterprizes with others, where expense and trouble must be incurred in the preparation for and organization of companies, and larger or less sums may be expended, before they are told by those, upon the confidence of whose means and assis-

(*a*) Tonica and Petersberg Railroad Company *vs.* Mc'Neely, Adm. etc. 21 Ill. R. 72; Griswold *vs.* Trustees of Peoria University, 26 Ill. R. 43; Johnston *vs.* Ewing Female University, 35 Ill. R. 527.

tance they venture, that they will withdraw, and set up the endless technicalities of the law as a justification and defence. Should these be encouraged and sustained, the public will derive but little good from general acts of incorporation.(a)

These acts are intended to invite and aid small capitalists by association to furnish and accommodate the growing wants of the community. The policy is judicious and much may be accomplished from limited means ; when it is understood that in this, as in other agreements, parties will be held to the performance of their contracts in which the rights and interests of others are involved.

Judgment affirmed.

ANDREW CHRISTY, Plaintiff in Error, v. JAMES PULLIAM, Defendant in Error.

ERROR TO ST CLAIR.

A husband made certain bequests to his wife, among others, certain lands, "to dispose of at her death to any person she may think best to live with her, and take care of her ;" she conveyed these lands, and it was held that the grantee in an action of ejectment might offer his deed in support of his title ; and that evidence of a tenancy of defendant under his grantor, with a view of estopping him from denying title in plaintiff, is proper. (d)

The power conferred on the wife by the will, may be executed by deed or will, or other simple writing, if sufficient to convey the subject matter of it ; the intention of the devisor, by the power conferred on the wife, is too plain to admit of restriction.

THIS was an action of ejectment, to recover the possession of a certain tract of land situate in St. Clair county. Declaration contains but one count ; plaintiff claims an estate in fee in said land.

The cause was tried by the court and jury. Plaintiff showed a connected title of record from the United States to one Joseph Olge, and produced the last will of said Joseph Ogle, duly proved which will contained the following provisions : "Also I give and bequeath to the above named Lucy Ogle, to have and to hold during her natural life, the land that I now own and reside on to occupy and use the said laud in the same way as it would be lawful for her to do if the title were full and complete in her," and in subsequent part of will, the provision, viz.: "*The land not included in adove bequeath,* (*referring to lands in controversy,*) *I give and bequeath to my beloved wife, Lucy Ogle, to dispose of at her death to any person she may think best to live with and take care of her,*" and then offered to introduce a deed from

(a) Peoria and Oquaka Railroad Company vs. Elting, post. 432.
(b) Overruled. Pulliam vs Christy, 19 Ill. R. 333.

Lucy Ogle, the widow of Joseph Ogle, deceased, conveying the lands sued for to the plaintiff, having proved by one Duncan, that the land sued for was not included in the special bequest referred to in said will, which said deed was by the court excluded from the jury.

The plaintiff then called one Absalom Badgly, and offered to prove by him that the defendant came into the possession of the premises under a lease from the grantor of the plaintiff,and asked the following question: "Do you know of James Pulliam, the defendant, having paid rent to Lucv Ogle, the grantor of the plaintiff?" which question the court would not permit the witness to answer.

The plaintiff then offered to prove by said witness that the defendant rented the land in controversy of Lucy Ogle, who was the grantor of the plaintiff, and that the relation of landlord and tenant existed beween them; also to prove that said Lucy Ogle has conveyed her interest in said land to said plaintiff, all of which the court refused to let plaintiff prove, and thereupon the jury found a verdict *pro forma* for the defendant, of not guilty, at August term, 1855, of the St. Clair Circuit Court, Breese, Judge, presiding.

The plaintiff moved a new trial, which was overruled.

G. Trumbull, for Plaintiff in Errorr.

W. H. Underwood, for Defendant in Error.

Scates, C. J. The testator provided for the payments of his debt and funeral expenses out of his personalty and gave the remainder to his wife forever. He also devised to his wife the land upon which he lived, viz.: "To have and to hold during her natural life the land that I now own and reside on, to occupy and use the said land in the same way as it would be lawful for her to do if the title were full and complete in her." He further devised, at the death of his wife, two other tracts, a forty and a thirty-five acre tract, to certain nephews, by metes and bounds, (which by codicil he revoked as to them and gave to another nephew,) and then proceeded: "and the land not included in the above bequeath, I give and bequeath to my dearly beloved wife, Lucy Ogle, to dispose of at her death to any person she may think best to live with her and take care of her." The will was proved Sept. 21, 1846. On the 12th of June, 1854, Lucy Ogle executed a deed in fee of these lands to plaintiff. The court excluded this deed in evidence, and refused evidence of a tenancy of defendant under the grantor. Upon these rulings arise the questions before us.

The first clause recited devises a life estate in her of the homestead tract; the second does not devise the lands, but creates a general power of appointment in fee, without special or particular conditions or directious as to the time, mode or manner of doing so, or restriction in appointing an estate less than a fee, or in executing it at different times, for different parts of the land, or quantum of interest. "To dispose of at her death" might import a limitation as to time and the mode by will, were not the sense and intention of the testator so clearly manifested by the remainder of the sentence. But it is very clear that the object of the power was for the benefit of the devisee of it, to enable her, in her discretion, to make provision for her sustenance and comfort until her death, for which purpose the power enables her to dispose of the land "to any person she may think best to live with her, and take care of her." The literal reading would lead us to an absurd conclusion and make nonsense. The testator never contemplated such an idea as restricting the power to the time of her death, for it would then imply that the person receiving the land would have "to live with her, and take care of her" after he had received it, in order to return the consideration for it, in the "care" provided for. To avoid this absurdity, we must understand, under such a restriction of the power, that the purchaser under it, must bestow, in advance, during her life-time the "care" intended, which means, not only attentions, but moneys, maintenance, and all neccessaries of life, and trust to her execution of the power in his behalf at her death; and should she fail, neglect or refuse its execution, it might be very questionable whether equity would interpose for his relief, by supplying a want of it in his behalf. 4 Kent Com. 339, 340, 341; 1 Coke Little. 113 *a*, note (C. 2); Clinefelter et al. *v*. Ayres, 16 Ill. 329. We must therefore, seeing so plainly an *intention* by the power, to make provision for her maintenance according to her own discretion, give it full effect by forbearing such restrictions as might wholly defeat a purpose so grateful to the heart of a dying husband.

The same rules of construction govern contracts and wills, and are framed and adopted to ascertain the intention which is to govern. 1 Greenleaf Ev., Sec. 287 and notes, and Sec. 289 and notes.

When the mode of executing the power is not defined, it may be executed by deed or will, or other simple writing, if sufficient to convey the subject matter of it. 4 Kent Com. 330; Fairman *v*. Beal 14 Ill. R. 244; 2 Hilliard on real Prop. 559, Sec. 12; 1 Sugd. on Pow. 258, Sec. 3, clauses 9 and 13, (1 Law. Lib. p. 228.) And the power need not be referred to in the instrument executing it. 4 Kent Com. 334.

The manner of execution here by deed, the time, and the quantity of estate, are all within the terms and intention of this will—4 Kent's Com. 319—and we are, therefore, left to the inquiry of the grounds of its exclusion in evidence.

We remark, in the first place, that the exclusion of the evidence of a tenancy of defendant under the grantor, with the view of estopping him from denying title in plaintiff as her grantee, was proper; for while we recognize the law as correctly laid down on that subject, we think it has no application here, as will be apparent from the principles which govern a case like this.

It is not the case of an ordinary conveyance, nor like it in its effects; but the doctrine of powers has its peculiarities.

Plaintiff, as appointee under the power, derives his title, not under the person exercising the power, but from the will; the deed operates as the direction of a use, and he takes in the same manner as if the use had been limited to him by the will. 4 Kent Com. 327, 328. And this deed of appointment relates back to and takes effect from the will: and he takes under the testator, and not Mrs. Ogle, who merely executed it by his direction. 4 Kent Com. 337, 338; 1 Coke on Litt. 112 *a* and notes (M. 1) (N. 1) Albany's case; Marlboroug *v*. Godolphin, 2 Ves. Sen. R. 61; Cook *v*. Duckenfield, 2 Atk. R. 565—8; Middleton and wife *v*. Crofts, 2 Atk. R. Appendix 661; Bradish *v*. Gibbs, 3 John. Ch. R. 550; Doolittle *v*. Lewis et al., 7 John. Ch. R. 45. And this was carried so far in Roach et al., *v*. Wadham, 6 East. R. 289, that Watts, who had the power of appointment, with a limitation over to him in fee, on default of appointment, rendering rent to plaintiff, one of the parties to the creation of the power as part owners of the estate, discharged the land from his covenant to pay this rent to plaintiffs, which covenant run with the land; and the appointee took the land free of the rent, by the appointment of Watts, but not by conveyance from him, and was, consequently, not subject to his covenant to pay the rent. But this relation back to the creation of the power is not to be understood, nor will it overreach intervening rights. 4 Kent's Com. 338; Marlborough *v*. Godolphin, , 2 Ves. Sen. R. 78; Southby *v*. Stonehouse, id. 610.

This is not a naked power, but is coupled with a beneficial nterest in the devisee of it; and her exercise of it will if practicable, be upheld. Clinefelter et al. *v*. Ayres, 16 Ill. 329; Fairman *v*. Beale, 14 Ill. R. 244.

The plaintiff has set forth, according to the statute, the estate he claims, which is a fee, and can recover no less estate. The deed conveys a fee—and there is no proof in the record that the lands described in the deed and declaration are the

homestead, in which the grantor took a life estate as devisee under the will.

The question, therefore, does not arise upon this record as to the effect of the execution of the power upon the life estate in the homestead. The land described may be the same, in whole or in part; but as the will did not describe it by numbers, and no witness has deposed to its identity, we cannot identify it.

The plaintiff must recover, according to his allegations, a fee or nothing. Ballance *v.* Rankin, 12 Ill. R. 420; Rawlings *v.* Bailey et al., 15 Ill. R. 178. But the evidence offered by him will *prima facie* support his allegations, and should, therefore, have been admitted.

Judgment reversed and cause remanded for new trial.(*a*)

Judgment reversed.

WILLIAM A. RICHEY, Plaintiff in Error, *v.* WILLIAM MCBEAN, Defendant in Error.

ERROR TO MASSAC.

A. sued B. before a justice of the peace, to recover back money which B. alleged had been overpaid to A. on a contract for ferriage. Both were sworn at the trial; A. affirmed the existence of a contract, which B. denied. A. then charged B. with perjury and had him arrested, and, on examination, he was discharged, for which B. brought an action for malicious prosecution against A. *Held*, that on the trial of the action for malicious prosecution, A should be permitted to show in his defence the testimony given by him upon the hearing of the prosecution, touching the existence and character of the alleged contract.

A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guily of the offence with which he is charged, is probable cause to be shown in defence of an action for malicious prosecution.

THIS action was tried in the Massac Circuit Court, before PARRISH, Judge, and a jury, at June term, 1854; verdict and judgment for the plaintiff below for five hundred dollars and costs.

R. S. NELSON, for Plaintiff in Error.

J. A. LOGAN and C. G. SIMMONS, for Defendant in Error.

SKINNER, J. This was an action on the case for malicious prosecution.

Richey, the defendant below, sued McBean before a justice of the peace, to recover back money paid McBean by Richey

(*a*) Wills conferring powers upon wife constructed. In the matter of the Estate of Seth Whitman, 22 Ill. R. 510; Jennings vs. Jennings, 27 Ill. R. 518.

for ferriage. McBean became a witness on the trial for Richey, to prove an alleged contract between them in relation to such ferriage, and testified that no contract in relation to the ferriage was made between him and Richey. Richey made complaint before a justice of the peace, charging McBean with perjury in so testifying; a hearing was had before the justice, and McBean was discharged,

McBean then brought this suit for such prosecution. Upon the trial in the Circuit Court, McBean proved the prosecution and his discharge, and proved facts and circumstances tending to establish malice and want of probable cause. Richey, without objection, proved that he, on hearing of the prosecution and perjury, testified: that a contract was made between McBean and him as to the charge to be made for the ferriage; that McBean testified, on the trial of the civil suit between them, that no contract was ever made relating thereto; and that the testimony of McBean was untrue.

The proceedings in the civil suit were proved, by which it appeared that McBean was sworn and testified on that trial, and denied the making of the alleged contract with Richey, or any contract relating to the ferriage.

Richy also proved that McBean, before the commencement o. the civil suit of Richey against him, stated that he had agreed with Richey to ferry at five cents per barrel, but that now he would not do it for less than ten cents per barrel.

Considerable other evidence was offered by McBean and by Richey, upon the question of *probable cause*, but wholly unsatisfactory in its character.

The error assigned is: the refusal of the Circuit Court to set aside the verdict against Richey, because it was against the law and the evidence; and the only question is: was the defendant entitled to a new trial upon the evidence?

In this action, the declaration must charge that the defendant was actuated by malice in setting on foot the prosecution, and that the same was done without probable cause; to maintain the action these allegations must be proved, and it is for the plaintiff to prove them.

In this case, if it be admitted that the plaintiff established *prima facie* want of probable cause, yet, that the *prima facie* case was overthrown by the evidence on the part of the defendant, as given at the former trial, the testimony of the defendant given upon the hearing of the charge of perjury was before the jury, and that testimony, if true, showed a fit case for prosecution.

This testimony is corroborated by proof of an admission of the plaintiff inconsistent with the truth of his testimony in the

civil suit, and it may be said (in the absence of anything to the contrary) that the fact of the defendant calling upon the plaintiff to testify in relation to the alleged contract, when his case depended upon the proof of such contract, is a circumstance consistent only with the supposition that he understood that a contract did exist, and that he relied upon it for redress.

From all that appears in the case, the contract, if one existed, was known only to the parties, and it would seem to follow, upon grounds of public policy and of necessity, that the testimony of the defendant, given upon the hearing of the prosecution touching the existence and character of the alleged contract, should be admitted in his defence of an action brought against him for such prosecution.

If this is not the law, no citizen could be safe in prosecuting another for crime, where the offence is peculiarly within his knowledge and not attended with circumstances susceptible of proof by others. Johnson et ux. *v.* Browning, 6 Mod. R. 216; Guerrant *v.* Tinder, 1 Va. R. 56; Burlingame *v.* Burlingame, 8 Cowen 141; Scott *v.* Wilson, Cooke's R. 315; 1 Greenl. Ev., Sec. 362; 2 ibid., Sec 457; Scott *v.* Simpson, 1 Sand. R. 601.

The policy of the law is to favor prosecutions for crimes, and it will afford such protection to the citizen prosecuting as is essential to public justice.

We think the evidence on the part of the defendant established probable cause for the prosecution. Had the plaintiff been on trial of an indictment for perjury, and had a jury found him guilty upon the positive evidence of Richey, and the admission of the contract proved, we cannot say the verdict could properly be set aside for insufficiency of the evidence; and if this be so, it follows that the evidence in this case established probable cause.

Probable cause is defined to be: "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged." Munns *v.* Dupont *et al.*, 3 Wash. C. Ct. R. 31; Foshay *v.* Ferguson, 2 Denio 617; Ash *v.* Marlow, 20 Ohio 119; Jack *v.* Stimpson, 13 Ill. 701.(*a*)

Upon this definition, it cannot be doubted that the evidence established probable cause.

Judgment reversed and cause remanded.

Judgment reversed.

(*a*) Hurd *vs.* Shaw, 20 Ill. R. 356; Israel *vs.* Brooks, 23 Id 575; Ross and Co *vs.* Innis 35 Id. 572. To maintain an action for malicious prosecution trial, and acquittal by Jury is not necessary; 42 Id. 145; which, overrules Hurd *vs.* Shaw, so far as a contrary rule is intimated therein.

NANCY R. THATCHER, Plaintiff in Error, *v.* WESLEY THATCHER, Defendant in Error.

ERROR TO JEFFERSON.

On application for a divorce, if the jury find the allegations of the bill true, except that the plaintiff had been a dutiful wife, it entitles her *prima facie* to a decree.

In such a case, if the court thinks the finding wrong, it should set aside the verdict and order a new trial, or, perhaps, reform the verdict and enter a decree contrary to it.

The verdict of a jury in such a case, where the evidence is not preserved in the record, shows that the proof sustained the allegations in the bill, and the court must so consider it.

In a case for divorce, where a bill is dismissed, it is erroneous to enter a judgment against the wife for costs.

THIS cause was heard before BAUGH, Judge, and a jury, at September term, 1854.

The opinion of the court furnishes all the facts necessary to a full understanding of the case.

R. S. NELSON and H. JOHNSON, for Plaintiff in Error.

R. F. WINGATE, for Defendant in Error.

CATON, J. This was a bill for a divorce, filed under our statute by the wife against the husband, charging acts of extreme and repeated cruelty. There was a trial by jury and a verdict returned finding all the allegations of the bill sustained, except the allegation that she was a dutiful wife, whereupon the court dismissed the bill at the complainant's cost. This verdict was substantially a verdict for the complainant and *prima facie* entitled her to a decree. If the court thought from the evidence that the finding should have been the other way, it should have set the verdict aside and ordered another trial, or perhaps—under the decision in the case of Garrett *v.* Stevenson, 3 Gilman, which was under the mechanics' lien law, with principles similar, as to the right of trial by jury, with our statute of divorces—the court might, in view of the evidence, reform the verdict or enter up a decree contrary to the verdict, yet such decree must be sustained by the evidence contained in the record, as much at least as any other decree in chancery. *Prima facie*, at least the verdict shows that the proofs sustained the allegations of the bill, and as this is all that the record does show as to what the proof was or what facts were proved on

trial, we must treat it as evidence of the facts. Were the proofs which were given at the hearing embodied in the record, from which we could see that the verdict was clearly wrong, and the allegations of the bill not sustained, we might sanction the decree which was entered or order another trial. It has been several times decided by the court, even under the late statute allowing oral proofs to be heard at the hearing in chancery suits, that the evidence upon which a decree is entered must be embodied in the record. Unlike actions at law, the evidence in a chancery suit constitutes a part of the record, except there be a verdict of a jury, or the report of a master finding the facts, in which case such verdict or report presents in the record the facts established instead of the evidence heard to establish the facts. In this case the record does not show sufficient to sustain the decree. But even if there were sufficient in the record to sustain the dismissal of the bill, that portion of the decree requiring the complainant to pay costs was erroneous. (*a*) The court by its decree continued her under the disabilities of a *feme covert*, but subjected her to the liabilities of a *feme sole*. This portion of the decree against her was inconsistent with the position in which she was required to continue.

The decree must be reversed and the suit remanded.

Decree reversed.

ROWLEY SMITH *et al.*, Appellants, *v.* EDWARD KAHILL, Appellee.

APPEAL FROM WASHINGTON.

In an action for work and labor, the certificate of a foreman of the defendant showing the number of day's labor performed, accompanied by evidence tending to prove that the person signing the certificate was foreman, is proper for the consideration of the jury.

Where objection is not made to the introduction of parol evidence in the Circuit Court to prove a contract, the effect of that evidence cannot be avoided.

Where the record does not show an exception taken to the decision of the Circuit Court in overruling a motion for a new trial, the decision cannot be assigned for error.

THIS cause was tried before UNDERWOOD, Judge, and a jury, at October term, 1854, of the Washington Circuit Court. Verdict and judgment for Appellee in the court below.

NELSON and JOHNSON, for Appellants.

BOND and GRAY, for Appellee.

(*a*) Reavis *vs*. Reavis, 1 Scam. R. 242.

Skinner, J. Kahill sued Rowley, Smith & Co., before a justice of the peace of Washington county, to recover for work and labor. The plaintiff recovered judgment for $23.02. The cause was appealed to the Circuit Court, where judgment was rendered for the plaintiff for the same amount, upon verdict of a jury. The defendants appealed to this court.

On the trial in the Circuit Court it was proved that the plaintiff, with other laborers, had worked on section ninety-seven of the Ilinois Central Railroad for Stiles & Co., who were sub-contractors under the defendants: that one month's pay was due them and unpaid, and that they refused to work longer on that account; that defendants then told them to go to work for them and open a new pit so that the defendants could measure their work and distinguish it from work done for Stiles & Co.; that the plaintiff's labor was worth $1.25 per day.

The plaintiff read in evidence a certificate dated August 15, 1853, to the plaintiff, signed by the defendants, "per M. P. Waters, foreman," and certifying that the plaintiff had worked for them on said section ninety-seven, eighteen and three-fourths days; proved the hand-writing of Waters, and offered evidence tending to prove that Waters was the foreman of the defendants, and authorized to give the certificate. The defendants objected to this evidence; the objection was overruled and defendants excepted,

The defendants offered in evidence a similar certificate of the same date, to one Ferriel, signed by Waters as foreman of Stiles & Co. To this the plaintiff objected, the court sustained the objection, and the defendants excepted.

We can see no error in admitting the certificate to plaintiff. It stated the time plaintiff had worked, there was evidence tending to prove authority in Waters to execute the same for the defendants, and it was proved to have been signed by Waters.

The certificate to Ferriel, a third person, and shown in no manner to have been connected with the plaintiff, nor with the transaction between the plaintiff and defendants, was properly excluded.

It was also proved that the defendants paid plaintiff the amount due him from Stiles & Co., about 15th July, 1853. Some of the witnesses testified that when the hands refused to work on account of Stiles & Co. failing to pay them, the defendants told them to go to work and they would see them paid, or would pay them, but which they could not positively say; that the hands refused to go to work without an assurance in writing, and that the defendants gave an assurance in writing.

The defendants set up the statute of frauds as a defence. It

was for the jury to determine from the evidence what the contract was, and there was evidence before them of a direct undertaking by defendants to pay, in consideration of work performed by plaintiff for them.

If such was the contract, it was not within the statute.(*a*)

No objection was made to parol evidence of the contract, and the defendants cannot now avoid its effect. Sawyer *v.* The City of Alton, 3 Scam. 127. And we think the evidence does not show that there was a written contract between the plaintiff and defendants concerning the subject matter of this suit.

There was a difficulty among laborers on the work because they were not paid. The defendants "gave an assurance in writing," but to whom it was given, or whether to secure the payment of what was due them from Stiles & Co., or for work yet to be performed, does not appear.

The defendants moved for a new trial, but the record fails to show that they excepted to the decision of the court overruling their motion. This, therefore, they cannot assign for error. Selby *v.* Hutchinson, 4 Gil. 319 ; Pottle *v.* Worter, 13 Ill. 454.

Judgment affirmed.

BENJAMIN BOND, Appellant, *v.* ADDISON G. BRAGG *et al.*, Appellees.

APPEAL FROM CLINTON.

The law of the place where a promissory note is made, and of that where it is indorsed, will govern the contract and fix the liability of the several parties.

The laws of the forum must govern the pleadings and evidence.

To fix the liability of an indorser, it was necessary to demand payment and give notice of its refusal.

A protest is not required on inland bills and promissory notes, unless by local law or usage ; and such protest is not, of itself, evidence of demand of payment non-payment, and notice.

THE appellant was sued as indorser of a promissory note. The declaration alleged that one Judson made the note, payable to appellant at the banking house of J. J. Anderson ; that it was made and indorsed in the State of Missouri ; that after the time for payment expired, or the third day of grace, it was presented at Anderson's for payment ; that payment was refused ; that the note was protesed for non-payment ; and that appellant was notified. That Judson, the maker of the note, had absconded and was insolvent, whereby, under the laws of Missouri, appellant became liable, &c. To this declaration the general issue was interposed. At October term, 1855, of the Clinton Circuit

(*a*) Kite *vs.* Wells, post 91; Eddy et al. *vs.* Roberts, post 508 ; Brown *vs.* Strait et al. 19 Ill. R. 89 ; Bristow et al. *vs.* Lane et al. 21 Ill. R. 198.

Court, the cause was submitted to BREESE, Judge, for a trial without the intervention of a jury—verdict and judgment for the appellees. The note, protest and notice, by notary public of Missouri, were offered in evidence, as also the affidavit of the notary that he had, on the day of the date of the protest, notified the maker and indorser, in writing, of the protest, &c. It is also proved that the maker of the note was sometimes called "Ned Buntline," and that he had not, at the date of the protest, any effects in St. Louis or anywhere else, which, with some sections of the statutes of Missouri in reference to promissory notes, was all the evidence offered.

The appellant moved for a new trial, which was denied him.

W. H. UNDERWOOD, for Appellant.

D. WHITE, for Appellees.

SCATES, C. J. The only proof offered on the general issue in this case, was a notarial protest of a demand and refusal of payment on the last day of grace, and an affidavit of the notary before a justice of the peace in St. Louis that he enclosed and mailed said protest, duly certified by him, officially, directed to the maker and indorsers at their several places in St. Louis, Carlyle and Memphis.

We deem it unnecessary to notice the question of diligence against the maker, or rather excuse for not sueing him, because of his insolvency and absconding. The law of the place of making and that of indorsing will govern the contract, and fix the liability of the several parties. Holbrook et al. *v.* Vibard et al., 2 Scam. 467. This note was made payable, and indorsed, in Missouri, and, by her laws, a demand of payment and notice of refusal are necessary; and the law of the forum must govern the pleadings and evidence.

To fix the liability of an indorser, it was necessary to demand payment, and give notice of its refusal. Kaskaskia Bridge Co. *v.* Shannon, 1 Gill. R. 24; 2 Greenleaf's Ev., Secs. 179, 181, 186; Story on Prom. Notes, Secs. 241, 297; Chit. on Bill, side, p. 330; Story on Bills, Secs. 323, 346; 2 Smith's Lead'g Cases, [19 Law Lib. to p. 44, 47.]

In Morgan *v.* Van Ingen, 2 John. R. 204, it was held, in an action against the notary for failing to give notice, that it was no part of his official duty to do so. Be that as it may, so far as liability for neglect is concerned, yet notice must be given to the endorser, &c., verbally or in writing, and personally, by agents, or by post, and in due time. Story on Bills, Sec. 300.

But as a protest is not required on inland bills and promissory

notes—unless by local usage or statute—none need be made nor proved, nor notice of protest given. 2 Greenleaf's Ev.; Sec. 185; Story on Promissory Notes, Sec. 297; Nicholls *v.* Webb, 8 Wheat. R. 326, 331.

A notarial protest is not, therefore, in cases of inland bills and promissory notes, evidence of demand, non-payment, and notice by notary, when given by him. Story on Prom. Notes, Sec. 297; 2 Greenleaf's Ev., Sec. 183 and note 1; Nicholls *v.* Webb, 8 Wheat. R. 326–331; Kaskaskia Bridge Co. *v.* Shannon et al.; 1 Gil. R. 24; Robinson *v.* Johnson, 1 Mo. R. 308 (434). [*a*]

The notarial protest may not have been improperly admitted in proof of the averment of protest made in the declaration; but it should not have been received, and was incompetent to prove the demand of payment, or notice of non-payment.

There being no other evidence of these facts, we are of opinion the evidence does not sustain the finding of the court.

Judgment reversed and cause remanded for new trial.

Judgment reversed.

AMOS STEWART, Appellant, *v.* SOPHIA HOWE, by her next friend, JOHN HOWE, Appellee.

APPEAL FROM MASSAC.

An infant under ten years of age may maintain an action, by her next friend, for slanderous words charging her with theft.

THIS was an action for slander, commenced by Sophia Howe, by her next friend, complaining of Amos Stewart. The words, as proved, were: "She stole my money;" "she stole ninety dollars;" "she is a smart little thief." It was also in proof that Sophia was but nine years and nine months old.

The Circuit Court refused to instruct that, if the jury believed from the evidence that at the time of the speaking and publishing of the words laid in the declaration, the plaintiff was under the age of ten years, they must find the defendant not guilty. But the court did instruct the jury, that it made no difference whether the plaintiff was, at the time of said speaking and publishing, more or less than ten years old, for, in either case, if the jury find the issue for the plaintiff, the verdict ought to be for the plaintiff, and the jury can only regard the age of the plaintiff upon the question of damages.

(*a*) Mc'Allister *vs.* Smith, et al. post. 386.

The cause was tried before PARRISH, Judge, and a jury, at the October term, 1855, of the Massac Circuit Court; verdict and judgment for twenty-five dollars. Motions for a new trial and in arrest of judgment were made by the defendant in the court below, which were overruled.

T. G. C. DAVIS and R. S. NELSON, for Appellant.

J. JACK, Appellee.

SCATES, C. J. The slanderer insists, in effect, upon the infancy of his intended victim, in justification of his malice. Feejee cannibalism could ask no greater license or security for the gratification and satiety of its unnatural and morbid appetite. I must confess that while the law recognizes the speaking and publication of actionable words as a wrong and injury, for which it offers a remedy, I shall feel, if judges may be allowed that pardonable weakness, that such a defence has not a solitary grace to recommend it to favor. I would sooner see the action abolished, than to read out infancy from the pale of its protection. If there can be a redeeming trait in the character of the cormorant, it must be in satiating his gluttony upon the strong and powerful, at the hazard of physical retribution. But judges have no right to feel, or at least to make it a predicate of their judgment. It is the head, and not the heart; and from it must proceed justice, legal justice, though the heavens fall by the fiat.

Chief Justice Sewall said of the defence: "It may be justly stigmatized as base and dishonorable; it may be considered as unjust, when offered under circumstances like those now in evidence;" Phillips' Limerick Academy *v.* Davis, 11 Mass. R. 115; but he sustained the defence as legal. So here I should not pause or hesitate to sustain the plaintiff, however hateful his occupation, when he has shown his right to legal impunity for reputational infanticide. We must therefore appeal to and abide the law as evidenced by the decisions.

Spencer, J., in Brooker *v.* Coffin, 5 John. R. 191, in solving the question whether a general charge of common prostitution was actionable, laid down a rule as a test, that "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude or subject him to infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be, whether the crime is indictable or not, (1 Com., tit. Action on the Case for Defamation, F. 20.)" And this rule has been approved in many cases. Schæffer *v.* Kintzer, 1 Binney R. 542; Mc Clurg *v.* Ross,

5 Binn. R. 218; Andres and wife *v.* Koppenheafer, 3 Serg. & Raw. R. 259; McCune *v.* Ludlum, 2 Harrison N. J. R. 17.

Again, in Van Ness *v.* Hamilton et al., 19 John. R. 367, Spencer, J., re-defines a test rule of the actionability of words of spoken slander: "The words must either have produced a temporal loss to the plaintiff, by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself, and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude. To maintain an action for a libel, it is not necessary that an indictable offence should be imputed to the plaintiff. If a libel holds a party up to public scorn, contempt and ridicule, it is actionable (9 John. R. 214; 7 John. R. 246)." This is approved in the above case of McCune *v.* Ludlum, and indeed seems warranted not only by the modern but earlier reports.

Thus in Ogden *v.* Turner, 6 Mod. R. 104: "There goes Ogden, who is one of those that stole Lord S.'s deer," it was held that "words which are of themselves actionable, without regard to the person, or foreign help, must either endanger the party's life, or subject him to infamous punishment; and it is not enough that he may be fined and imprisoned, for if one be found guilty of any common trespass he shall be fined and imprisoned, yet none will say, that to say one has commited a trespass, will bear an action; or at least the thing charged upon him must, in itself, be scandalous; and this here is, that 'he stole a deer,' which is a *feræ naturæ*, and therefore not scandalous."

In Purdy *v.* Stacy, 5 Burr R. 2698, it was held that a charge of having given £200 for a warrant to be purser of a man-of-war was not actionable, because it did not show that the money was given to the Commissioners of the Admiralty, who appoint pursers. Given to them, it would be criminal in the corruptor and the corrupted. "In the present case it is defectively laid, and does not appear to be defamation, or a charge of any indictable crime."

Comyns enumerates a great many actionable charges of this class, which endanger life, as charges of treason, murder, or other felony; corporal punishment, as perjury and subornation of perjury, and others which subject a party to indictment, &c. 1 Comyns' Dig., tit. Actions on the Case for Defamation, D. 1 to D. 10.

The same general rule is shown by the cases where the words were held not actionable for the same reasons. Thus in Mayne *v.* Digle, Freeman R. 46, in 1672, with a colloquium of encompassing a house to break it open and rob it, Digle said: "It was Mayne and J. Disne, that were about to rob Ed. Cooper's

house," which merely imputed a design and no action towards its accomplishment. Hext *v*. Yeomans, cited in Cromwell *v*. Denney, 2 Coke R. pp. 14, 15, held that words charging another with seeking his life, and imputing a suspicions of felony were not actionable, for like reasons, with many other illustration of like character. "Thy boy [plaintiff's wife's son,] hath cut my purse, and thou hast received it knowing it, and hath the rings and money that were there, in thy hand therefore, I charge thee with felony," held not actionable, "for it doth not appear that the purse was cut *feloniously*, and then the receiving of the boy and the things which were in the purse, is not felony." Cox *v*. Humphreys, Croke Eliz. 889. And herewith agree the modern rulings, except an innovation now and then upon the common law, and an occasional statutory addition thereto, embracing charges of false swearing, want of chastity, and such like very scandalous matters.

Lord Holt said, in Ogden *v*. Turner, "that to say of a young woman that 'she had a bastard,' is a very great scandal, and for which, if he could, he would encourge an action; but it is not actionable, because it is a spiritual defamation, punishable in the spiritual courts. So it is to call a man a 'heretick.'"

This point is then well settled, and fortfiiyed by authority, and I have cited more at large to show that I admit the rule with its alleged reasons, whenever the question is and in *settling*, *whether words are actionable in themselves*.

What then follows in its application, with the reasons upon which it is founded, to the case in hand? The words here are clearly actionable in themselves, in their ordinary and legal import.

But it is contended by the plaintiff's counsel, and with great force and plausible and ingenious reasoning, that the reasons for the actionable character of the words themselves, extend to and include the actual state and condition of the defendant here, and the facts establishing that condition. And when from the condition, of the defendant she is not, as matter of law punishable in that condition, although a punishable crime is charged, yet thereby the words cease to be actionable.

This is truly to me a new view of the subject. I had been accustomed to look at the charge, in order to determine its slandderous character, through the medium of the characteristics that distinguish actionable from non-actionable charges.

Now we are required to turn from the character of the charge, to the character of the subject of it. Punishableness is now said to be an essential, an indispensable, element of fact in the person accused, as well as for the crime alleged or imputed.

Therefore, as by our statute, no child under ten years can be

punished for larceny, these words, though actionable at common law, and imputing a crime, infamous in character, and punishable by indictment, fine and imprisonment, are not actionable when spoken of one not subject to that punishment in fact, by reason of the exemption of persons of such tender years. Scandal, as an element of slander, and malice, are lost sight of, by this view. Is this supported by the authorities, and the nature of slander, as an injury, or the reasons for offering, and the various grounds upon which redress will be afforded?

I think not, and must be indulged in a further view of the doctrine of slander, in support of the distinctions, which, I think exist. Indictableness and punishableness for the crime imputed by the words, and the infamy and scandal attendant upon such crimes and punishments, seem to have been chief elements, with the founders of the law of slander, in fixing upon rules for ascertaining and redressing injuries of this sort, arising from *that class of charges* which imputed *crime*. But this by no means comprehended the extent of that system, which was adopted on this subject.

By Statute 2, Rich. 2–5, confirmed by Stat. 12, Rich. 2-11, those who devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons and other nobles and great men of the realm, and of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or the other, and other great officers of the realm, &c., and which is part of our common law, so far as the characters are found amongst us, is the foundation of our scandalum magnatum—the clergy found protection from charges which would scandalize and disgrace as well as those from which temporal injury, by loss of place, might ensue. The owner and the heir to real estate found protection under this law of slander, from claims to, or aspersions of, title—and charges of bastardy which might work a disherision of his descent. Professional men and trades-people were within its pale in their profession and callings. Legislators and justices of the peace had over them the same shield—and *all* persons in every walk and condition of life might seek reparation and redress for the *particular damages* occasioned by false, malicious and defamatory language, whether in affairs of business, of the heart, or servile character only. See 1 Comyns' Dig., tit. Actions on the Case for Defamation, C. 1, 2, D. 1 to 30, E. 1 to 9, F. 1 to 22. And to all this is added the law of libel, where redress is given for things not actionable when merely spoken—but which are false, malicious and defamatory.

The law as a system in this branch of it, in relation to slander, had a larger view, and a wider scope than is supposed by

the views contended for in the argument. In an early day it reached a great way to redress the injuries inflicted by the tongue, that unruly evil, full of deadly poison, which no man can tame, but which will be punished. In King *v.* Lake, 2. Ventres R. 28, C. J. Vaughn said that, in ancient books, we read nothing of words that did not concern life. "The growth of these actions will spoil all communications," "their progress extends to all professions." But the other three justices held that an action would lie for writing to the client of an attorney, "that plaintiff would give vexatious and ill counsel, and stir up a suit, and that he would milk her purse, and fill his own large pockets," by which that and other clients were lost.

In Gainford *v.* Tuke, Cro. Jas. 536, the words were, "Thou wast in Launceston gaol for coining." Plaintiff replied, "If I was there, I answered it well enough." Defendant rejoined, "Yea, you were burnt in the hand for it." They were held actionable, for "these are malicious words, and show his intent to accuse him for being imprisoned for coining"—and subsequent words do not diminish, but aggravate. So in Boston *v.* Taturn, Cro. Jas. 623, words in the past tense: "He was a thief and stole my gold," were actionable, "for it shall be intended to be maliciously spoken, and to discredit him. And it is a great slander to be once a thief;—for although a pardon may discharge him of the punishment, yet the scandal of the offence remains; for *pœna potest redimi*, *culpa perennuis exit*; and it ought not to be intended, that it was when he was a child."

These and other cases are referred to by Mr. Starkie in his treatise on slander, 1. Stark. Sland. 19, 20, for the purpose of showing that criminal liability is not always the peculiar and exclusive ground of action, for even this class of slanderous words:—and a future liability is to punishment for the offence charged, if true, is not indispensable to maintain this action. Van Aiken *v.* Westfall, 14 John. R. 232, is upon the same ground, for the words spoken, "he is a thief, and has stolen fifty dollars in cash from Jacob De Witt," was of a transaction in another State, and although the objection was taken, that he would not be liable to punishment in N. York, if true, yet the court held that the action would lie. This has been feebly challenged in a note to 1 Stark, on Sland. 21, note 1, p. 43, note 1, as uncalled for and against the rule laid down in Brooker *v.* Coffin, 5 John. R. 188.

Whether called for as a decision, or thrown out as a dictum, I think both the law and good sense will sustain it—and I am unable to detect the conflict between the decisions. In Brooker *v.* Coffin, the court laid down a rule to test the actionable character of words imputing a want of chastity—and in Van Aiken

v. Westfall, the court simply applied the well settled rule of law upon words actionable in themselves, by holding the defendant liable for speaking them, without regard to his special pleading by way of defence of his victim, against a criminal liability for what he had charged.

Once license malice to prefer all charges of scandalous and nfamous matter, and justify it upon the ground t hat there is no ocal, or present, or future liability criminally for it, if true, and the law of slander will become a mockery and a means, rather than a redress for slanders and injuries of this character. No better illustration can be given than this case. She is charged with stealing. She is only a few days under ten years. The statute exempts infants under ten, from criminal punishment, upon an inflexible rule, deeming them *doli incapax* for want of intellect. The common law, between seven and fourteen, fixed upon the flexible rule of capacity, in fact, to discern between right and wrong. This is the more sensible, and ours the more convenient and easy of application, and more tender of life and liberty. It is a rule of policy and humanity. But we all know from observation the precocious development of some minds as well as bodies. Imputations of this character, made upon a young mind of precocious and clear discernment, will disparage and scandalize as fully and maturely as if made of adults and indeed, much more than some adults, if the degree of intelligence of the accused, is to be the measure of damages. When we adopt the imbecility of infancy as a test of the actionability of words, we should also adopt the degree or quantum of intelligence as the measure of damages in adults.

The law may and will spare infancy, but the slanderer cries aloud and spares not. I am not called on to say how young a plaintiff may sustain this action for words imputing crime, but, as called upon in this case, I am compelled to say that this plaintiff shall not shield himself from accountability, by alleging defendant's infancy, which should have afforded a conclusive reason for charitable forbearance of his malice, and shall no constitute a shield and ground of defence to him.

Judgment affirmed.

SKINNER, J., dissented.

JOEL VAUGHAN, Plaintiff in Error, v. JOHN THOMPSON, Defendant in Error.

ERROR TO MASSAC.

If a debtor has no more property in his hands than the law exempts from execution, he is not required to turn out one piece of it for an officer to levy upon, as the condition upon which he may retain the residue.

A mortgage of property by a person who does not hold more than the amount exempted by law, is not in fraud of creditors.

Property exempted by law may be sold or exchanged by the debtor, without subjecting it or its equivalent to execution. (a)

A mortgagor in possession of property exempt from execution, may maintain an action against an officer who improperly levies thereon.

THIS suit was instituted before a justice of the peace to recover the value of a mule seized and sold by defendant, as a constable of Massac county, which mule was alleged by plaintiff below, to be exempt by law from levy and sale on execution.

The evidence showed that at the time defendant below sold the mule in question on an execution against Vaughan, as also at the time the execution was served on Vaughan, he claimed the mule as being exempt from execution, and notified the officer of his claim at the time; that Vaughan was the head of a family and residing with the same; that Vaughan was poor and had but little personal property—the mule worth thirty or thirty-five dollars, an old mare not worth anything, one or two cows and a few hogs, cows worth ten dollars each, hogs in all worth about fifteen dollars; that Vaughan classed as a farmer in the community, and the mule was suitable to his condition in life; that defendant below went on and sold the mule at constable's sale. It appeared by the evidence that Vaughan, some time before this, had bought a wagon of one Smith at eighty dollars, to be paid in equal payments at six and twelve months, in cord wood, to be delivered on the bank of the Ohio river at Metropolis, and that to secure said payment Vaughan had agreed with Smith that Smith should hold a lien upon the wagon to secure the payment, and in case of failure, that Smith was to have the wagon back again, and for the wear and tear of the wagon during the year, in case of failure in payment as agreed, then Smith was to have the mule in question, and that there was a writing expressing this contract; that the wagon was delivered to Vaughan, and he had been using it some time, say between six and twelve months, at the time the mule was levied on and sold by Thompson; that the possession of the mule never passed from Vaughan to Smith up to the time it was seized and sold by Thompson.

(a) Green vs. Marks, 25 Ill. R. 223; Brown vs. Coon, 36 Id. 248; Ives vs. Mills, 37 34 Id. 76; Bliss vs. Clark, 39 Id. 500.

This cause was tried before PARRISH, Judge, and a jury, at October term, 1855, of the Massac Circuit Court, and resulted in a verdict for the defendant. The plantiff below brings the cause to this court for review.

J. JACK, for Plaintiff in Error.

T. G. C. DAVIS, for Defendant in Error.

SCATES, C. J. There is error in the refusal of instructions asked by plaintiff, and in part of those given for defendant as well as in refusing a new trial.

It does not appear from the evidence that plaintiff had any property subject to be levied on by this execution. The whole, not specifically exempted, is shown to be worth fifty-five or sixty dollars—the latter sum, by valuing the mule at thirty-five, the hogs at fifteen and the cow at ten dollars. Where a debtor has no more than is specifically exempted, or may be claimed as suitable to his condition, the law will not require him to turn out one piece thus secured to him, as the condition upon which he may be allowed to assert his claim to another. Nor do I recognize the position that he forfeits his right to such property by mere prevarication, pretending that he has, when he has not other property. If the officer will sell, under the belief and pretence that the debtor has other property which he neglects or refuses to offer in lieu of that taken, or because the debtor neglects or refuses to bring it to him at a particular time and place, he must sell at his own peril of the truth as it may be shown to be. The defendant was clearly, distinctly and repeatedly notified by plaintiff and his wife that he claimed the mule under the law, and as distinctly informed by the defendant that he would sell the mule if plaintiff did not bring him other property in lieu of it. There is no principle settled, either by the facts, or in the argument of the court, in Cook *v.* Scott, 1 Gil. R. 333, which would require plaintiff to comply with this demand as a condition of releasing the mule, for the simple reason that plaintiff had no more property than he could exempt by claim. If the defendant doubted this, it was his duty to have made inquiry and set apart to the value protected by law, respecting the plaintiff's selection, which, for any proof in this record, he had neither waived, abandoned or lost the right to make. He chose to disregard the plaintiff's rights in the matter then, and must now meet and answer to the true state of facts as presented on this trial, and that clearly appears to be, that all the property, including this mule, was worth only about

the amount he was entitled to hold exempt from levy and sale. This principle is clearly recognized and sanctioned in Mc Clusky *v.* Mc Neely, 3 Gil. R. 578.

The defendant has partly placed his defence upon the ground of a fraudulent sale of the mule to Smith, with a view to hinder and delay Hanna in the collection of his debt, and relies upon the case of Cassall *v.* Williams, 12 Ill. R. 387. There is a similarity in the facts, but there is this essential difference: that judgment was upon the ground that the property was shown to belong to another and not to the debtor; and the court say that may be shown by a fraudulent sale before or a *bona fide* sale after, that delivery of execution.

Neither of those facts exist in this case. There has been no sale of the mule to Smith. The transaction is shown to have been a mortgage. But whether a sale or a mortgage, it could not have been fraudulent as to Hanna, as the property was not subject to sale for his debt, and could not be, while plaintiff possessed less than sixty dollars worth. I presume a debtor may sell or dispose of, as he thinks most conducive to his interest, such property as is secured to him, free and exempt from the execution and claims of creditors. I do not construe the law as requiring him to keep it in kind, and withdrawing its protection the moment it is disposed of for such articles as varying circumstance may make suitable, or necessity may render indispensable to the wants, maintenance, support or relief of the debtor's family. It might become indispensable to exchange such property for bread or medicine, as well as advantageous in a general view of bettering his condition by converting its value into something more suitable to provide a home, furnish his family, or prosecute his livelihood. But no matter how urgent the debtor's necessities might be, he could not sell, if creditors could take the consideration immediately, nor could any one buy, if the property became liable in their hands by withdrawal of the debtor's protection of it. Such would not, I think, be a fair construction of the act, nor a reasonable limit to its protection. He may dispose, as he deems for his interest, of all such property upon which creditors have no claims for payment, while it continues exempt by his continuing destitution. But it may, I should think, become again subject to levy by his subsequent acquisition of more property than is so exempted while he retained the same, so once under protection; and this would supject him to another, or new election.

Now if this view be correct, I do not see how a sale or mortgage of property thus exempted can become fraudulent to those who have no right to levy upon or sell it for their debts. Such

was the condition of the mule, and the mortgage of it to Smith could not be a fraud upon, or hinder, or delay Hanna in collecting his debt by sale of it when he had no such right whether it was mortgaged or not while plaintiff remained owner of no more than was so exempt. The question might be changed he were shown to be covering sixty dollars worth of other if property by exmption and this by mortgage. Then, indeed, a *bona fide* mortgage, as this appears to be, might become fraudulent as to creditors by the actual possession of the mortgagor, according to the principles settled in Thornton *v.* Davenport et al., 1 Scam. R. 296 ; Kitchell *v.* Bratton, id. 300. The mortgage here is spoken of as being in writing, but is not set forth in the record, and is not shown to have been acknowledged and recorded as required by the statute. Rev. Stat. 91. So it is not shown to constitute any title in Smith, or hindrance in law in Hanna's way, if the property levied upon was liable to his execution. But it is not liable because exempt by the statute protection, and therefore he cannot complain of fraud in mortgaging property not liable for satisfaction of his debt.

But defendant has a right to urge in his defence that plaintiff has parted with his property, and is not now, as owner, entitled to sue for this penalty. Plaintiff's statements that Smith owned the property, and that it was mortgaged to Smith, were admissible, and were in evidence. But while they were thus made evidence, there is no circumstance to constitute them an estoppel upon him, to now assert by proof, and insist upon the truth of the matter as to Hanna. The truth appears to be that the mule was mortgaged to Smith as additional security for the payment for the wagon, plaintiff continuing in possession of the mule. While the mule remains exempt from execution for want of other property worth sixty dollars, we think plaintiff, as mortgagor in possession, may sustain this action of trespass for levying upon and selling it.

Mortgagors of land, in possession, are regarded as the true and real owners of the estate, and their equity is liable to sale on execution . Fitch *v.* Pinckard, 4 Scam. R. 83. The mortgagor of personalty in possession must have at least a like and equal interest where the mortgage is duly recorded, and the absolute property where it is not, so far as creditors and subsequent purchasers are concerned, when liable to execution. The mortgagor's interest would be of little value to him under such circumstances if he could not maintain the usual actions for its protection. The application of the principles here laid down will show that the refusal of the second, eighth, ninth and tenth, and the modification of the sixth, instruction asked for by the plaintiff were erroneons ; and so the first, fifth and seventh

instructions asked for and given to defendant should have been refused.

Judgment reversed and cause remanded for new trial.

Judgment reversed.

JOHN W. HALL, Plaintiff in Error, v. WILLIAM HARPER, JR., Defendant in Error.

ERROR TO JOHNSON.

Where a minor makes an exchange of a horse belonging to his father, and the father apparently acquiesces in the bargain for a considerable time after it has been made, he cannot recover the horse, his son has exchanged, in an action of replevin. (a)

THIS cause was tried before DENNING, Judge, and a jury, at August term, 1853, of the Johnson Circuit Court. The facts of the case will be found in the opinion of tne court.

DAVIS and JACK, for Plaintiff in Error.

J. A. LOGAN, for Defendant in Error.

CATON, J. This was an action of replevin for a horse. The bill of exceptions shows that in the spring of 1852, a son of the plaintiff, about eighteen years of age, and who resided with him, exchanged the horse in question, which belonged to the plaintiff, with the defendant, for another horse. A few days before the exchange the plaintiff forbid his son to exchange the horse. After the exchange the son took the horse home to the plaintiff. The agreement to exchange was made on Saturday, and the exchange was made several days after. The son told his father, on the Saturday, the agreement which he had made to exchange, and it does not appear that the plaintiff expressly approved of or forbid the exchange. The witness does not seem to remember what his father said about it, only he says he knows his father did not tell him to make the exchange. Nor does it appear, from the son's testimony, that his father made any objections when he brought the horse home which he got of the defendant. The plaintiff was afterwards seen riding the horse. A few days after the exchange, the plaintiff told the witness, Snyder, that if the horse which his son had swapped with the defendant for, "lived and lucked well, he would make a horse that would sell for more than the one his son had

(a) But see Watkins vs. White, 3 Scam. R. 550.

swapped to defendant." The parties lived about two miles apart, and met several times; and on one occasion the defendant rode the horse in controversy to the plaintiff's house, but nothing was said between them about the exchange of horses which had been made. Two or three weeks after the exchange had been made, the plaintiff was taken sick and remained ill till about the time this suit was commenced. After the exchange the son took the horse home to his father's, where he remained two or three months; at the expiration of which time, the plaintiff took the horse back to the defendant and offered to return him, and demanded of the defendant the horse which his son had let him have. The defendant refused to return him, whereupon this suit was brought.

From this evidence, the jury was well warranted in finding that the plaintiff had acquiesced in and approved of the exchange of horses which had been made by his son, and thus adopted that act as his own. He did not repudiate the bargain which his son had made for the exchange when he was advised of it before the exchange was actually made, but passively allowed the executory bargain to be executed; and when his son brought the horse home he made no objections to the exchange, but retained and used the horse obtained of the defendant. He still forbore to remonstrate when he met the defendant several times subsequently, and even when the defendant rode the horse, which he had obtained of his son, to his house. It is plainly inferable from the evidence, that he retained and treated the horse as his own for about three months, without a word of dissatisfaction or disapproval. An old and just legal maxim may well be applied to the plaintiff here, which says, if he keep silent when duty requires him to speak, he shall not be allowed to speak when duty requires him to keep silence. His continued silence and long apparent acquiescence in the act of his son, well justified the defendant in supposing that it met with his entire approval. He cannot be allowed to lay by and speculate on the chances of a good or a bad bargain, or upon the chances of the horse, procured of the defendant, turning out good or bad; or, to use his own expresion, "lucking well." If he intended to repudiate the action of his son, he should have done so promptly, so that the defendant might know what he had to rely upon.

We think a different verdict would not have been justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* WILLIAM PICKERING, Appellant, *v.* JOSEPH DEVIN *et al.*, Appellees.

APPEAL FROM EDWARDS.

Where stock owned by the State, in a railroad corporation, was legally sold and a certificate thereof given, assigned by the Governor, by indorsement thereon, the purchaser and assignee of such stock had a right to vote thereon for the election of Directors, unless some statute of the State, or by-laws of the company precribed some other mode of conveyance or additional formality.

THIS was a proceeding by quo warranto, commenced by the State's Attorney on the relation of Pickering, against Joseph Devin, Elisha Embree, Robert Parkinson, J. N. Jacques, George W. Brown, Francis B. Thompson, Jonas Hardy, Samuel Thompson and James H. Embree, for usurping the offices of President and Directors of the Alton, Mount Carmel and New Albany Railroad Company. The defendants pleaded to the information, that on the sixth day of June, A. D. 1853, there was an election held for nine directors of said company, at which all stockholders, legally qualified, had been notified to appear and cast their votes, at which time the respondents were duly elected, having received a majority of all the votes of the legally qualified stockholders, and were so declared elected; that they were each of them eligible, having the legal qualification required by the acts incorporating said company. To this plea the complainant filed several replications—denying that a legal election was held on the said sixth day of June, 1853—denying that the respondents received a majority of all the votes of the legally qualified stockholders on the said day—denying that the respondents were stockholders in the corporation. At September term, 1854, of the Edwards Circuit Court, the cause having been submitted to MARSHALL, Judge, without the intervention of a jury, judgment was entered for the respondents; thereupon Pickering took an appeal.

The evidence showed that a notice had been given as pleaded; that the election was held as notice required, and that the respondents were declared elected; that a book containing a list of stockholders was produced, showing that each of the respondents held two shares of stock in said corporation, and also a valuation made to relator, showing him to be entitled to 1494 shares of stock issued to him by the board, for a portion of his interest in said road, by virtue of his purchase at a sale at public auction, made by the governor of the State, by authority of the act of the 12th of February, 1849; that said 1494 shares of stock had been sold on execution against the company, and

that Robert Parkinson became the purchaser; that Parkinson had transferred one half of this stock to Joseph Devin, and the remainder to James H. Northcott; that these shares of stock were those voted on at the election on the said sixth of June. Pickering offered in evidence the certificate of the Secretary of State, showing that a certificate of entry was made in the books of his office, declaring that the State was entitled to 5259 $\frac{7}{50}$ shares of fifty dollars each in the capital stock of said company; also, a certificate or declaration from the Governor of the State, that Pickering had become the purchaser of the right of way, embankments, &c., owned by the State in said railroad, for a sum specified, on the payment of which sum, he would be entitled to the legal evidences of his purchase; also, a conveyance from the Governor in conformity to the above certificate; also, a certificate for 5259 $\frac{7}{50}$ shares of stock issued to the State by said company, and asigned by the Governor to Pickering; also, a copy of the vote offered by him on the said sixth day of June, for certain persons therein named as directors, on the said 5259 shares of stock, which was rejected and the rejection thereof was written on the back of the vote and signed by the three judges or directors of the election; also, that Pickering offered to vote on 3756 shares of stock, which vote was rejected, and that the judges of the election refused to allow Pickering to vote at that election; that Pickering exhibited to the judges of the election all the evidences of his right and title to the stock, as hereinbefore recited, at the time he offered his vote.

Beecher and Underwood, Attorneys for Appellant.

Olney, for Defendants in Error.

Caton, J. Although many of the irregularities urged against the election of the defendants, we consider well taken, we shall principally confine ourselves to the refusal to allow the relator to vote on the stock which he had purchased from the State and still held. We shall not enter upon a review of the laws which authorized the Governor to sell this stock, and under which the relator purchased it. This point was conceded in the very electian under which the defendants claim to hold their offices, for by far the greatest number of votes which they received was upon this very stock, and the only ground upon which the objection was placed to allowing the relator to vote upon the balance of that stock which had not been sold on the execution against the company, was that its transfer did not appear upon the stock-books of the company. This brings us to the simple question whether that objection was a valid one. In pursuance of law

and by order of the board of directors, there had been issued, to the State, a certificate of stock for 5259 $\frac{7}{50}$ shares. In pursuance of law, all of the interest of the State in the road was sold by the Governor, and a formal conveyance made to the purchaser, and au assignment of the certificate of stock was made on the back thereof by the Governor. This vested in the purchaser all the rights of the State to the stock, both legal and equitable, unless some statute of the State, or by-law of the company, prescribed some other mode of conveyance, or some additional formality. It may well be conceded that the company had the right to provide by by-law that stock in the company should only be transferred upon transfer-books kept for that purpose, and even requiring the old certificates of stock to be surrendered and canceled, and new certificates issued to the assignee; but the evidence does not show, nor was there any pretence upon the argument, that any such by-law, resolution or order had ever been passed, either by the stockholders or board of directors. In the absence of such regulation, any mode or form of conveyance, sufficient in law to transfer the title to any other property or chose in action which by law is transferable, must be held sufficient to vest the legal title in the assignee, and entitle him to all the rights and benefits accruing to the legal owner of the stock, as much as if it had been transferred on the stock-books of the company, had there existed a by-law requiring such a mode of transfer.

Was then the relator entitled to vote, at the election in question, upon the stock which he had purchased of the State and then held? To this question but one answer can be given.

He not only shows to us, upon this record, that the stock had been regularly transferred to him, but he laid before the judges or directors of the election the evidences of such transfer, the same which we now have before us. Upon this evidence of his right, he offered to vote the 5259 shares for a set of directors other than the defendants, but the vote was refused. He then offered to vote 3765 shares, which were left him after deducting the 1494 shares which had been sold on the execution against the company, and which had already been voted for the defendants by the assignee of the purchaser at the sheriff's sale. This vote was also rejected, and the defendants declaired duly elected. Had this latter vote been recieved, it would have decided the question at once against the defendants, and would have electeb the candidates for which the relator offered to vote. Here was a manifest and gross violation of the rights of the relator, who owned more than two-thirds of the stock of the company, and yet who was allowed no voice in the election of the directors who were to manage its concerns; but a set of directors were

thrust upon him, whose whole previous conduct, so far as this record shows, was hostile to his interests, and in whom he well might feel a want of confidence. Nor was he deprived of his rights in pursuance of any by-law which he, or those who had formerly owned the stock which he then held, had ever consented to. Had the owners of this stock, or their representatives in the board of directors, adopted a regulation requiring any different evidence of the transfer of the stock than that which was presented, the case would have been different. But there is no pretence that such was the case. The persons having charge of the election, and who in no way represented the stock or stockholders, for the purpose of making rules concerning the mode of transfer, arbitrarily disfranchised the relator's stock, and treated him as an utter stranger. And in this, too, they were guilty of the grossest inconsistency, by allowing the vote on 1494 shares of stock for the defendants, of which there was no sort of transfer by the State, except the one under which the relator claimed the right to vote.

That the transfer by the sheriff, to the purchaser at his sale, was made in a mode conformable to their notions of propriety, could not help the case, for, in tracing back the title to this stock, reliance was necessarily had upon the transfer from the State to the relator, for through that alone could any claim of right to the stock be asserted. If, then, the relator's title was bad, the title of those claiming through him, under the same transfer, was necessarily defective also. But these inconsistencies are of little moment, except as showing the arbitrary manner in which the relator's rights were treated; for, although the vote admitted on the 1494 shares may have been illegally admitted, they still got some other votes which secured the defendants, election, if the vote of the relator was properly rejected. But we have no sort of doubt that he had a right to vote his stock and secure the election of those for whom he offered to vote, holding as he did a majority of all the stock offering to vote.

The election of the defendants was clearly illegal, and in manifest violation of the rights of the relator, and a judgment of ouster should have been entered by the Circuit Court, whose judgment must be reversed, and the proper judgment of ouster entered here.

Judgment reversed.

Lewis Hite, Plaintiff in Error, v. Barney E. Wells, Defendant in Error.

ERROR TO MARION.

Each count of a declaration must truly set out the contract and cause of action, and, if the evidence does not sustain the count, the action fails; a party cannot, in any subsequent pleading, change the contract so as to present a new or different cause of action

The statute of frauds is the plain law of the land, and it is the duty of courts to enforce its provisions. This statute requires the promise to be in writing, and the common law makes a consideration necessary to the legal obligation of the promise.

Parties may make valid contracts, though not in writing, to pay the debt of, or for services rendered for, another; but the new or orginal contract must be declared on; and this must be founded upon a new and original consideration moving to the party making the promise, and the debt of the original debtor must not be the consideration for the promise.

The opinion of the court recites the facts in the case. The cause was heard at September term, 1854, of the Marion Circuit Court.

Haynie and Beecher, for Plaintiff in Error.

R. S. Nelson, for defendant in Error.

Skinner, J. Assumpsit by Wells against Hite.

The declaration contains two special counts. The first alleges that one Lyle was indebted to Wells in $208.75; that Hite, in consideration that Wells would procure from Lyle on order on Hite for the money so due Wells, undertook and promised to pay to Wells the money due from Lyle to him Wells; that Wells procured the order, and showed and presented the same to Hite, and demanded payment of said sum of money; and that Hite refused to pay.

The second count alleges that Wells had been in the employment of Lyle, and that money was due him from Lyle on account of such employment; that Lyle being in failing circumstances, he, on account thereof refused to continue in such employment; that Hite thereupon, in consideration that Wells would go on and continue in such employment, undertook and promised to pay Wells what was due and should become due him, by reason of such employment, from Lyle; that Wells did, in consideration thereof, go on and perform work and labor for Lyle; that there was due him for such work and labor done and performed, before and after said promise and undertaking, the sum of $208.75, and that Hite refused to pay the same.

To these counts Hite plead the statute of frauds and perjuries. To this plea Wells replied, " that the promises and undertakings

in said counts mentioned were made by Hite upon new considerations,moving from Wells to Hite, and not upon considerations moving from Lyle to Wells."

To this replication Hite demurred; the court overruled the demurrer, and Hite abided his demurrer.

If the plea is a good answer to the counts, it is evident the demurrer should have been sustained to the replication. By the well established principles of pleading, each count must truly set forth the contract and cause of action, and upon trial of the issue, if the evidence fails to prove the contract as alleged in the count, the plaintiff must fail as to such count.

He cannot in any subsequent pleading set up another contract, add to, or diminish from, the contract alleged in the count, so as to present a new or different cause of action. It is upon the cause of action alleged in the count alone, that he can recover in actions *ex contractu*. If, in this case, the contracts alleged in the counts are such as they are stated to be in the replication, then the promises therein alleged need not be in writing, and the plea of the statute is no defence; but it is for the counts, and not for the replication, to set forth the contracts, for the breach of which the plaintiff sues.

If the counts state contracts void under the statute, if not in writing, the plea of the statute is, *prima facie*, a complete defence, and is conclusive, if true. To determine upon the sufficiency of the plea, the court can only look to the counts, to which it is pleaded: if the contracts therein alleged are not within the statute, the plea will be held no defence; but if such contracts are within the statute, the plea, which alleges that they were not in writing, will be held a bar, and, if true, the plaintiff's action is taken away by the statute.

The replication is bad for departure from the counts, if it amounts to anything more than an attempt to construe, for the court, the contracts stated in the counts; and, if it is to be so regarded, it is equally bad; for it is the office of a pleading to state facts, and for the court to construe them. 1 Chitty's Pl. 644; Stephens' Pl. 410.

But if the plea is no defence, the demurrer to the replication should have been carried back and sustained to the plea; and this compels us to determine whether the contracts stated in the counts are within the statute. Myers and Bellinger v. Morse, 15 John. 426.

The statute provides, that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writ-

ing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Chapter 44, R. S.

This act is entitled "An act for the prevention of frauds and perjuries," and was adopted to give greater security to property; to guard against false contracts, set on foot by fraud and supported by perjury. It originated in England in the reign of Charles the Second; has been adopted generally in the United States; and its wisdom is universally acknowledged. Departures from the letter and spirit of this statute, both in England and the United States, are not unfrequent in the reported cases; and such departures, or rather established exceptions, have on other occasions been followed as precedents, with expressions of regret that they exist, and of doubt of their policy.

The statute is an iron rule found necessary to the protection of property, requiring more certain evidence of this kind of contract than in other cases, and like all general rules, is occasionally hard in its operation, yet, while it is the plain law of the land, it is the duty of the courts to enforce its provisions. The promise stated in the first count in this case, is, to pay to Wells the debt of Lyle existing at the time of making the promise; the consideration of the promise is stated to be the procuring by Wells, from Lyle, a written order on Hite to pay the debt.

The promise is to answer for the debt of another, and is, therefore, within the statute. But it is insisted that the undertaking of Wells to procure the order, and the procuring the same, constituted a new consideration, and that upon this is based an original and independent contract. The plain answer to this position is, that the statute requires the *promise* to be in writing, and the common law makes a consideration necessary to the legal obligation of the promise.

Though Hite had promised in writing, a consideration would have been necessary to sustain the promise. No promise or agreement, except under seal, (which imports a consideration,) not founded upon a consideration good in law, can be enforced. The promise stated in the second count is: that Hite would pay Wells what at the time of making the promise was due him, and what should become due him from Lyle, for his services performed for Lyle; and the consideration stated for this promise is: that Wells would go on and continue to work for Lyle. In this count, as well as in the first count, it is the debt of Lyle, though not wholly accrued, which Hite promised to pay; and the remarks in relation to the consideration of the promise stated in the first count apply equally to this.

But, it is insisted that Wells may recover at least for work done for Lyle *after* the making of the promise of Hite. To this

position we reply, that the promise alleged is to pay the debt due and to become due from Lyle, for which Lyle is answerable to Wells, and is wholly dependent upon, and collateral to, such debt and liability.

We understand both counts as based upon the debt and liability of Lyle, and not upon an original promise from Hite to Wells, founded upon a consideration moving from the promisor to the promisee ; and such is the fair construction of the counts, taking the allegations in them most strongly against the pleader. We hold the promises as stated in both counts, within the statute, and the plea, therefore, a good answer to them. Scott *v.* Thomas, 1 Scam. 58 ; Roberts on Frauds, Chap. 3, Part 6 ; Nelson *v.* Boynton, 3 Metcalf 396 ; Curtis *v.* Brown et al., 5 Cushing 488 ; Farley *v.* Cleveland, 4 Cowen 432 ; Elder *v.* Warfield, 7 Harris & John. 391 ; 2 Parsons on Cont. 300 ; and Story on Cont., Sec. 861.

It is not denied that parties may make valid contracts, though not in writing, to pay the debts of another, or to pay for services rendered for another.

In such case the plaintiff must declare upon the new or original contract ; it must be founded upon a new and independent or original consideration of benefit to the defendant or harm to the plaintiff moving to the party making the promise, either from the plaintiff or some other person ; and the debt or liability of the original debtor must not be the moving cause, or the consideration of the promise nor the promise incidental and collateral to the debt or liability of such original or principal debtor.

The statute cannot be avoided by the mere show or form of an independent contract. It is the substance and force of the contract to which courts will look in determining whether the contract is an original one, or incidental and collateral to the debt or liability of another.

If Hite was indebted to Lyle, or had funds of Lyle in his hands, and upon the faith of the same promised Lyle to pay or accept an order, to be drawn by Lyle on Hite, in favor of Wells, in such case, we do not doubt Hite would be bound to pay the order obtained upon the faith of such promise, although the promise was not in writing. [*a*]

Judgment reversed and cause remanded.

Judgment reversed.

(*a*) Smith *vs.* Kahil, Ante. 69 and notes and post 507.

ANN H. OSBORNE, *et al*, Plaintiff in Error, *v.* JACOB HORINE, Defendant in Error.

ERROR TO MONROE.

A petition for the assignment of dower is a chancery proceeding; and the record should show the evidence upon which the decree was founded; and, where the answer to the petition admits the right, and no evidence is furnished of the release of it, this court will presume that a decree which does not assign dower, is erroneous.

THE opinion of the court furnishes a statement of the case. The decree complained of was rendered at September term, 1855, of the Monroe Circuit Court.

ABBOT, UNDERWOOD and QUIRK, for Plaintiff in Error.

G. KOERNER, for Defendant in Error.

CATON, J. This was a petition filed for the assignment of dower. The answer admits the facts set up in the petition, showing the right to the dower claimed, and sets up as new matter by way of defence a release of the dower by the dowress. Upon the hearing, the petition was dismissed at the complainant's cost, upon which the case is brought to this court for review. The record presents no evidence of this release. By Section 19, Chapter 34. R. S., this question was expressly required to be filed on the chancery side of the court, and it must be governed by the rules of evidence and practice which obtain in that court. Kimball *v.* Cook, 1 Gilman 423. It has been repeatedly decided by this court, that we cannot, in chancery cases, presume that any evidence was given in the cause in the court below except what appears in the record. White *v.* Morrison, 11 Ill 361. Ward *v.* Owens, 15 Ill, 283. Here the answer admits enough for the complainant's purpose, and the record fails to show any proof establishing the defence set up, In the absence of such proof in the record, we cannot presume that any was before the court on the hearing.

There being nothing therefore to sustain the decree, it must be reversed, and the suit remanded.

Decree reversed.

ROBERT BRADFORD, Plaintiff in Error, *v.* JOHN JONES, Executor of Michael Jones, deceased, Defendant in Error.

ERROR TO GALLATIN.

In a suit against an executor, after the expiration of two years from the date of his letters testamentary, upon a demand which had not been presented for allowance within that time, the judgment should direct the levy to be made out of property belonging to the estate which has not been inventoried, whether found previous or subsequent to the judgment.

THIS was an action of *debt*, commenced by Bradford against John T. Jones, executor of Michael Jones, deceased, in the Gallatin Circuit Court, on the 7th of Nov., 1849, upon a note executed by his testator.

The general issue was pleaded with notice of several special matters, among which was this: that the note sued upon "was never exhibited and allowed in pursuance of law against the estate of said Michael Jones, deceased, within two years from the time of granting letters to the defendant."

By consent, the matters of law and fact were tried by the court, MARSHALL, Judge, presiding, without the intervention of a jury, at July term, 1853.

The amended notice of special matter shows that on the 9th of January, 1845, the last will and testament of Michael Jones was proven in the Probate Court of Gallatin county, and that on the same day letters testamentary were granted to the defendant.

The court found the issue upon the statute of limitations for the defendant, and that the plaintiff recover his debt and damages and costs, "to be levied and made of the estate of said Michael Jones, deceased, which may hereafter be found not inventoried or accounted for by the said defendant, as executor as aforesaid, at this time, according to the statute in such case made and provided."

This judgment the plaintiff assigns for error.

N. L. FREEMAN, for Plaintiff in Error.

OLNEY, for Defendant in Error.

CATON, J. This suit was brought against an executor after the expiration of two years from the time letters testamentary were granted, and upon a demand which had not been presented for allowance within that time. The Circuit Court gave judgment for the plaintiff, "To be levied and made of the estate of

the said Michael Jones, deceased, which may hereafter be found not inventoried or accounted for by the said defendant as executor as aforesaid, at this time, according to the statute in such case made and provided."

This portion of the judgment is assigned for error, because it restricts the plaintiff to obtain satisfaction of his judgment out of property belonging to the estate, which should be found subsequent to the rendition of the judgment. We think the error is well assigned. The language of the statute is: "And all demands not exhibited within two years shall be forever barred, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator." It has already been decided that this statute, is not an absolute bar to the recovery of a judgment, but that it must be a special judgment, the satisfaction of which can only be sought from property belonging to the estate subsequently discovered. Thorn *v.* Wolson, 5 Gilman 26. We are now called upon to determine with more precision what property falls within this description. Upon this point we think the meaning of the statute is very plain. The law requires the executor or administrator to make out and file with the Probate Court an inventory of the estate, both real and personal, which shall come to his possession or knowledge. R. S. 554, Sec. 81. And by Sec. 89 he is required to file further inventories of debts and liabilities as occasion may require, so that the records of the Probate Court may present as fully the condition of the estate as is known to the executor or administrator. It was evidently the intention of the statute to allow debtors, who had neglected to present their claims against the estate within the two years, to seek satisfaction out of any property belonging to the estate which had not been thus inventoried, and which they can find and thus apply, assuming, as the law might well assume, that the inventories would show all, of which the executor or administrator had any knowledge. It is a matter of no moment, and can make no difference with the debtor's rights, whether the estate not inventoried is, discovered before or after he obtains his judgment, or even the commencement of his suit, or even whether he himself first finds such property. The test prescribed by the statute is whether it has been inventoried or accounteb for by the executor or administrator. If it has not been, and he can find or get hold of it, he is entitled to have it applied to the payment of his debt, in the mode pointed out by the statute. It was urged in argument that the object of the statute was to stimulate the vigilance of the creditor to find other property of the estate, and to reward such vigilance by allowing him to seek satisfaction out of such as he alone should

discover; and if the executor or administrator, or any one else, should discover the property before him, he should have no right to resort to it. This would present an impracticable issue, and one not contemplated by the law. Of course he cannot seek satisfaction out of such subsequently discovered estate till he finds or discovers it. In many, if not in most cases such property must be in the knowledge of somebody, and possibly in the knowledge of the executor or administrator; but when the debtor discovers or finds it, the law has secured him the benefit of it. It then becomes subsequently discovered estate within the meaning and language of the law. (*a*)

The judgment of the Circuit Court must be reversed and the cause remanded, with directions to that court to enter a judgment conformable to the principle here laid down.

Judgment reversed

MARGARET B. LANE, Plaintiff in Error, *v.* FRANCIS BOMMELMANN, Defendant in Error.

ERROR TO ST CLAIR.

All public acts of congress in relation to the public lands, and the acts of such officers to whom execution of them is confided, as are required to make and keep public records in relation thereto, may be shown by the public records, or by copies duly authenticated, and these are admissible in evidence.

If a record shows that a court had jurisdiction of the subject matter and the person, the judgment rendered by the court cannot be collaterally questioned for errors of substance or form.

A certified copy of a patent for land issued by the United States, may be offered in evidence.

A report of commissioners in partition not under such is good collaterally.

THIS was an action of ejectment brought by the plaintiff in error to recover possession of the east half of lot two in north half of claim 2209, survey 607, in St. Clair county, which by consent of parties was tried by the court, BREESE, Judge, presiding, without a jury, at July term, 1854. The plaintiff claimed a fee in the premises. Plaintiff introduced an exemplification of a patent from the U. S. to John Edgar and Arthur St. Clair, Jr., dated 7th August, 1817, for said claim and survey, which was admitted *pro forma*. And then offered to produce in evidence, a judgment of the Circuit Court of St. Clair county, made at the September term, 1833, of partition of said claim and survey, (the petition in the case having been filed on the 3rd April, 1833,) between the heirs of said John Edgar, and the heirs of Arthur St. Clair, Jr., whereby, in the language

(*a*) Judy et al. *vs.* Kelly, 11 Ill. R. 217; Peacock *vs.* Haven, 22 Ill. R. 25; Rosenthal Admr. *vs.* Magee, 41 Ill. R. 376.

of the order of court, "The northern half to fall to the lot of John Edgar's heirs, and the southern half to the lot of Arthur St. Clair's heirs," to the reading of which in evidence the defendants objected, which objection was sustained by the court, and the same excluded; to the excluding of which the plaintiff at the time excepted.

Plaintiff then offered in evidence the petition of Wm. Morrison, adm'r of John Edgar, deceased, to the Circuit Court of Randolph county, for the sale of this land among others, to pay debts of said estate; which petition was filed on the 16th of April, 1833, (which was subsequent to the commencement of the suit for partition in the St. Clair Circuit Court,) and the order of sale granted thereon, made at the April term, 1834, (subsequent to the judgment in partition in St. Clair Circuit Court,) to sell all the interest of John Edgar at the time of his death in said claim 2209, survey 607, together with other lands. Also the deed from William Morrison, administrator, to Ninian W. Edwards, for said land, dated Aug. 26, 1834, and deed from Ninian W. Edwards and others to the plaintiff, dated May 4, 1854, several tracts of land, embracing the tract in controversy, together with the deed referred to in said last deed mentioned.

The court found for the defendant.

Plaintiff moved for a new trial, which was overruled, to which plaintiff excepted and brings the cause to this court, and assigns for error the judgment of the court below in excluding said judgment of partition from the evidence.

G. TRUMBULL, for Plaintiff in Error.

G. KOERNER, for Defendants in Error.

SCATES, C. J. A certified copy of the patent was admitted in evidence *pro forma* below, and is now objected to, on the ground that such copies are not embraced within the statutes of the State, or the United States, relating to copies of records as evidence. True it is not—nor need there be any statute for that purpose, as it is admissible at common law. The power of the government for the disposition of the public lands, has its foundation in the constitution itself. All public acts of Congress for that purpose, and of public officers in their execution, who are required to make and keep public records of their surveys, sales and conveyances, may be competently shown by the public records thus made and kept, or by copies thereof, duly certified by the proper officer under seal of his office. 1 Stark. Ev. 226, 230, 251; 3 Bacon Abrid. tit., Ev. F. p. 533, Ed. 1846; Wickliffe *v.* Hill, 3 Littell R. 330. (*a*)

(*a*) Patterson *vs.* Winn, et al. 5 Peters 233; Lee Impl. etc. *vs.* Getty, 26 Ill. R. 80.

These documents or records cannot be removed without great inconvenience and danger of being lost or damaged, and they may be wanted in two places at the same time. 1 Stark. Ev. 251. See Lynah *v.* Clerke, 3 Stalk. R. 154.

"The extraordinary degree of confidence thus reposed in such documents, is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose, and also on the publicity of the subject matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded for the benefit of the public, those who are to act in making such investigations and memorials, are in fact the agents of all the individuals who compose the public, and every member of the community may be supposed to be privy to the investigation." Therefore they " are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining of the parties on whose authority the truth of the document depends, for duly certified copies are admissible as well as sworn copies. 1 Stark. Ev. 230 ; 1 Greenleaf. Ev., Secs. 483, 484, 499, 500, 501 ; United States *v.* Perchcman, 7 Pet. R. 85. (*a*)

The petition for partition, report of commissioners, and decree under which plaintiff derives title, where offered, and excluded, on the ground that the report of the commissioners for partition was not under seal. The act of 1827 directed the proceedings of the commissioners to be returned by them " under their hands and seals." Rev. Laws 1833, p. 239, Sec. 14. In Bledsoe *v.*Wiley's *lessee*, 7 Humph. R. 507, such a provision was held to be directory merely. and an omission of the seal did not vitiate the record of partition.(*b*) Whatever force this objection might have on appeal or writ of error in the case, we can allow it none as a collateral attack upon such proceedings, which were approved by the court, were spread of record, and confirmed by a decree in partition, which has been aquiesced in and acted upon by the parties to it, for twenty years, so far as anything is shown in the record. Of the same character is the objection to the misdescription of the land in the notice of publication, together with all others made to this record.

No greater weight can be allowed the objections to the record of proceedings and decree for the sale of the lands of Edgar, on the petition of his administrator. The court of Randolph county had jurisdiction under the 98th section of the Statute of Wills of 1829. Rev. Stat. 1833, pp. 644, 645, Secs. 98, 101.

Where the record shows jurisdiction of the subject matter and the person, it is too well settled to require further discus-

(*a*) 2. U. S. S. at large, 7177 Id. 111. 627. 418.
(*b*) Sullivan *vs.* Sullivan, 42 Ill. R. 318.

sion, that the judgment of the court cannot be collaterally questioned for errors of substance or form intervening. Buckmaster et al., *v.* Jackson et al., 3 Scam. R. 104; Swiggert et al. *v.* Harber et al., 4 Scam. R. 364; Young et al. *v.* Lorain et al., 11 Ill. R. 624; Buckmaster *v.* Ryder, 12 Ill. R. 207; Thomson *v.* Tolmie et al., 2 Pet. R. 157; Voorhees et al. *v.* Jackson ex dem., 10 Pet. R. 449; Willcox *v.* Jackson ex dem., 13 Pet. R. 498; Lessee of Guynore et al. *v.* Astor et al., 2 How, U. S R. 319; Wright *v.* Marsh et al., 2 Green. Iowa R. 94; Doe ex dem. Hain et al. *v.* Smith, 1 Carter Ia. R. 451; Cole *v.* Hall, 2 Hill R. 625.

So far as the partition and allotment under, and the deed from the executors of N. Edwards is concerned, there is a link wanting in the chain of evidence, to show any relevancy in these as testimony.

If Ninian Edwards bought the land at Morrison's sale, and took a deed in the name of Ninian W. Edwards, and the lands were devised to the executors, then these additional facts are necessary to show that title was derivable through a partition amongst his heirs, and the deed of his executors. As the record stands, these portions of the evidence appear wholly irrelevant. Judgment reversed and cause remanded for new trial.

Judgment reversed.

WILLIAM ADAIR, Plaintiff in Error, *v.* FERDINAND MAXWELL Defendant in Error.

ERROR TO RANDOLPH.

A. B., a land officer, employed C. D. as his clerk, who was to receive for his services one half of the salary and compensation allowed to A. B.; this compensation was increased retrospectively: *Held*, that C. D. was entitled to one-half of the increased compensation.

THIS cause was submitted to BREESE, Judge, without the intervention of a jury, at October term, 1855, of the Randolph Circuit Court, who found for the defendant in error, and gave a judgment in his favor for $475.27 and costs. Whereupon the plaintiff in error brought the record to this court.

The facts of the case will be found in the opinion of the court.

W. H. UNDERWOOD, for Plaintiff in Error.

G. KOERNER, for Defendant in Error.

CATON, J. Adair was register of the land office at Kaskaskia, and in November, 1854, employed Maxwell as clerk in said office. Adair was to pay Maxwell one-half the salary and one-half the compensation allowed the receiver. The services sued for were for the quarter next before the passage of the act of March 3rd, 1855. That act increased the compensation of the receiver retrospectively, covering the time during which the services sued for were rendered, and the only question is whether Maxwell is entitled to one-half of such increased compensation. I hardly know how to argue this question. If this additional pay, which was given to the receiver, was designed as an additional compensation for the services rendered in his office, which is clearly the intention of the law, then the agreement is that Maxwell should have one-half of such additional compensation. Clearly one-half of the compensation provided for, meant one-half of all the compensation allowed by law, or which the party should receive according to the law. Had the salary of the register been reduced after the bargain was made, Maxwell would have been bound to serve the time agreed upon, taking half of the reduced salary. By the contract the clerk took his chances of compensation the same as the receiver did. I can only say such was the agreement, and the parties were bound by it.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM M. STETHAM, Appellant, *v.* JOHN SHOULTZ, Appellee.

ERROR TO ST. CLAIR.

Where one of three defendants asked to have a judgment set aside, upon the ground that his co-defendants, who assented to a trial, were sureties for him on the note sued on, and did not know his defence, and that he had been too sick to attend court and make his defence, which was denied, it is held by this court that proper diligence was not shown, and that the application to the Circuit was properly overruled.

THIS cause was heard by BREESE, Judge, at August term, 1855, of the St. Clair Circuit Court. The statement of the case is made in the opinion of theCourt.

R. F. WINGATE, for Appellant.

G. TRUMBULL, for Appellee.

SKINNER, J. Shoultz sued Stetham, Rose, Davis and Frendley, in an action of debt in the St. Clair Circuit Court.

The writ was sued out to the March term, 1855. At this term the defendants appeared and filed their demurrer to the plaintiff's declaration, which was overruled. The defendants then filed their plea of *non est factum*, and several pleas of part failure of consideration, upon which pleas the plaintiff took issue. The declaration counted upon a sealed note. Stetham then moved for a continuance upon affidavit setting forth the consideration of the note, and part failure of the consideration of the same, and alleging that he could prove his defence by one Smith, an absent witness.

The court thereupon continued the cause. At the August term, 1855, the parties waived a jury. The cause was tried by the court and judgment rendered against the defendants for the amount of the note sued on.

At the same term, Stetham moved the court to set aside the judgment, and for a new trial, upon his affidavit setting forth that his co-defendants and securities only in the note sued on, and were wholly unacquainted with his defence thereto; that he alone had attended to said defence; that he at the previous term employed counsel to make his defence, and that said counsel had attended thereto but was unable to make such defence on the trial, on account of the absence of Stetham; that Stetham was prevented by sickness from being in attendance at the trial; that he had been sick and confined to his room for nearly a month prior to the day of trial and was then for the first time able to leave his home, about twelve miles distant from the place of holding court.

The affidavit sets forth the same defence of part failure of consideration, in the special pleas alleged, and that the same can be proved by several persons residing in St. Clair county. The court overruled the motion.

Stetham appealed to this court and assigns for error the refusal of the Circuit Court to set aside the judgment and grant a new trial. The court properly overruled the motion. The affidavit does not show diligence in preparing for trial; nor does it negative circumstances from which negligence may reasonably be inferred. Schleneker et al. v. Risley, 3 Scam. 483; Crozier v. Cooper, 14 Ill. 139. (*a*)

The sickness of Stetham alone is not sufficient to show that his defence could not have been fully interposed by ordinary diligence. His witnesses resided in the county, and their attendance could have been coerced by the process of the court, and which he was at liberty to invoke.

Nor effort was made by either Stetham or his counsel to obtain

(*a*) Sterns *vs*. Gettings. 23 Ill. R. 387; Cowen *vs*. Smith, 35 Id. 417.

the testimony of defendant's witnesses, and no excuse is shown for not doing so ; nor does it appear that the presence of Stetham was necessary to the defense.

Judgment affirmed.

ANTON ZARRESSELLER, Plaintiff in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO MARION.

The act for the suppression of intemperance, approved February 12th, 1855, did not repeal prior laws, providing for the granting of licenses for selling spirituous liquors, and penalties for selling without such license.

No portion of this act was to take effect, until after the people should decide by a vote to adopt it.

In construing a statute the intention of the legislature will be considered ; and to this end the whole act, the law existing prior to its passage, the motive for its passage, and the mischief to be remedied or avoided, will be carefully weighed.

An indictment which declares the offence to be, the selling " of one gill of spirituous liquors, " being &c., less than one quart, is sufficiently certain, under the license laws of this State.

An indictment for a violation of the license laws, which concludes " against the peace and dignity of the people of the State of Illinois," is within the meaning of the constitution.

In cases of misdemeanor, if the defendant waives a jury and puts himself upon the court for trial, he cannot assign for error that the court tried the issue.

THIS indictment was tried before PARRISH, Judge, (a jury being expressly waived) at the September term, 1855, of the Marion Circuit Court. The defendant was found guilty. Motions for a new trial and in arrest of judgment were overruled.

Judgment was rendered for a fine and for costs. The opinion of the court furnishes a statement of the case.

G. KOERNER, for Plaintiff in Error.

J. S. ROBINSON, State's Attorney, for the People.

SKINNER, J. Anton Zarresseller was indicted in the Marion Circuit Court for selling spirituous liquor without license.

The indictment charges that Zarresseller, on the fourth day of April, 1855, at the county of Marion, one gill of spirituous liquor, the same being a less quantity than one quart, to one Tracy, unlawfully did sell.

The defendant appeared and moved the court to quash the indictment, on the ground that the act entitled, " an act for the suppression of intemperance, and to amend chapter 30 of the Revised Statutes," approved February 12, 1855, had repealed

the laws authorizing the granting of licenses to retail spirituous liquors, and the penalties for selling without such license. And also, for the reason that the indictment did not describe the kind of liquor sold, and did not conclude in the language of the constitution.

The first question is, did the act of 1855 repeal the laws regulating the retail of spiritous liquors, or any part of them? According to the principles laid down in the case of Sullivan *v.* The People, 15 Ill. 233, the laws authorizing the granting of licenses to sell spirituous liquors, and the laws providing penalties for selling without license compose one system, are dependent upon each other, and the repeal of the one would operate as a repeal of the other. If, then, the act of 1855, repealed the statutes authorizing the granting of licenses, it also repealed the penalties provided for selling without license. But we do not regard the act of 1855, as operative to affect these laws in any manner whatever.

The thirty-sixth section of the act of 1855, provides, that all laws and parts of laws inconsistent with this act, shall be repealed when this act goes into operation; provided, that all prosecutions which shall have been commenced at the time this act goes into operation, shall be carried on to final judgment and execution as if this act had not been passed; provided, all laws authorizing the issuing or granting of licenses to sell spirituous or intoxicating or mixed liquors, shall be repealed from and after the date of the passage of this act."

The thirty-ninth section of the act provides that, "The foregoing provisions of this act shall take effect on the first Monday of July next; provided, if a majority of the ballots to be deposited as hereafter provided, shall be *against prohibition*, then this act shall be of no force or effect whatever.

The act then provides for submitting the adoption of the act to the people, to be determined by vote, and the mode of determining upon its adoption or rejection by the people. These two sections are apparently conflicting and repugnant; and it is insisted that the last proviso of the thirty-sixth section repeals the laws authorizing the granting of licenses, and providing penalties for selling without license. It is the duty of the court to construe these two sections together, and in connection with the whole act, and if practicable, reconcile the apparently opposite provisions, so as to give effect to each provision, and so make them resnlt in an harmonious whole. The mere words of a proviso should not prevail against the clear object, scope and spirit of the act; the aim and end of construction being to ascertain the will of the legislature.

Taking these two sections together, and with a view to the

whole act, it seems ts us that the legislature did not contemplate or intend that any part of them should have the force of law, until the adoption of the act by the people, and until the first Monday of July, 1855, in case of such adoption. If such was not the intention, why the provisions of the thirty-ninth section, that "the foregoing provisions (and which include the thirty-sixth section) of this act shall take effect on the first Monday of July next," and if a majority of the ballots should be against prohibition, "then this act shall be of no force or effect whatever"?

It is to be recollected that the act provides for the vote upon he question of adoption of the act by the people, to be taken on the first Monday in June, 1855.

The same question may be asked with reference to the first clause of the thirty-sixth section: "All laws and parts of laws inconsistent with this act, shall be repealed when this act goes into *operation*."

The laws inconsistant with that act, were the laws providing for the granting of licenses, and providing punishment for selling without license.

The second clause of the same section, provides that "all prosecutions which shall have been commenced at the time this act goes into operation, shall be carried on to final judgment and execution, as if this act had not been passed."

This clause would be absurd and inoperative if the last clause of the section repealed the license system; for by such repeal all right of prosecution would have been taken away; there would no longer have been a law in existence to sustain such prosecutions. If the law creating the offence is repealed, no prosecution can be commenced, carried on, or punishment inflicted therefor. Eaton *v.* Graham, 11 Ill. 619.

To give consistency and effect to the several parts of these two sections, the last clause of the thirty-sixth section (notwithstanding the words,) must be understood as referring to the time when, and condition upon which, the act was to go into operation. And by the rule for construing statutes, provided by the 90th chapter of the Revised Statutes, the thirty-ninth section would prevail over the provision of the thirty-sixth section, repugnant thereto.

The 24th section of this chapter provides that, "If conflicting provisions be found in different sections of the same chapter, the provisions of the section which is last in numerical order shall prevail, unless such construction be inconsistent with the meaning of such chapter;" and the 36th section of the chapter makes this rule of construction general.

And the same rule seems to have been recognized at common

law. "If the latter part of a statute be repugnant to the former part thereof, it shall stand, and so far as it is repugnant, be a repeal of the former part; because it was last agreed to by the makers of the statute." Dwarris on Statutes, 675.

But, aside from the reasons already given we could not hold that the proviso of the thirty-sixth section repealed the license system and the penalties provided for its violation. The grand object in construing statutes is to ascertain the will of the legislature; and to accomplish this, courts not only will look to the provisions and language of the whole act, but to the law as it was at the time of the passage of such act, to the cause and motive of the act, and the mischief to be remedied or avoided thereby.

This act professes to be "for the suppression of intemperance," and its theory is, the prohibition of the manufacture and sale of intoxicating liquors, except for limited and specified purposes; and its mode of legislation is, a reference of the act to the people, at the polls, for their adoption or rejection.

The law, as it stood at the time of the passage of the act, regulated, and in a degree restrained, the retail of such liquors. One of its objects, as well as its effect was to lessen the mischief sought to be suppressed by the act under consideration.

Can it be supposed, then, that at the date of this act, and when its final adoption was wholly hypothetical, the legislature intended to remove all restraint upon the free sale and use of such liquors, for any and every purpose, and thereby remove all barriers to intemperance? Or, can it be supposed that the legislature intended to open wide the flood-gates of evil, and hold this condition *in terrorum* over the people to influence their vote at the polls, upon the adoption of this act as the law of the land?

Such suppositions are not compatible with the integrity of the law-making power, and we are not disposed to entertain them.

The next question is, does the indictment describe the offence with sufficient certainty? A majority of the court hold the indictment sufficient in this respect, under our statute, and they are not without precedent in this conclusion. Commonwealth *v.* Odlin, 23 Pick. 275.(*a*)

I am unable, however, to concur with the majority of the court upon this point.

The indictment concludes, "against the peace and dignity of the people of the State of Illinois.', The 25th section of the 5th article of the constitution provides, that all prosecutions shall be carried on "in the name and by the authority of the people of the State of Illinois;" and concludes, "against the peace and dignity of the same."

We do not think it necessary to comply literally with this provi-

(*a*) Rice *vs.* People. 38 Ill. R. 435.

sion. The conclusion is the same in substance as required by the constitution, and within the spirit and meaning of the requisition.

The issue was tried by the court, by agreement of the parties in open court, and this is also assigned for error. We do not doubt the right of the defendant, in cases of misdemeanors, to waive a jury and put himself upon the court for trial. He may waive his right in this respect, and, having done so, cannot assign for error that the court tried the issue. The people *v.* Scates, 3 Scam. 351.

Judgment affirmed.

WILLIAM GLENN and HIRAM TORREY, Plaintiffs in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO MARION.

In a prosecution under the act to prevent the immigration of free negroes into this State, it is erroneous to instruct the jury to disregard the statements of the negro, if such were contradictory of his acts, as to his intention to be a resident; both should be considered, giving such weight to each as they might deserve. The affidavit for an arrest under this statute, should aver that the negro has come into the State within the time prohibited; and he has a right to demand the nature and cause of the accusation against him, and if this does not show an offence against the law he should be discharged.

THIS cause was heard before BAUGH, Judge, at April term, 1855, of the Marion Circuit Court.

The facts are stated in the opinion of the court.

HOUTS and HAMILTON, and R. S. NELSON, for Plaintiffs in Error.

J. S. ROBINSON, District Attorney, for The People.

SKINNER, J. William Glenn, a negro, on the 31st day of January, 1855, was arrested under the third section of an act entitled, "an act to prevent the immigration of free negroes into this State," approved February 12, 1853.

He was tried before a justice of the peace of Marion county, found guilty and fined $50.

Glenn appealed to the Circuit Court, and H. Torrey became his security in the appeal bond. In the Circuit Court, Glenn appeared and moved to dismiss the prosecution; the motion was overruled, a trial by jury was had, a verdict of guilty re-

turned, and judgment rendered against Glenn and Torrey, his security, for $50.

From this judgment Torrey appealed to this court, and assigns for error the refusal of the court to dismiss the prosecution, and the giving of instructions on the part of the plaintiffs. The instructions complained of, are as follows: "That if the acts and conduct of the negro were contradictory to his statements as to his intention of remaining here, then the jury should disregard his statements made to witnesses, and find the defendant guilty, if the other material allegations are proved."

"That it is not necessary for the prosecution to prove how long the negro intended to remain here, if he did remain here more than ten days, and it was evident from his acts and conduct that he intended to remain longer, then the jury should find him guilty."

The court erred in giving these instructions. The affidavit, which is the foundation of this proceeding, charges: "that William Glenn, a negro, is now remaining in the town of Salem, where he has been so residing more than ten days, with the evident intention of residing in this State."

The first instruction directs the jury to disregard the statements of the negro, if his statements and acts were contradictory. These statements and acts were detailed by the witnesses in connection, as evidence of his intention to reside in this State, and with his acts, were the *res gestæ* of the inquiry. They should have been taken and considered together by the jury in determining upon the question, attaching such weight to any of them as to the jury, upon consideration of the whole evidence, they seemed to deserve.

The last clause of the instruction is equally objectionable. The "material allegations" must be understood as referring to the charge in the affidavit. This charge amounts to no offence in law. The offence consists in "coming into this State and remaining ten days, with the evident intention of residing in the same." The affidavit does not allege that the negro, *came* into this State, and for aught that appears, he may have resided in this State at the time of the passage of the act of 1853, or have been born in this State.

The second instruction is based upon the supposition that the offence consists in remaining in the State more than ten days, with the intention of remaining longer, and is erroneous for the reason before stated.

The Circuit Court should have dismissed the prosecution for want of an affidavit charging an offence under the law. In this, as in all other criminal prosecutions, the negro had a right "to demand the nature and cause of the accusation against him,"

and, if the accusation did not amount to an offence against the public law, and no sufficient charge was made by amendment, he was entitled to be discharged from the prosecution.

Judgment reversed.

SAMUEL KIRKHAM *et al.*, Plaintiffs in Error, *v.* SUSAN JUSTICE *et al.*, Defendants in Error.

ERROR TO GALLATIN.

Parties to suits in chancery should be described by their proper names, if known; if their names are unknown, they must be made parties in the manner prescribed by the forty-first section of the twenty-first chapter of the Revised Statutes.

THE opinion of the court furnishes a statement of all the facts necessary to a full understanding of it,

The decree in the case was entered by DENNING, Judge, at June term, 1850, of the Gallatin Circuit Court.

W. HARROW, for Plaintiffs in Error.

BAUGH and OLNEY, for Defendants in Error.

SKINNER, J. The bill in this case shows that the complainant has the legal and equitable title to the lands in dispute, provided the sheriff's deed to him, under the execution in favor of William and Redman Lasswell, and against Samuel Kirkham, was made to the person legally entitled thereto. The probability is that the sheriff's sale appears, from the record, to have been made to the plaintiff in the execution, and that no sufficient assignment was made to anthorize the execution of the deed to the complainant; and that this bill was filed to establish the complainant's title under the judgment, execution and sheriff's deed.

The bill is, however, too uncertain in its allegations to entitle the complainant to relief.

Certificates of purchase, under executions at law, were first made assignable Febuary 19th, 1841, and the manner of assignment is provided for by the act authorizing such assignment. Purple's Statutes, 341.

The sheriff's sale alleged in complainant's bill was made before the passage of this act, though the sheriff's deed to complainant was executed long after. If the parties in interest

attempted an assignment or transfer of the certificate of purchase, for a valuable consideration, to complainant, and the parties intended thereby that all rights under the sheriff's sale should pass to complainant, and that the sheriff's deed should be executed to the complainant, equity, upon a proper showing by allegations and proofs, would afford adequate relief.

The decree of the Circuit Court is against all of the defendants, and requires them to execute a deed of the lands in controversy to complainant.

Summons issued against the "heirs of Redman Lasswell," and the "heirs of John M. Ham," and they were made parties defendants by that style. The summons was returned "not found" as to these parties, and an affidavit was filed by complainant setting forth "that hedoes not know the residence of the heirs of Redman Lasswell, unless it be in Indiana, nor that of the heirs of John M. Ham."

Publication was then made, as in case of non-resident defendants in chancery, against these defendants, by the styles given them in complainant's affidavit. Parties to suits in chancery should be described by their proper names, or the names by which they are known and called, if their names are known; and if their names are unknown, they can only be made parties defendants, in pursuance of the 41st section of chapter 21 of the Revised Statutes.

This section provides that "In all suits in chancery, and suits to obtain the title to lands, in any of the courts of this State, if there be persons interested in the same, whose names are unknown, it shall be lawful to make such persons parties to such suits or proceedings, by the name and description of persons unknown, or unknown heirs or devises of any deceased person who may have been interested in the subject matter of the suit, previous to his or her death; but in all such cases an affidavit shall be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown." And then provides that process may issue and notice be given by the name and description given as aforesaid.

This statute was not complied with, and the court acquired no jurisdiction of the persons thus made parties.

The decree is reversed and the cause remanded, with leave to complainant to amend his bill and make proper parties.

Decree reversed.

HARVEY B. LUCAS, Plaintiff in Error, *v.* WILLIAM B. DRIVER, Defendant in Error.

ERROR TO JEFFERSON.

Where an agreement was made between A. and B., that the latter was to haul railroad ties, with two teams, for six months, and A. refused to furnish ties for a part of that time, so that B. could not work his teams: *Held*, that B. was entitled to recover damages, and that a receipt at the end of the first month, in full of all demands to date, did not preclude B. from recovering damages for the residue of the time, the contract still remaining between the parties.

DRIVER sued Lucas in the Circuit Court of Jefferson county, averring specially the agreement, as stated in the opinion of the court; the declaration also contained the common counts in assumpsit. The defendant pleaded the general issue and a plea of set-of to this declaration. There was a trial by jury, verdict and judgment for Driver, before MARSHALL, Judge, at May term, 1854, of the Jefferson Circuit Court. Lucas sued out this writ of error.

NELSON JOHNSON, for Plaintiff in Error.

R. F. WINGATE, for Defendant in Error.

CATON, J. In February, 1854, an agreement was made between Lucas and Driver, by which the latter was to haul railroad ties, with two teams, for the former, for six months, at seven cents per tie; and Lucas agreed to furnish Driver all the ties he could haul with the two teams during the six months, the service to commence as soon as Lucas' saw-mill got in operation, payments to be made monthly. The mill was started on the 18th of May following, when Driver commenced hauling with two teams, but the mill could not cut enough to keep Driver's teams going, and also two of Lucas' own teams, which were also engaged in hauling ties, in consequence of which Lucas did not furnish Driver with as many ties as he could haul. On the 18th of June, one month after Driver commenced work, a settlement was had between the parties, and a receipt given of the following purport:

"Received from H. B. Lucas, sixty-four dollars and eight cents, in full of all demands up to date.

his
WM. B. ⋈ DRIVER.
mark."

After this settlement, Driver continued work, and hauled six

hundred and sixty-three ties, when Lucas refused to furnish him any more and discharged him. The evidence also shows that Driver had built a shanty at the mill for his accommodation during the job, which cost him fifteen or twenty dollars. The teams could average about fifty ties per day each.

Upon this evidence the jury returned a verdict for the plaintiff below, for $86.41, which the court refused to set aside, but rendered judgment for that amount. This decision is assigned for error. The price for the ties hauled, subsequent to the settlement, was $46.41, so that the jury allowed Driver $40 for his damages, for the violation of the contract by Lucas, in not furnishing him ties as he had agreed.

It is now insisted, on the part of Lucas, that the receipt given upon the first settlement is evidence of a settlement and satisfaction for those damages for the breach of the agreement. We cannot concur in this view of the case. To give the receipt the most liberal construction for Lucas of which it is susceptible, and it cannot be said that any damages for the breach of the contract were then settled for, except what had accrued before that settlement. Nothing more could have been paid for at that time, unless an agreement was then made to terminate the contract. There can be no pretence that this was done, for the subsequent transactions between the parties show very clearly that both regarded it as still subsisting and executory for the six months originally stipulated. Lucas continued to furnish ties, and Driver continued to haul all he could get. It is true that frequently, previous to the final dismissal of Driver, both Lucas himself and his agent, Hope, refused to furnish ties, when demanded, but never did they put the refusal upon the ground that the contract was terminated, and hence Lucas was not bound to furnish any more, but always assigned as a reason, that the mill could not cut sufficient ties to keep both Lucas' and Driver's teams going. By the agreement, as proved, Lucas was bound to furnish Driver with ties to keep both his teams at work not only for the month at the end of which the settlement was made, but also for the succeeding five months. This he refused to do, and thereby violated his contract and rendered himself liable to Driver in damages. Those damages the jury assessed at $40, which, we think, judging from the evidence, was in no way excessive.

The court properly overruled the motion for a new trial, and its judgment must be affirmed.

Judgment affirmed.

JACOB WEINZ, Plaintiff in Error, *v.* JACOB DOPLER, Defendant in Error.

ERROR TO WAYNE.

To authorize a justice of the peace to enter a judgment upon an award, it must be made in a suit pending before him, upon a reference by the parties.
Judgment cannot be entered in courts of record upon awards, unless the submission to arbitrators is made in pursuance of the statute.
An award, made upon a submission which is not in pursuance of the statute, must be enforced by common law remedies.

THIS case is stated in the opinion of the court. This cause was heard before BAUGH, Judge, at April term, 1855, of the Wayne Circuit Court.

C. A. BEECHER, for Plaintiff in Error.

S. S. MARSHALL, for Defendant in Error.

SKINNER, J. Jacob Weinz and Dopler, on the 10th day of January, 1855, executed a writing under seal, whereby they mutually bound themselves to each other, that certain matters of difference between them should be determined by certain persons therein named, and that they would perform such award as said persons should make in writing, ready to be delivered on said 10th day of January, 1855. The obligation also provided "that judgment should be rendered on such award, in any court having jurisdiction of the same."

On the 11th day of January, 1855, the arbitrators made their award in writing, and awarded that Weinz pay to Dopler $71.83, and costs of arbitration.

On the 13th day of January, 1855, Calvin McCracken, a justice of the peace of Wayne county, rendered judgment on this award, in favor of Dopler and against Weinx, for the sum in the award mentioned. From this judgment Weinz appealed to the Circuit Court.

In the Circuit Court Weinz moved to disniss the suit, for want of jurisdiction in the justice, which motion was overruled, and judgment was rendered on the award against Weinz.

The decisions of the Circuit Court in overruling Weinz's motion to dismiss the suit, and in rendering judgment on the award against Weinz, are assigned for error.

The record of the proceeding before the justice wholly fails to show service of summons on Weinz, or appearance. The judgment was evidently rendered upon the award, without summons or appearance, upon the supposition that the submission

authorized the rendition of judgment thereon. To authorize a justice of the peace to render judgment upon an award, the award must be made upon a reference by the parties to a suit pending before such justice. R. S. 321, Sec. 43.

Chapter 7 of the Revised Statutes authorizes judgments to be entered upon awards in courts of record, and does not apply to justices of the peace; nor can judgment be entered in courts of record upon awards, unless the submission under which the arbitrators acted is made in pursuance of the statute. In all cases of submission to arbitrators, not in pursuance of the statute, the parties are left to their common law remedies. Low et al. *v.* Nolte, 15 Ill. 368. (*a*)

In this case no suit was pending between the parties, before the justice; the award could have no other effect than at common law; and gave the justice no jurisdiction to render judgment against Weinz without service of summons or appearance. Evans *v.* Pierce et al., 2 Scam. 468.

We are not called upon to decide whether the award is void, it not having been made within the time provided by the submission.

The powers of the arbitrators were derived from the submission, and beyond its provisions they could not go, without authority from the parties.

The Circuit Court should have dismissed the suit and reversed the judgment.

Judgment reversed.

ISAAC N. MORRIS, Appellant, *v.* WILLIAM THOMAS, as Representative of the Bank of Illinois, &c., Appellee.

APPEAL FROM GALLATIN.

In chancery proceedings a trustee may state facts explanatory of a transaction, and interpose denials and objections, with a view to negative his own transactions as charged, and to require full proofs of complainant.

Although a remedy at law may exist, yet if a complaint is one of equitable jurisdiction, chancery will sometimes take cognizance of it, where its aid is more effectual.

In matters of trust funds, &c., courts of law might enforce bargains, which equity would set aside, as being in violation of the trust.

Equity will not enforce an agreement made by a trustee in gross violation of his trust to take land in satisfaction of a judgment.

The power given the trustee, to close up the affairs of the Bank of Illinois by making such settlements and compromises as he might deem most advantageous, is subject to the revision and control of a court of equity; whic will inquire, not only into the good faith, but the propriety of his act revoking or confirming them at its discretion.

(*a*) Hamilton *vs.* Hamilton, 27 Ill. R. 160; Rankin *vs.* Rankin, 36 Id. 298.
(*b*) Thomas *vs.* Sloo, 15 Ill. R. 71.

This was a bill in chancery exhibited by the appellant against said Thomas as representative of the Bank of Illinois

The bill shows that the Bank of Illinois obtained a judgment at law against said Morris and others as his sureties, in the Gallatin Circuit Court at October term, 1843, upon which an execution was issued and levied upon certain lands of said Morris, which were not sold, and the execution returned; that afterwards a *vendi. exponas* issued directing the sale of the lands, which were situate in Adams county; that one Caldwell was appointed receiver of the Bank; that the act of 15th Feb., 1851, constituted Brown, Gillespie, and Caldwell, or whichever should give bond, the successor or successors of the assignees of the Bank; that Caldwell alone qualified; that Caldwell having authority so to do, appointed Onias C. Skinner his agent and attorney to settle and compromise said debt with said Morris; that said Morris did settle and pay said judgment to said Skinner, by conveying to said Bank the south-west quarter Sec. 14, T. 6 S., R. 6 west, situate in Pike county, and the payment in cash to said Skinner of $59.75, which is indorsed and receipted on said *venditioni exponas*; that afterwards, Caldwell having died, said Thomas was appointed Trustee of the Bank by the Circuit Court of United States, who sued out a further *venditioni exponas*, directing the sheriff of Adams county to sell the lands levied upon under the original execution; and that said Thomas knew that the judgment was satisfied.

The bill prays an injunction against said last *venditioni exponas*, which was granted.

The answer and amended answer admit the allegations of the bill, except that they deny that Caldwell had authority to receive the land in payment of the debt, alleging that the debt was secure, and that the land taken in compromise for it was of no value.

Depositions were taken going to show that the land was of small value, but failing to show that Morris had made any representations to Mr. Skinner, the agent of Caldwell, as to the value or character of the land taken in payment.

Thomas, as trustee, filed his answer; denying the authority of Caldwell to authorize the compromise; denying that he gave authority to make such compromise as was charged in the bill; denying that he gave any authority after his appointment as trustee; denying the authority of the legislature to authorize Caldwell to make compromise in such case; denying that this was a doubtful debt, or that there was any controversy for compromise; denying that the compromise was made with knowledge on the part of the attorney of the value of the land conveyed; denying that trust fund was bound by such compro-

mise, and denies ratification by Caldwell; averring that the land conveyed was of no value; denying that the conveyance of the land to the bank was, or could be, in any wise binding, and insisting that the complainant has a full and complete remedy at law, and therefore that he has no right to injunction.

The injunction was dissolved and the bill dismissed by Baugh, Judge, at December term, 1854, of the Gallatin Circuit Court.

The complainant appealed.

W. H. UNDERWOOD, and N. L. FREEMAN, for Appellant.

W. THOMAS, *Pro se.*

SCATES, C. J. The offer to except to the amended answer and the depositions came too late at the trial term, when the answer to the depositions had been on file near a year, and especially so, as the exceptions tendered are of a technical character, and the matters excepted to in nowise important in the determination of the equities between the parties. Of like character we regard the exceptions to the former answer, which were disallowed by the court. The defendant may be allowed to state and insist upon principles of law, which his duty as the trustee of a fund requires him to assert for its protection; and for the purpose of showing that he does not waive any right of the *cestui que trust.* So he may state facts explanatory of the transaction, and interpose denials and objections, with a view to require full proofs from complainant, and negative his own acquiesence in the transaction as charged. The defendant is acting as a trustee for others, and is called upon to answer to transactions of a former trustee and his agents; in which he was not personally concerned, and of which he had no personal knowledge. From one thus situated, we cannot exact such disclosures as would be called for from the party to the transaction. The present defendant does not represent the former trustee, but the trust. He has nothing to do with the obligation of his agreements, any further than they bind and are enforcible against the trust fund, and those interested in it; and we therefore recognize it, not only as his right but his duty to protect that interest against all improvident acts which sacrifice or waste it.

We do not think the defence set up in the answer, and insisted on here, that the party having a remedy at law, therefore, has none in equity, sustainable in this case.

The general proposition is true, and has been repeatedly recognized by this court; and has been applied and enforced in a variety of cases. Beard *v.* Foreman et al., Breese 303; Robinson *v.* Chesseldine, 4 Scam. R. 332; State Bank *v.* Stanton

2 Gil. R. 352 ; Woodward et al. *v.* Seely et al., 11 Ill. R. 162 ; Ross *v.* Buchanan et al., 13 Ill. R. 58.

But if the complaint is one of equitable jurisdiction concurrent with a court of law, the court will exercise a sound discretion in assuming it. Mason *v.* Piggott, 11 Ill. R. 89 ; Truett *v.* Wainwright et al., 4 Gil. R. 418 ; and will only refuse when the party not only has a remedy at law, but in which it is clear, complete, and effectual, as in equity. Frazier *v.* Miller, 16 Ill. 50.

The common law courts have the power to correct and prevent abuse of their process—to hear proofs of payment of their judgments—order satisfaction to be entered—and order a return of and quash, executions issued to collect such satisfied judgments. Such motions have been repeatedly entertained, and the power recognized in other cases. Beard *v.* Foreman et al., Breese R. 303 ; Russell *v.* Hugunin et al., 1 Scam. R. 563 ; Robinson *v.* Chesseldine, 4 Scam. R. 332 ; McHenry *v.* Watkins, 12 Ill. R. 233 ; Day et al. *v.* Graham, 1 Gil. R. 435.

Yet notwithstanding this power in courts of law to correct abuses, prevent oppression, and afford redress in many, we might say most, cases, circumstances may exist which require the party, as in the last case cited, to seek his redress in a court of equity ; and in others it is more effectual, and therefore allowed. Truett *v.* Wainwright et al., 4 Gil. 418 ; Frazier *v.* Miller, 16 Ill. R. 50 ; Crawford *v.* Thurmond et al., 3 Leigh R. 87 ; Christie *v.* Bogardus, 1 Barb. Ch. R. 170. (*a*)

The case before us is one peculiarly fit for a court of equity, The character of the fund, a trust, gives jurisdiction in questions arising out of its management and disposition. A court of law might inquire into and enforce bargains made in relation to it, while equity would set them aside as violations of the trust.

Such we regard as the charactor of the transaction before us. The aid of the court is invoked to enforce and carry into effect, by injunction, an agreement to take land in satisfaction of the judgment, which appears to us, under the proofs in the record, as a sacrifice of the interest of the *cestui que trusts* and the trust fund, and a gross violation of the trust.

We have already given our opinion in Thomas, trustee, *v.* Sloo et al., 15 Ill. R. 66, that such an agreement is a violation of the trust, and not authorized or sanctioned by the laws under which the assignees and trustee, are acting. That case came before the court with higher claims to consideration than this, as one assignee had agreed to and made the arrangement and another had formally sactioned it afterwards. Here the arrangement has not been submitted to the approval of the trustee who authorized a settlement of the judgment with land,

(*a*) Cooper *vs*. Mc'Lure, 16 Ill. R. 443.

and has been expressly rejected by his successor, the present defendant.

The former trustee, and those thus dealing with him, seem to have proceeded upon the ground that the power to "make such compromises and settlements as they may deem most advantageous to the said bank," conferred by Section 15, of act of 1845, p. 248, and repeated in the acts of 1851, p. 121, Sec. 4, "to make such compromises as they may deem proper of the debts due the said bank, having a due regard to the rights of the creditors of said bank," would enable and authorize him to make any settlement he might think proper without a power of revision and control, and that all such arrangements can be enforced in law or equity.

This is not the doctrine of courts of equity, more especially in those cases which need and call upon them for aid in their enforcement. The legislature never intended, by these provisions, to overturn all the well settled principles of equity in relation to trustees, and trust estates, and give an unbridled uncontrolled power, without revision. The power was conferred for the benefit of the trust and not of the debtors to it; it was given to secure and collect, not to waste, or diminish, or delay its collection. The power to compromise and settle debts was intended to enable the trustee to secure and collect in cases of doubt, controversy, insolvency, and such like, and not a power to forgive the debt on being paid, or of purchasing property at exorbitant prices in the name of payment. When such compromises and settlements are made, the trustee and parties to them must stand prepared to prove and show, when questioned, not simply that they were made in good faith, but that in good faith and truth they were the best arrangement for the benefit of the trust fund that could have been effected under the circumstances, or at least a fair and reasonable one. So I understand the meaning of these provisions of the statute. While I so understand them, I can never sanction such an arrangement as this, even when made with the most solemn sanction of the trustee, unless it be first approved by the court or the creditors and those interested in the fund. The trustee is not acting for himself but for the creditors and other owners of the fund; he must act for their interest and benefit, and be able to make his acts appear to be fair, and calculated to promote that interest. Where judgment has been rendered for the debt and property amply sufficient to pay it has been levied upon, and in cases where the debt is amply secured by mortgage or otherwise, there is no room for compromise in the sense of abandoning part of the claim or purchasing in payment. Under such circumstances the sinple duty of the trustee is to enforce

the collection and payment of the debt, without resorting to or hazarding speculative bargains. If the trustee were authorized or justified in taking real estate in payment, under circumsstances like these in the record, still we should unhesitatingly disapprove any bargain he might make upon terms so inadequate. The land is proven to be of very little value and unsaleable. The duty of the trustee, and the interest of the credtiors of this fund, alike demanded a sale of the lands levied upon if the debt were not paid. It is not a case in which he was authorized to purchase land in payment, unless compelled to do so to secure the debt by bidding under the execution. We are therefore of opinion that the bill was properly dismissed, with cost and damages. Neither the deed nor money has been accepted by the trustee, being offered in execution of the arrangement. The money would be good payment to that extent, and if the parts of the transaction are separated, the complainant will find ample redress by a motion to the court of law to restrain the collection again of that amount if attempted. There is no ground for a partial decree or injunction on part payment.

Decree is not for as much damage as the statute allows.

Decree affirmed.

EDWARDS H. RIDGWAY, Plaintiff in Error, *v.* ANGUS M. GRANT, Defendant in Error.

ERROR TO JEFFERSON.

After a partnership is settled and a balance is struck, if a surplus remains with one co-partner, he may be liable to the other in an action for money had and received. Until this is done, one co-partner must seek his remedy against the other, by action of account, or by bill in chancery.

THE judgment, complained of in this case, was rendered by BAUGH, Judge, at May term, 1855, of the Jefferson Circuit Court. The facts of the case are stated in the opinion of the court.

R. F. WINGATE, for Plaintiff in Error.

S. S. MARSHALL and R. S. NELSON. for Defendant in Error.

CATON, J. This was an action of covenant, brought by one partner against the other, upon the co-partnership articles, for the recovery of one thousand dollars, the amount of capital stock paid into the concern by the plaintiff. The substance of

the articles of co-partnership is, that the plaintiff should put into the concern one thousand dollars in cash, and that the defendant should put in his stock of goods at one thousand dollars; that the business should be conducted in the name of A. M. Grant, who should be the active and managing partner, and that the name of Ridgway should not be known in the concern; that the co-partnership should continue for one year. The agreement concludes as follows: "The said A. M. Grant is to attend exclusively to the establishment, and at the expiration of the partnership, each party shall draw from the establishment one thousand dollars, as the capital stock in trade, and one-half of the profits accruing therefrom. The parties each and severally bind themselves to continue the partnership for the term of one year, and that the books and accounts, &c., shall be open to the inspection of either party, as long as the firm continues." The breach assigned is, that Grant, at the expiration of the partnership, did not pay to Ridgway the one thousand dollars. To this declaration a demurrer was sustained, which is now assigned for error.

We have no doubt that this demurrer was properly sustained. There is no covenant by either partner to pay the other the capital stock paid in. At the most, the covenant is by both partners, to each individually, that each should be entitled, at the termination of the partnership, to withdraw his capital put in and one-half of the profits realized, and this only upon the supposition that the concern should prove a profitable and not a losing operation. The declaration does not aver that any profits were realized, or even that any of the capital remained. This action is an attempt to make Grant a guarantor to his co-partner that the concern should not at least be a losing one. From the terms of this contract, Grant had as much right to insist that Ridgway should guarantee to him the amount of the capital which he put into the business, as the latter has to maintain this suit.

It is due to creditors that neither should withdraw his capital or profits until their debts are paid, and it is equally the right of each partner, that the assets of the concern should remain intact till all debts were paid and the balance struck. Even if the declaration showed that all debts had been paid, and a surplus exceeding the capital paid in remained, still this action could not be maintained. After a partnership is settled up, and a balance struck, with a surplus remaining in the hands of one partner, he may be liable to his co-partner for money had and received to his use. Till that is done, one partner must seek his remedy against the other, either by action of account or by bill in equity. (*a*)

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

(*a*) Davenport *vs.* Gear, 2 Scam 498 & notes.

MARY NAPPER and others, Plaintiffs in Error, *v.* WILLIAM H. SHORT, Executor, &c., Defendant in Error.

ERROR TO JEFFERSON.

Records from the Circuit Courts should be legibly written and the proceedings be stated in proper consecutive order.

Circuit clerks assuming to discharge the duties of that office without proper qualifications, will be held to the same accountability as if they were qualified, but knowingly neglected their duties.

Heirs, who are made parties to a proceeding for the sale of the land of their ancestor, although personal service of notice of the proceeding is not required to be made upon them, may sue out a writ of error to review such proceeding, but they must sue out the writ in their own names, or by their guardians or next friends, if they are still minors.

The attorney should state in his precipe for a writ of error, the names in full of all the parties to the controversy, and their position in the record.

Pleadings in the Supreme, as in other courts, should be properly entitled in the cause.

THIS case was brought to the Supreme Court by writ of error. At the presentterm, the defendant in error pleaded that more than five years had elapsed between the rendition of the decree complained of and the suing out of this writ of error, and that the right of the plaintiffs in error to maintain their writ did not accrue within five years next before the issuing thereof. To this plea the plaintiff in error replied: first, that Mary Herdman, alias Mary Kirby, wife of William Herdman, Sarah Kirby and Eliza Jane Kirby, were minors under the age of twenty-one years, and still are minors; second, that Sarah Kirby and Eliza Kirby, in their own proper persons come and say, that at the time of the rendition of the decree in the Circuit Court, and at the time of the issuance of the writ of error, they were and still are minors; third, that Mary Herdman, formerly Mary Kirby, was, at the time of the rendition of the decree in the Circuit Court, and the issuing of the writ, a *femme covert*; and fourth, that said Mary Kirby intermarried with William Herdman, was, at the time of the rendition of the judgment in the Circuit Court and at the issuing of the writ of error, a minor, &c. None of these replications were entitled as of any cause, or any term, or of any court. To the several replications a demurrer was filed. The writ of error was issued at the instance of parties described in it, " Mary Napper and others, " and in a judgment between " William H. Short, executor of Lydia Kirby," and the said Mary Napper and others, without any other description of parties.

NELSON and JOHNSON, for Plaintiffs in Error.

D. BAUGH and R. WINGATE, for Defendant in Error.

Caton, J. In order to determine these demurrers, we have had to look through the record and the whole proceedings, and we are constrained to say that they exhibit a looseness and irregularity of practice, which is exceedingly dangerous to the rights of parties, and which cannot be tolerated in this court. In the first place, the record from the Circuit Court is so made up that it is tedious and difficult to understand what it really does contain. Records, to be sent here, should be written in a fair and legible hand, and the record of the case should be inserted in proper and consecutive order. There has been much and just complaint at the bar, during this term, of the imperfect, slovenly and improper manner in which records have been sent up here, and it will be the duty of this court to take the necessary measures to remedy the evil complained of. If clerks will undertake to discharge the duties of an office for which they are not qualified, they must be held to the same accountability as if they were qualified, but knowingly neglected their duties.

The next step in the case is equally defective, and that is the writ of error. The record, so far as we can understand it, was a proceeding by an executor, to sell real estate left by a testator, and was a proceeding in rem., in which the actual parties in interest, that is the heirs of the testator, were not, and were not by the statute required to be, served personally. The summons below was to Mary Napper and Jonathan Ogden, for Mary, Sarah, and Elizabeth Jane Kirby, and was only served on Ogden. A decree was entered for the sale of the estate. It was competent for the heirs to sue out a writ of error to reverse that decree, because the statute has made it binding upon them, although the notice is only served on their guardian. If the heirs wish to reverse the decree, they must bring a writ of error in their own names, and if they are still infants, they must do that by their next friend or guardian, the same as they would commence any other action. Particularly in a case of this kind, where the record does not disclose who the real plaintiffs in error are, the party or attorney, prosecuting the writ, should file a precipe with the clerk of this court, describing, by a full statement of the names of each of the parties to the judgment sought to be reversed, and in whose favor the judgment was rendered, and then directing the clerk of this court to issue the writ in favor of the plaintiffs in error; giving each of their names in full, and against the defendants in error, giving the name of each in full; and, indeed, such would be the proper practice in all cases. Then the clerk could issue his writ without danger of mistake, and insert the names of all the parties, in full, in the writ and in all subsequent orders in the case, which is indispensable to the regularity of the proceedings in this or any other

court. Then, too, the attorney, who ought to do so, would take the responsibility of the regularity of the proceeding.

Now let us see what is the condition of this record, and apply it to the demurrers now under consideration. This writ of error was sued out in the name of "Mary Napper and others." To this writ of error the defendant filed simply a plea, that more than five years had elapsed since the rendition of the decree, when the writ issued. To this plea we find filed, first, a replication entitled "Mary Napper and al. *v.* William A. Sharp," and averring that, at the time the decree was rendered, and until the suing out of the writ of error, "The said Mary Herdman, alias Mary Kirby, wife of the said William Herdman, Sarah Kirby and Eliza Jane Kirby were minors," &c., and signed by the attorney. We then find upon another piece of paper, and without being entitled in any cause, what is designed for another replication by "the said plaintiffs, Sarah Kirby and Eliza J. Kirby, in their own proper persons," and averring their infancy as in the former replication. Then follows another replication, without any title, by "the said plaintiffs, Mary Herdman and William Herdman," averring the coverture of Mary Herdman, formerly Mary Kirby. On the same piece of paper, and still without a title, is another replication by "the said *defendant*, Mary Herdman, formerly Kirby, and William Herdman, her husband," averring the minority of Mary Herdman, at the time of the rendition of the decree and the suing out of the writ. I may here remark that these pleadings are too much interlined and too illegible to pass unnoticed, and that it is expected by this court that papers for its files should be at least plainly written, and not interlined or blotted to any considerable extent.

The statement of the record, which has been given, shows that the replications filed have no application, whatever, to the cause in this court. They are by persons in no way parties to this writ of error, and for that reason, even, the demurrer was not properly filed to them, but they must be stricken from the files as totally inapplicable to the case.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

DECEMBER TERM, 1855, AT SPRINGFIELD.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* ISAAC G. WILSON.

APPLICATION FOR A MANDAMUS.

The grant to a railroad company, to construct a road, with such appendages as may be deemed neessary for the convenient use of the same, will authorize them to acquire land by condemnation for work-shops, &c.—these being necessary appendages.

This power is not exhausted by an apparent completion of the road, if an increase of busines shall demand other appendages, or more room for tracks.

On an application to a judge for the appointment of commissioners to condemn lands, he is compelled to act, if such a case is made as the statute directs. He is rather a ministerial than a judicial officer.(*a*)

THIS application for a mandamus was founded upon a petition to the Honorable I. G. WILSON, Judge of the Thirteenth Judicial Circuit, asking the appointment of commissioners to fix the compensation to be made for appropriating certain lands and lots to the use of the Chicago, Burlington and Quincy Railroad Company, for constructing and maintaining thereon " turn-outs, depots, engine houses, shops and turn-tables."

The Judge denied the petition, for the following reasons: Because the charter of the company did not grant the power to condemn lands for shops; because, if the power ever existed, it has been exhausted, the road having been built and running regularly, and the company having located its line, stations, depots, turn-outs, &c., two or three years since; because the company does not show, by proof, that said lands are necessary or required for the purposes stated; and because the company does not prove,

(*a*) Gillenwater *vs.* M. A. R. R. Co, 13 Ill. R. 2; I. C. R. R. Co. *vs.* Rucker, 14 Ill. R. 353.

nor in any way show, that it has not been able to acquire the lands by purchase.

Judge Wilson agreed, if the court should be of opinion that commissioners should be appointed, to waive the necessity of an alternative mandamus.

This company was incorporated in 1849, under the name of the Aurora Branch Railroad Company.

The other facts necessary to a correct understanding of the case will be found stated in the opinion of the court.

J. F. Joy, for the application.

A. Lincoln and G. Goodrich, *Contra.*

Caton, J. By its charter the railroad company, which is the relator here, was authorized to construct a railroad on the prescribed route, "with such appendages as may be deemed necessary for the convenient use of the same," and to acquire the right of way or title to land necessary therefor. On the 26th of November, 1855, the railroad company, under the law of the 22nd of June, 1852, filed its petition in the office of the clerk of the Circuit Court of Kane county, for the purpose of procuring, by condemnation, the premises described therein, "for the purpose of constructing and maintaining thereon turn-outs, depots, engine houses, shops and turn-tables." In pursuance of notice given as required by the Act, application was made to the Circuit Judge for the appointment of commissioners to appraise the damages which the owners of the premises would sustain, by having them taken by the company, for the purposes stated in the petition. On the hearing, one of the owners of a portion of the land sought to be condemned appeared and resisted the application; and, at his instance, the president of the company was sworn; and stated that the ground was principally sought and needed for the purpose of erecting shops thereon, for the repair of cars and locomotives. After hearing the parties, the Circuit Judge, as he certifies, "denied the application, for the reason, mainly, that under the language of the charter, the company have not the power to condemn the lands for the purpose of erecting shops thereon," and filed the following stipulation: "If, upon the foregoing petition and evidence, the court shall be of opinion that the commissioners should be appointed as asked for, I hereby waive the necessity of an alternative mandamus, and consent that an absolute mandamus be awarded in the first instance."

We think the Circuit Judge misconstrued the language of the charter of the company. It is authorized "to maintain and con-

tinue a railroad, with a single or double track, *and with such appendages as may be deemed necessary for the convenient use of the same.*" We cannot entertain a doubt that shops for the repair of cars and locomotives are appendages necessary, for the convenient use of a railroad.(*a*) In construing both contracts and laws, courts must necessarily apply their general knowledge of the subject matter to which they refer. We know what is a railroad, a car, and a locomotive, and their relative uses, and at least some of the purposes to which they are applied and some of the incidents resulting from their use. To deny that we know that freight houses and depots, that switches, side-tracks, wood yards and water tanks, are necessary appendages to the convenient operation of a railroad, would admit a degree of ignorance which would unfit us for the places we occupy. These are things known to all men in this country, at least, whether skilled or not in that department of business. We know, too, equally well, in common with all of common experience and observation, of what is going on around us, that the rails by use become damaged, and have to be taken up and repaired, and that cars and locomotives are constantly liable to break and become unsafe and unfit for use till repaired; and the means for making such repairs are certainly necessary for the convenient use of the road. It is not a reasonable or satisfactory answer, to say that they may be sent away to the manufactories for repair. While it might be possible to do so, the delay and expense would render it very inconvenient, to say the least, both to the company and the public. It is possible to operate a railroad without depots, for they are not as indispensable as the track or the cars, or the motive power; and yet we do know that all railroad companies provide themselves with depots as fast as practicable; and we have equal knowledge of the fact that all roads provide repair shops as soon as practicable. It would be hard to find a railroad company, in all this country, which has operated a road of any considerable extent for a single year, without erecting for itself shops for the repair of its cars and locomotives. The question is, what did the legislature mean by the word appendages? They certainly meant something connected with and accessory to the road, and not the road itself. We must presume that the law-makers had a general knowledge of what accessories were necessary to the convenient operating of a railroad, and that among these were, almost indispensable, shops for repairing the rolling stock. There can be no doubt that they intended to embrace all such conveniences as would be necessary for the successful conduct of the business of the road, as depots, repairing shops, and the like, under this general designation, without particularly specifying either. The history of this class

(*a*) Low vs. G. & C. U. R. Co., 18 Ill. R. 325.

of our legislation shows that such was the intention and understanding of the legislature. In some railroad charters more, and in some less, of these conveniences are specially authorized, while in others none are particularized; while in all cases, lest some should be omitted, some general expression is used, with the manifest design to cover all that may be found useful and convenient. In many of the former, *shops* are expressly named. Of this legislation, I shall only refer to two cases. The act of the 22d of June, 1852, entitled "An act to amend the law condemning right of way for purposes of internal improvement," is the one under which this petition was filed. Quoting only so much of the first section of that act as is applicable to railroads, it is provided: "That when any" "railroad" "shall have been located by any" "corporation vested with power to take and apply private property in the construction or use of such road," "or for any purpose connected with the same," "such as constructing" "embankments, excavations, spoil-banks, turn-outs, depots, engine houses, *shops*, or turn-tables;" "and the right or title to property required for any such uses or purposes, cannot be acquired by purchase; a petition shall be filed in the clerk's office of the Circuit Court," &c. Now, it is manifest that the legislature here understood shops were necessary *appendages* to the convenient operation of railroads. Again: the same thing is manifest in the general railroad law of 1849, by the third subdivision of the twenty-first section of which, companies organized under that law are authorized "To purchase, and by voluntary grants and donations receive, and by its officers, engineers, and surveyors and agents, enter upon and take possession of and hold, and use all such lands and real estate, and other property as may be necessary, for the construction and maintenance of its railroad and stations, depots, and *other accommodations* necessary to accomplish the object for which the corporation is created, but not until compensation," &c. Here the legislature, has specified few of the objects supposed to be necessary, and embraced the others in the general term, *accommodations*, which a subsequent part of the same law shows was understood and intended to embrace *shops*; for, by the 8th specification of the 28th section, the railroad companies are required to report "The number of engine houses and *shops*, of engines and cars, and their character."

I take this to be simple demonstration that the legislature intended to grant to companies, organized under that act, the right to acquire grounds on which to erect shops, and that too nnder the general designation of *accommodations*. They certainly understand this word to embrace shops, else they were required to report that which they were not authorized to con.

struct and hold, which would be simply absurd. I assume, then, that it will not and cannot be denied that the power was granted to these companies, to acquire grounds on which to erect shops, and if so, then the same law granted to this company the same right, even if it had not been conferred by its original charter, for the last section of that law provides as follows: "All existing railroad corporations, within this State, shall respectively have and possess all the powers and privileges, and be subject to all the duties, liabilities and provisions contained in this act, so far as they shall be applicable to their present conditions, and not inconsistent with their several charters; and all railroad companies, that are now constructing their roads, may acquire titles to lands necessary for that purpose, under the provisions of this act." This company was already in existence, and I presume it will hardly be contended that this provision of the general railroad law, which authorized the erection of shops, was inapplicable to it or inconsistent with its charter. This law, so far as applicable to and not inconsistent with the original charter of this company, became a part of its charter, as well as the several special amendments thereto which have been subsequently passed by the legislature, and which, for the purposes of the present inquiry, it is not necessary to advert to particularly.

We are of opinion that the Circuit Judge was mistaken in his construction of the charter of the company, that it was not authorized to acquire lands by condemnation, for the purpose of constructing shops thereon, and this, too, whether we confine ourselves to the language of the original charter, or look to the provisions of the general railroad law subsequently passed, the provisions of which are made applicable to it.

Having thus settled the question upon which the difficulty arose in the mind of the Circuit Judge, and upon which he refused the application, we might, perhaps, without impropriety, dismiss the subject here, but some other questions were discussed at the bar, which we deem it proper to dispose of now. One of these is, that the road itself having been actually completed and running, the power to condemn land, either for the track of the road, or for depots or other appendages, is exhausted. In this view we cannot concur. It would be a disastrous rule indeed to hold, that a railroad company must, in the first instance, acquire all the grounds it will ever need for its own convenience or the public accommodation. Here, our railroads are built through extensive districts of country, at present almost entirely unimproved, and which now afford no business whatever, but which are as fertile as any in the world, and which, ere many years have elapsed, will probably be peopled with an industrious and prosperous population, affording an immense business to the

roads which pass through them. Probably not one-tenth of the land in the vicinity of this very road is now in cultivation, but no one, acquainted with the subject, can doubt that it is destined, at no distant day, to be brought into as high a state of productiveness as any of the older States. This will increase the population ten-fold, and may reasonably be expected to increase the business of the road in the same ratio, and hence there must be a corresponding increase of the rolling stock to do this increased business, requiring also a greater amount of machine-shops for its repair, as well as an increase of depots and other accessory accommodations. We cannot suppose that it was the intention of the legislature to oblige the company to acquire all the land, in the first instance, which, in any event, it should ever want, to do the largest amount of business it may ever hope to attain. The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility. It may be said that the company should, for the future, depend upon voluntary purchase, having exhausted its power of condemnation, as is supposed. But if its power to condemn is exhausted, then its right to purchase, or acquire in any other way, is also exhausted, for it possesses neither, only as it is granted by its charter, and that gives authority to acquire, by condemnation, whenever it does by voluntary purchase. We are of opinion that the company still has the right to acquire such lands as it may need for the accommodation of its business, from time to time, by the coercive process pointed out by the law.

The remaining objection urged is, that in determining whether such a case was made before him as required the appointment of commissioners, the circuit judge acted judicially, and in such a case we cannot grant a mandamus to require him to reverse his decision. Granting the assumption, and the conclusion legitimately follows. We cannot by mandamus control the judicial action of any inferior tribunal. We can, in such a case, only set it in motion, and require it to act one way or the other, but without determining how it shall act. And so, too, where the inferior tribunal is vested with a discretion in the performance of a duty imposed by the law. We can only compel the performance of the duty, without controlling that discretion or saying how the duty shall be performed. Here the act to be performed by the circuit judge is strictly of a ministerial character, and so it was determined by this court, in the case of The Illinois Central Railroad Company *v.* Rucker, 14 Ill. 153, where a mandamus, in precisely such a case, was awarded by this court. When such a case is made as is required by the statute, the judge has no discretion whether he will appoint commissioners or not.

It is his imperative duty to do so. Necessarily he must look to see whether such a case is presented as authorizes and requires him to act, and such is the case with every officer who is called upon to discharge a ministerial duty. The sheriff, before he makes a deed, must examine and determine whether there was a valid judgment, execution and sale under it A clerk, before he issues an attachment or a capias, must examine and see whether the affidavit, on which the application is made, is such as the law requires, and so of every other ministerial duty which any officer is required to perform, and although, in determining whether the act should be done the officer may have to decide, in his own mind, important legal principles, as is often the case, yet that does not make such decision a judicial act, which can only be reviewed on appeal. Such is not the true test of the judicial character of an act. A distinction was attempted to be drawn between this and other similar duties, from the fact that the adverse party is required to be notified to appear before the judge, at the time of the application for the appointment of the commissioners, and hence it is inferred that he has a right to contest the right of the applicant to have the commissioners appointed. He may undoubtedly show, if he can, that such a case is not presented, as requires the judge to act at all, but the important and substantial purpose for which he is called there is, that he may be heard upon those matters in which the judge may properly exercise a discretion ; that he may see that none but fair and impartial men are appointed commissioners. Beyond this the law has vested no discretion in the officer which it has appointed to make the selection for the parties. If the officer applied to may refuse to appoint them, in one case where the law has been complied with, he may in all cases, although never so clear a case is made out, and as the company has no redress but by mandamus, if his determination is held to be judicial, and not examinable on such an application, it is in the power of any of the various officers to whom this application may be made, to stop the progress of a railroad altogether. Such was never the intention of the legislature.

It is no answer to say that if one officer erroneously refuses to make the appointment, application may be made to another. Granting this to be so, and it is no more the duty of the last to appoint than it was of the first. And there is no more certainty that he will do so, and if there is no remedy against the first refusal, there can be none as to the last, and the party may be left without remedy. It is the duty of each to act when a proper case is made, requiring action. One officer might think that the company is asking too much ground for a depot, or that it has made an injudicious selection, and that a depot is not needed at

the proposed place. Another might be of opinion that the road was injudiciously located, and required it to be changed, before he would appoint the commissioners to enable it to acquire the property. It is possible, it is true, that a company may abuse the trust reposed in it, and seek to acquire property not needed for the purpose of the road or its buisness, but if such objections were listened to, for the purposes of vesting in the various ministerial officers, whose duty it is made to assist in acquiring the necessary property for the use of the road, the right to determine where the road shall be made, or where a depot shall be located, or how much land is wanted for a wood-yard, or where a water tank shall be erected, a far greater evil would result than the one attempted to be avoided. The legislature had a very satisfactory assurance, that the powers granted to these corporations would not be abused by coercing from the citizens more land than was necessary for the legitimate purposes of their roads. The land thus acquired, can only be held and used for specific purposes. They are not authorized to speculate and traffic in the land thus acquired, but can only hold it for the purpose of the railroad and its business accommodations. With this limited right to hold land, it was not to be supposed that any company would be so blind to his own interest as to go to the expense of acquiring land which could be of no use to it. It would have been just as reasonable to have provided in the charter, that the company should not throw away its money in any other useless and aimless mode. It is possible, it is true, that a company might, in disregard of its duty to itself, to the State and to individuals, apply to condemn land which it did not need, and for purposes other than those authorized by the law. When such a case of bad faith, abuse of power and violation of duty occurs, the law will readily find a remedy adequate to the protection of both the public and private rights, but we can see no pretence of such a case here, it being established that the purpose for which this land is sought to be acquired is such as is authorized by the company. Had the judge been correct in his construction of the charter, that the company was not authorized to acquire land for the purposes for which this was sought, then a case had not been presented which required him to act at all, and he would have been justified, and it would have been his duty, to refuse to appoint commisioners. In pursuance of the stipulation filed, a peremptory mandamus must be awarded.

Skinner, J. I do not understand the foregoing opinion as approving the doctrine contended for upon the argument, that

it is the sole province of the corporation to determine *what* property its exigencies require, and that such determination is conclusive upon the courts. Whether the corporation has the right to coerce the condemnation of the property sought to be condemned and taken, or any part thereof, is a question for judicial determination, and never intended by the legislature to be conferred upon the corporation. The appointment of commissioners, by the court or judge, is the inception of the proceeding which is to terminate in final adjudication upon the rights of the parties, and not an adjudication which determines those rights, and in its nature is a ministerial act.

In this view of the case I concur in the opinion of the court.

Mandamus awarded.

THE GREAT WESTERN RAILRROAD COMPANY, Appellant, *v.* ANDREW J. THOMPSON, Appellee.

APPEAL FROM MORGAN.

Railroad companies are not liable for injuries to cattle, unless they be wilfully or maliciously done, or done under circumstances exhibiting gross negligence. These companies are not bound to use the highest possible degree of care to wards animals coming in the way of their trains.

The case of the *Chicago and Mississippi Railroad Company* v. *Patchin,* in 16th Illinois, referred to and approved.

THE appellee sued the appellant, in case, for carlessly and negligently killing his horse. Plea, the general issue.

On the trial, the appellee examined several witnesses, none of whom were present at the time of the casualty, and gave no direct or conclusive testimony in regard to it. One of these witnesses testified, that he was shown the track of the horse that was killed, and if so, the horse, at no time he was running, was more than thirty feet from the track of the railroad.

On the trial, the appellant examined some three or four witnesses, who were on the train at the time of the casualty, who testified: That they were going from Jacksonville to Naples; that the horse first appeared some distance ahead of the train, approaching it at a right angle from the south; that when he came near the road, and without crosssing it, he turned to the left, and ran some distance between a farm and the road, until he came to the timber, and then turned round the corner of the farm in a southern direction, and that they lost sight of him, he going into the timber; that, when the horse first appeared, the

usual expedients, of whistling, to frighten stock away, and application of brakes, to moderate speed, were resorted to; that when, the horse first appeared, they were on a down grade, and so continued until they came to a curve, and at the steepest of the grade, about a culvert, the horse became entangled, and was run over and killed by the train; that, after the horse disappeared in the timber, they had no further apprehension of trouble, until the horse suddenly re-appeared, not far ahead of the train, approaching the road from the south; that, as soon as the horse was discovered so approaching, the brakes were applied; that he sprang on the road a short distance ahead of the train, and, after a jump or two on the track, became entangled in the culvert, and was run over and killed. The witnesses testified that they did all they could, in the management of the train, to prevent the casualty; that it was unavoidable, and that no human power or foresight could have avoided it; that if the engine had been reversed at the time of the re-appearanee of the horse, and the brakes applied, the casualty could not have been avoided.

In behalf of the appellee, the following instructions were given to the jury, which were excepted to by the counsel for appellant:

1st. That if they believe, from the evidence, that the horse of the plaintiff was killed by the railway train of defendant, and that, by the exercise of proper care and diligence, the agents of said company, in charge of said train, might have prevented said killing, the said company are responsible to said plaintiff. for the damage accruing; and they must find for the plaintiff in the amount of the value of the horse so killed.

2nd. That, if they believe from the evidence that the agents of the company, in charge of the train in question, had reasonable cause to apprehend a collision with the horse of the plaintiff, and did not use *all the means* in their power to prevent the damage to the horse, they must find for the plaintiff a verdict in the amount of the value of the horse so killed by said train.

In behalf of the appellant, the following instructions were asked:

1st. That the charge in the plaintiff's declaration is, that his horse was killed by the negligence of the defendant's agents, and that he must prove clearly, to the satisfaction of the jury, and by preponderance of his testimony, that the horse was so killed, before he is entitled to recover in this case.

2nd. That if the jury believe the positive statements of the agents of the defendant, who were present at the transaction, that the killing of the plaintiff's horse was the result of inevitable accident, then the jury must find a verdict for the defendant.

The court gave the first instructions asked for by the appellant, and modified the second instruction that they asked, by striking out the words "the result of inevitable accident," and substituting the words "unavoidable, and that they used all the diligence in their power to prevent it;" to which modification and the instruction as modified, appellant, by his counsel, excepted.

The jury rendered a verdict for the appellee, and the appellant, by his counsel, moved to set aside the same, and to grant a new trial.

The motion for a new trial was overruled, and the appellant excepted.

The errors assigned in the case are:

1st. That the court below erred in giving the several instructions that were asked for by the appellee.

2nd. That the court below erred in modifying the second instruction that was asked for by the appellant.

3rd. That the court below erred in not granting the motion for a new trial.

D. A. Smith, for Appellant.

J. L. McConnel, for Appellee.

Scates, C. J. The instructions given for defendant here, and the modification of plaintiff's second instruction, were erroneous, and for which this judgment must be reversed.

The general doctrine upon the subject of care and neglect, as laid down and applied, between common carriers and passengers and goods under their charge, is not the doctrine applicable to, and which governs circumstances like these.

We gave to this subject a very careful consideration, and a full examination of authorities in the case of The Chicago and Mississippi Railroad Co. *v.* Patchin, 16 Ill. R. 198; and, upon further reflection, are more confirmed in the conviction that the true rule to fix the liability of plaintiffs and establish the rights of defendant in such cases was there suggested. And we must think it would promote the public good if these rights and liabilities were known and understood. (*a*)

A common impression that railroads are under the liabilities of insurance for persons they carry, and for the highest possible degree of care towards all persons and animals consorting about the track and trains, leads to a greater degree of carelessness in others than is compatible with their own safety or the interest of the roads What. could have been done by the company in this case more than is shown to have been done by the record,

(*a*) See C. & M. R. Co. *vs.* Patchen 16 Ill. R. 198, where other cases are noted & post 541; St. L. A. & R. R. *vs.* Linder, 39 Ill. R. 433; T. W. & W. R. R. *vs.* Furguson, 42 Id. 449.

I am at a loss to conjecture, even had they been under the degree of care supposed. If juries will assess damages under such circumstances, parties asking them will only increase their misfortune by adding thereto costs.

There is nothing in the record showing any want of care in the defendant, and to us the plaintiffs appear equally blameless.

Judgment reversed and cause remanded for new trial.

Judgment reversed.

SKINNER, Justice. Not having the record before me for examination, in connection with the foregoing opinion, I do not feel justified to dissent from the judgment of the court reversing the judgment below, but I deem it my duty here to enter my protest against the doctrine that railroad companies in this State are not liable for injuries done by them to stock upon their roads, unless they be willfully and maliciously done, or by such gross negligence as is equivalent thereto.

This I understand to be the rule laid down in the case of The Chicago and Mississippi Railroad Co. *v.* Patchin, referred to and approved in the foregoing opinion. I am aware that recent cases may be found apparently sanctioning this doctrine, especially in those States where by law the owner is a trespasser by permitting his stock to run at large upon the unenclosed grounds of another.

By the settled law of this State stock may lawfully run and range upon unenclosed lands, and I can find no satisfactory reason for distinguishing, in this respect, unenclosed railroads from common highways and open prairies and woodlands. The law must be the same in either case. It cannot be questioned, that for willful and malicious injuries to another's property, and for injuries caused by such negligence as evinces a wanton disregard of consequences, legal liability, *universally* attaches to the party in the wrong and causing the injury. In my opinion the law holds railroad companies to the same degree of care, and liable for the same degree of negligence in case of injuries done by then to stock upon their unenclosed roads, as in case of injuries by individuals to stock upon the common highways and open lands of the State ; and I can sanction no doctrine extending immunity in this respect to railroad companies not common to all.

Persons and corporations must so use their property as to do no *unnecessary* injury to others, and the law is the same in regard to liability in the one case as the other. Nor am I prepared to concede that, in cases like the present, proof of the injury does not *prima facie* establish liability, requiring explanation in discharge of such *prima facie* liability.

Railroad companies are common carriers, and the law is well settled that in case of injury to person or property in the course of their transportation, proof of the injury, or ordinarily accident and injury, presumes the fault of the common carrier, and devolves upon him the burthen of proving the facts in discharge of liability. I am not prepared to admit that this doctrine is not properly applicable to cases of injuries by railroads to stock upon their unenclosed roads. It is a common principle of the law that in actions for injuries to the person or property of another, which, according to the experience of mankind, are usually produced by the wrong of another, proof of the injury presumes the wrong, and the party committing it must prove his justification. Besides, the facts are peculiarly within the knowledge of the company and its servants, and easy of proof by the company. The owner of the stock finds them killed by a train of cars and their carcasses strewn upon the road, but the circumstances attending the killing he ordinarily knows nothing of, nor by whom they can be proved.

The law should afford *substantial* remedies for wrongs, and when men learn that they are not obtainable through the law, there is danger of the worst of evils; the resort to that supposed redress suggested by feelings of passion and revenge.

David A. Smith, Administrator, *et al.*, Appellants, *v.* Murray McConnell *et al.*, Appellees.

APPEAL FROM SCOTT.

The holder of a legal title not in actual possession, cannot, as a general rule, maintain a bill to quiet his title, and compel a relinquishment of adverse claims. Equitable titles, which cannot be enforced at law, may stand differently.

Posthumous children take by descent with the antecedent children or with other heirs.

The heir is owner of the lands of an intestate and the rents and profits derived therefrom, until divested by an order of sale or decree for the purpose of paying debts.

An administrator takes no estate, right, title or interest in reality. He takes only a power.

An administrator cannot in equity obtain relief by the removal of adverse apparent titles to the lands of his intestate, or convert an equitable into a legal title.

The facts of this case, as they appear from the pleadings and proofs, are as follows:

In September, 1837, Jesse McKee conveyed for $450, to McConnell, Vansyckel and Ormsbee, a piece of ground in Naples,

covenanting that he was seized of an indefeasable estate in fee simple, that he had good right to sell, that it was unencumbered, and to warrant and defend the title. In July, 1839, Ormsbee conveyed his interest in the property to McConnell and Vansyckel.

In December, 1837, Jesse McKee for $5,000 conveyed with general warrant, certain Naples property to Delahay and died testate in December, 1838, appointing his brother, Wm. McKee, his executor with power to sell real estate to pay debts, and after payment of debts his property to be equally divided between his widow and nephew, the said Jerome McKee, deceased. Wm. McKee proved the will and qualified as executor.

In July, 1849, McConnell and Vansyckel filed a bill in chancery in the Circuit Court of Scott, alleging the foregoing facts ; that Delahay made a mortgage to one Neice, including one of the items of property conveyed to Delahay as aforesaid, and that was estimated in the conveyance at $150. That the mortgage was assigned to McConnell and Vansyckel and they foreclosed the same and became the purchasers of the same. That at the time Jesse McKee made the aforesaid deeds, he had no title to the items of property above referred to, "and the said McConnell and Vansyckel further aver that said land, at the time said McKee sold the same, belonged to Charles Collins, and to no other person ; and in 1848 the said Charles Collins asserted his right thereto, and said land never having been in the possession of said McKee, but it being a vacant, unimproved tract of land, no actual eviction could occur against said complainants otherwise than in this, the said Collins exercising said right as owner of said land, sold and by deed conveyed the same to Murray McConnell, who is now the owner thereof, having received from the said Collins a conveyance therefor, has taken possession thereof, and thereby evicted said complainants." That covenants in Jesse McKee's deeds have been broken and they have a right to purchase money aud interest out of his estate. That personal estate had been fully administered and that certain items of real estate that are in controversy in this case belonging to said estate, are in the hands and possession of Wm. McKee, as executor. That the widow had married one Sutphen, and they had quit-claimed their interest in the real estate to Jerome McKee, the other devisee, who had died leaving a widow, Isabella McKee, (no child,)his father, the said Wm. McKee, and his brother Samuel McKee, as his heirs at law, against whom the bill was exhibited as defendants. Answer on oath is waived, and the executor is called upon to make discovery as to title and estate of Jesse McKee, deceased. Prayer of bill for sale of the specific items of property in controversy

in this case, or for such other and further relief as complainants were entitled to. Copies of deeds above referred to (excepting deed of Collins to McConnell) are annexed to the bill, as also copy of will of Jesse McKee and probate thereof. *Subpœna ad respondendum* served upon the executor, who did not answer Bill taken *pro confesso v.* him and co-defendants, as non-residents, at appearance term, September, 1849, and decree rendered for sale of property in controversy in this case; advertised and sold by the master in chancery of Scott county, 19th of November, 1849. All sold to McConnell except the sixth item in master' sreport, which was sold to John Abbot for $55. The sale produced twenty-one and one-half cents more than amount of decree, interest and costs. The master reported sales and conveyances to the next term of the court, and his report was approved by the court, and it was ordered by the court that purchasers have immediate possession of the estate sold, and rents and profits from day of sale.

In February, 1853, appellants exhibited their bill, *v.* appellees in the case, stating that Jerome McKee, Sen., died intestate in Ohio, in April, 1849. That at the time of his death, not by descent or devise, but as a purchaser for a valuable consideration, he was seized in fee of the items of real estate in controversy in this case. That McConnell and Vansyckel in July, 1849, on a groundless and unjust claim against the estate of said deceased, as claiming through the estate of Jesse McKee, deceased, filed a bill *v.* Wm. McKee, Isabella McKee, and Samuel McKee, as heirs at law of the said Jerome McKee, deceased, and at the next term of the court obtained a decree by default for sale of said real estate, and that it was sold as alleged in the master's report above referred to. "When in fact and in truth your complainant Jerome McKee, Jr., as a posthumous child of the said deceased, and said Isabella, born 15th November, 1849, at the time of obtaining said decree is, and was to be regarded as, the sole heir at law of said deceased, and as born in the life time of said deceased." That McConnell, bought the 7th item of said real estate for $10 and sold it to Lee for some $300, and that the appellees were in possession of said items of real estate. That David A. Smith was appointed administrator of said deceased in July, 1852, and in December, 1852, obtained order of sale of said real estate to pay debts of said deceased, and that there would probably be left a surplus of said estate after selling enough to pay debts. That it would not be safe or just to execute the order of sale while applelees were in adverse possession of the real estate, claiming title thereto, and if sold under such circumstances would produce little or nothing. That as far as appellees or any of them had claims against the estatte

of Jesse McKee, deceased, they were barred by the statute of limitations and non-claim. Prayer of bill that any claim of the appellees, any or either of them, to sell real estate, be vacated for protection of sale under order and for ultimate benefit of Jerome McKee, junior, as to any surplus not sold, and that appellees give possession of lands when sold, and for general and alternative relief.

John Lee answers that he was purchaser for valuable consideration of Mc Connell of eighty acres of wild land, went into possession of it and improved it, and claims to be re-imbursed for his improvements if his title fails. Relies upon proceedings and decree at suit of McConnell and Vansyckel above referred to—as in full force and a bar to this suit. That Jerome McKee, senior, had no other title or claim to the land in controversy than as devisee of Jesse McKee, deceased. That in the suit of McConnell and Vansyckel to sell the lands, Wm. McKee as executor was the only necessary defendant, and that Jerome McKee, junior, as posthumous child of his father, is bound by the decree in that case—that no such person as the posthumous child was ever heard of until this suit was brought. That Wm. McKee as executor advised and encouraged the institution of the suit of McConnell and Vansyckel, and before it was commenced told the complainants that Jerome McKee had died without child. That Isabella McKee being entitled to dower in the lands, is a necessary party to the suit, and it ought to be dismissed because she is not party. That bill ought to be dismissed for multifariousness, as to parties and objects of the bill. Denies that Smith, as administrator, had authority to file bill to quiet title to the land, or has obtained any proper order to sell land—says that his letters of administration were obtained by fraud—that the whole of the proceedings are fraudulent and void—and makes exhibits of proceedings of County Court of Scott, granting administration to Smith, allowing claims against estate on notice—order of sale of real estate.

McConnell files plea in bar, setting out record and proceedings at suit of himself and Vansyckel above set forth, and saying that the same rights were settled in that case that are songht to be relitigated in this case.

Replication was filed to the foregoing answer and plea.

Vansyckel filed demurrer assigning six causes specially

Stipulation was entered into as to certain facts, April term, 1855, cause to be heard in vacation, and was heard October term, 1855, on same stipulation and four deeds. 1st, Sutphen and wife quit-claim deed to Jerome McKee, 1st of January, 1848. 2nd, Deed of same date, to same, by Wm. McKee, executor, conveying same property described in first deed, in con-

sideration of Jerome McKee making his note at one day's date to Wm. McKee for $2,400, balance due executor from estate of Jesse McKee, deceased. 3rd, Quit-claim deed, July, 1848, McConnell to Jerome McKee for one of the items of property in controversy. 4th, General warranty deed of same date, to same McConnell and Vansyckel and wives for $150 for part of another of the items of property in controversy in this case.

Decree dismisses bill absolutely as to appellant Smith, and without prejudice as to appellant McKee.

Errors assigned by appellants severally:

1st, That court below dismissed bill.

2nd, That court below did not grant relief specifically asked in the bill.

3rd, That court below did not decree account of rents and profits allowing for improvements, if any.

D. A. SMITH, for Appellants.

M. McCONNELL, for Appellees.

SCATES, C. J. The decree should be affirmed. The court have, in Alton Marine and Fire Insurance Co. *v.* Buckmaster et al., 13 Ill. R. 205, sanctioned the doctrine laid down in the Trustees of Louisville *v.* Gray, 1 Litt. R. 147; and Harris *v.* Smith, &c., 2 Dana R. 10, that "the holder of a legal title not in actual possession, cannot, as a general rule, maintain a bill to quiet his title, and to compel a relinquishment of adverse claims." (*a*) Niven *v.* Belknap, 2 John. R. 573. "The reason why the party out of possession cannot maintain such a bill, is, that he may bring an action at law to test his title, which, ordinarily, a party in possession cannot do; such a bill is only entertained by a court of equity, because the party is not in a position to force the holder of, or one claiming to defend under, the adverse title, into a court of law to contest its validity; and this, as a general rule, is the test to which a court of equity will look to determine whether the necessity of the case requires its interference." 13 Ill. R. 205. And the question in 2 Dana R. 10 was regarded as one of jurisdiction.

But the reason of the rule, as thus laid down, is applicable to legal titles in persons out of possession, and would not embrace mere equitable titles, which could not be asserted at law. Though bills may be brought, sometimes, before establishing complainant's rights at law, they are entertained with great caution, even on behalf of persons in possession, when there is no such disturbance of the right or possession as will enable the

(*a*) M'Connel et. *vs.* Smith, 27 Ill. R. 234; Miles et al. *vs.* Danforth, 37 Ill. R. 156; Stout et al. *vs.* Cook, Id. 245; Phelps Admr. *vs.* Funkhouser, et al. 39 Ill. R. 492; As to unoccupied lands, see Laws 1869, p.

party to maintain his action at law. 1 Litt. R. 147. See 1 Atk. R. 284; 2 Atk. R. 484; Prec. Ch. 531.

This case presents no such grounds. The heir is out of possession and the defendants in, and the courts of law are not only open, but competent to try his title, which is a legal one. Upon recovery by him at law, under our statute for bringing ejectments, under which the real title may be put in issue and determined, no apparent ground of equitable jurisdiction or interference would remain, not even in the shape of a cloud, upon the title.

The question involved seems to be one of a simple, naked succession by descent, being cut off by a decree and sale in a proceeding in equity against these alone who would have been heirs of the same intestate, had not this posthumous child been born in due time, together with the executor of the testator, from whom the intestate took by devise.

Our Statute of Wills (Rev. Stat. '45, p. 547, Sec. 54) has expressly provided for such a case, and that they shall take "in all respects as though he, she or they *had been born* in the *lifetime* of the intestate." An analogous statute (10 and 11 Wm. 3, Cap. 16) was passed in England, providing that posthumous children should take estates limited in remainder, under *marriage or other settlement.s*

In Reeve *v.* Long, 1 Atk. R. 227, the House of Lords, reversing the judgment of the Court of King's Bench, held that a posthumous child could take a contingent remainder limited under an executory devise in a will. This case was before the statute of William Third. And tradition gives us a reason for omitting such devises in the statute, that the Lords were unwilling to throw thereby a doubt upon the correctness of their own decision, with which the judges were much dissatisfied, and blamed the judge who tried the cause for suffering a special verdict to be found. Id. Butler's note to Coke Litt. p. 298.

It is said there is no ground for a distinction under the statute between executory devises and marriage and other settlements. Buller Nis. Pri. p. 105; and in Roe *v.* Quartly, 1 Term R. 634, it seems to have been taken for granted that executory devises were within the statute. This case, among others, was cited and approved in Thellusson *v.* Woodford, 11 Ves. Jr. R. 140, and the court sustained an executory devise dependent upon nine lives in being, and the survivor of them. And although it was the manifest intention of the testator to prevent the alienation of the property as long as he could, and provide for an accumulation of rents and profits during the same period, yet, as much as the law abhors perpetuities—and judges set their faces against

them—it was held that the period of gestation might be counted as a life, in being both at the beginning and the end of the nine lives; thus doubling the period of gestation, and treating each child *en ventre sa mere*, at the beginning and at the end of the lives, upon which the executory limitation depended for vesting, as a life in being, sufficient to sustain it. Many decisions are reviewed in it, and all of which fully sustain the position that such a posthumous child is not only capable of taking himself, but is such a life in being as will support a contingent remainder under an executory devise by will, and a contingent remainder limited by marriage or other settlements. See Love *v.* Wynham, 1 Mod. R. 50; Scatterwood *v.* Edge, 1 Salk. 229; Humberton *v.* Humberton, 1 P. Wms. R. 332; Sheffield *v.*Lord Orrery, 3 Atk. R. 282; Gurnall *v.* Wood, Willes R. 211; Robinson *v.* Hardcastle, 2 Bro . C.C. 30; Loddington *v.* Kime, 1 Ld. Raym. R. 207; Northey *v* Strange, 1 P. Wms. R. 340; Burdet *v.* Hopegood, id. 486; Beale *v* Beale, id 244; Wallace *v.* Hodgson, 2 Atk. R. 117; Basset *v* Basset, Atk. R. 203; Gulliver *v.* Wicket, 3 Wils. R. 105; Doe *v.* Lancashire, 5 Term R. 49; Doe *v.* Clarke, 2 H. Black R. 399; Long *v.* Blackall, 3 Term R. 486; 7 Term R. 100; Harrison *v.* Harrison, stated from register book, 4 Ves. Jr. R. 338.

It is said in 11 Ves. Jr. R. 140, by Baron Macdonald, arguendo, that the rule is otherwise in case of descent, and which is strongly implied by our statute as amendatory of the common law; yet, whether we could or not derive the rule from the common law, which held it criminal to destroy such a life, we have it expressly given by statute, and the minor plaintiff falls clearly within it. The same rule was sustained as to devises in New York, without a statute. Stedfast *v.* Nicoll, 3 John. Cas. 18. The American law is so summed up by Mr. Hilliard, both by decent and limitations. 1 Hilliard on Real Prop., Cap. 45, p. 521. See 4 Kent Com. 248.

It had been held repeatedly by this court that the lands of one dying intestate descend to the heir; and although it is subject to the payment of debts, and may afterwards be divested by decree and sale of the administrator, the heir is nevertheless owner and entitled to the rents and profits in the meantime. The administrator, therefore, takes neither an estate, title or interest in the reality; not even so much as to make judgments for debts against the estate absolutely binding by privity, as against the heir and the land on an application to sell to pay the debts. Stone et al. *v.* Wood, adm'r, 16 Ill. R. 177. (*a*)The administrator,therefore, takes a power, and not an interest. No argument supported by analogy to settled principles, and no authority or decision was shown, which would enable an administrator to sub-

(*a*) M' Connel et al. *vs.*Smith, et al. 39 Ill. R. 282, and cases cited; also 39 Ill. R. 405 and cases cited. Handbury *vs.* Doolittle, 38 Id. 203.

port any possessory or real action, in law or equity, for the recovery or maintenance of possessi on or title; or to clear up and vindicate title from clouds from adverse claims.

A very forcible argument was offered to show how beneficial it might be to so change the law as to allow administrators to do so, for the purpose of preventing sacrifices by selling under such circumstances of suspicion upon the title, since they have power to dispose of the whole fee. The object is a worthy and meritorious one, well calculated to promote the interests of both creditors and heirs. And had the heir filed his bill to enjoin a sale by the administrator at a sacrifice, until he could remove such depreciating influences with a *bona fide* offer, with convenient speed to do so, a much stronger ground for equitable interposition would have been presented. The law dose not afford redress, literally, as broad as its theory and maxims. Every possible damnification is not a legal injury. So it was held in Burnap *v.* Dennis, 3 Scam. R. 478, that where a public sale of personalty by an administrator was prevented by threats to prosecute and litigate with any person who should purchase, no action was maitainable. The doctrine of slander of title does not embrace personalty, and administrators cannot maintain such action in respect of the reality. I am of opinion that an administrators' rights and powers in this respect are no broader than his duties; and they are limited to the sale of the title and estate of the intestate and the due administration of the proceeds.

Decree affirmed.

SKINNER, J. I do not assent to the doctrine that an administrator whose duty it may be, for want of personal estate, to sell under authority of law the real estate of his intestate to pay debts, cannot in equity obtain relief by the removal of adverse *apparent* titles, or by the conversion of an equitable into a legal title. This may be, and often is, necessary to avoid sacrifice of the estate; and to deny it, would often defeat the very object of the sale—the conversion of the estate at its full value into money for the payment of debts.

I concur in affirming the decree.

OLIVER W. BROWNING, Plaintiff in Error, *v.* THE CITY OF SPRINGFIELD, Defendant in Error.

ERROR TO SANGAMON.

An action for damages resulting from negligence will lie against a municipal corporation, if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform this duty. (*a*)

BROWNING brought his action in damages against the City of Springfield, alleging that it was the duty of the city to keep a certain street in repair, which duty had been neglected in consequence thereof he had fallen and broken his leg. To this action the city interposed a demurrer. The demurrer by consent was sustained by DAVIS, Judge, presiding, at November term, 1850, of the Sangamon Circuit Court.

LINCOLN and HERNDON, for Plaintiff in Error.

STAURT and EDWARDS, and W. J. BLACK, for Defendant in Error.

SCATES, C. J. The case is one for negligence in not repairing the street; and may be distinguishable from a case for carleessness, negligence or unskillfulness in the manner of doing work, or making repairs. Parties might be liable civilly for private damage for the latter, who were not so liable for the former. Corporations like individuals are liable for the negligent, unskillful acts of their servants and agents, in the performance of their work in such manner as to injure the property of others. *Sicutere tuo n on alienas laedas*, is applicable to all, and should afford practical redress against a certain class of injuries to others, arising from the manner in which we enjoy and exercise our rights over our own property. It is broadly laid down and applied in The Mayor, &c., New York *v.* Bailey, 2 Denio R. 439, for the unskillfull and insufficient manner of building the dam on Croton river, for the water-works of the city, though the city had a discretion whether the dam should be built. Mc Combs *v.* The Town Council of Akron, 15 Ohio R. 474, held a still broader rule and fixed the liability for an injury to a house from grading a street, where there was neither negligence or malice.

The case of Russell er al. *v.* The Men dwelling in the County of Devon, 2 Term R. 671, has settled that the inhabitants of a county are not liable to a civil action for injuries occasioned by want of repairs of a bridge; although the county was required

(*a*) Scammon et al. *vs*. the City of Chicago, 25 Ill. R. 424; Clayburgh vs. the City of Chicago, Id. 535; City of Joliet vs. Verley, 35 Ill. R. 58; City of Bloomington *vs*. Bay, 42 Ill. R. 507; City of Chicago vs. Powers, Id. 169; City of Chicago *vs*. Robbins, 2 Black, (U. S. Supreme Court,) 418.

to make the repairs. And it was put upon the footing that the common law afforded no remedy in such a case.

This has since been extended by decisions in this county to counties, overseers of highways, commissioners of highways, and towns, and the case of Russel et al. *v.* The Men of Devon, has been invariably referred to to show there was no civil remedy at the common law. Mower *v.* Leicester, 9 Mass. R. 250; Riddle *v.* The Proprietors of Locks and Canals on Marrimack River, 7 Mass R. 169; Farnum *v.* The Town of Concord, 2 N. Hamp. R. 392; Hedges *v.* The County of Madison, 1 Gill. R. 568; Bartlett *v.* Crozier, 17 John. R. 446; Morey *v.* The Town of Newfane, 8 Barb. S. C. R. 646.

These decisions are doubtless all correct, but the reason upon which they are founded, is not to be found in the case of Russell et al. *v.* The Men of Devon. As a general rule at the common law the counties were charged with the duty of repairing highways and bridges, unless other parishes, boroughs, or corporate bodies were liable by prescription or statute. The People ex rel. Hoes et al. *v.* Canal Trustees, 14 Ill. R. 402. But this liability with us is one of imperfect obligation, because the duty is not absolute, nor the means of performing it unlimited: The county, to a great extent, exercises a discretion in building and repairing bridges, and in opening and discontinuing highways. *Ibedem.* Besides a want of perfect and full powers, in counties, supervisors and other public officers charged with these duties, adequate to raise the necessary means, and a discretion to judge of the time, place, manner and amount required, they are corporations or *quasi* corporations, and officers involuntarily charged with duties appertaining alone to the public; and exercise subordinate ministerial functions in the discharge of fixed and prescribed duties. They are criminally liable for neglect, by information or indictment, to fine; and to this only to the extent of the means placed under their control. Bartlett *v.* Crozier, 17 John. R. 438; The People *v.* Adsit et al., 2 Hill R. 619; People *v.* Commissioners of Highways of Hudson, 7 Wend. 474; Morey *v.* The Town of Newfane, 8 Barb, S. C. R. 646; Barker *v.* Loomis, 6 Hill R. 464; Lynn *v.* Adams, 2 Carter R. 143. While this obligation is perfect with respect to the duty prescribed, and the liability criminally is reciprocal for its breach, yet in the sense and view of a private civil remedy by suit for damages for its neglect, its obligation is imperfect upon these mere public agents or officers, whenever the power and means are wanting, and the duty is not clear, specific and complete. I speak of non-feasance, for there might be liability for malfeasance, when none would arise civilly for neglect. But this class of public agents, and this class of powers, and duties, are not

to be confounded with another, whether individual or corporate, possessing ample and full powers and means, and charged with a full, specific and complete duty. Such are liable for injuries arising from omissions of duty, and, like individuals, for a careless, negligent and unskillful performance.

This shows the true distinction between the two classes of cases: where the duty is clear, specific and complete, but where the means may not be adequate, and those cases where both are complete. In the former the obligation is imperfect,—that is, there is no civil liability; in the latter there is a perfect obligation and a civil liability for neglect in all cases of special private damage.

A short review of cases of this latter class may clear the subject of apparent difficulty by confounding them. By immemorial usage the corporation of Lyme Regis were bound to repair a certain creek, for the want of which Turner was compelled "to carry his corn round about," without alleging other special damages. Held, that the action would lie; "it might be the very condition and terms of their creation and charter. The Mayor of Lyme *v.* Turner, Cowp. R. 86. In The Mayor of Lyme Regis *v.* Henley, 1 Bingh. N. C. 222, (27 Eng. C. L. R. 366) in the House of Lords, special damages were laid. The action was sustained upon the ground that the charter imposed the duty of repairing the buildings, banks, sea shores, and all other mounds and ditches, the pier-quay or the cob, &c. Certain farm rents due from the corporation were remitted; liberty to dig stone, and other means of performing the duties enjoined, were conferred upon the corporation.

Park, J., in delivering the opinion of the Judges, lays down certain predicates which test the question, and when they all exist the civil action will lie:

First, It must appear that the corporation is under a legal obligation to repair the place in question;

Second, That such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair;

Third, That the place is out of repair; and lastly, that the plaintiff has sustained some peculiar damages beyond the rest of the subjects.

The doubt arose upon the first and second requisites. The duty to repair arose as a condition of the Charter with the privileges and means conferred, and which were accepted. Upon the same principle in Hutson *v.* The City of New York, 5 Sandf. R. 296, the city was held liable for damages occasioned by the non-repair of a street; and in construing the 175th Section of the general act relating to the city of New York, a

phraseology merely permissive was held to be peremptory in imposing the duty of repair. The Mayor, &c., New York, *v.* Furze, 3 Hill R. 612.

This was applied to the negligence of persons employed by the officers of the corporation in repairing sewers, in Llyod *v.* The Mayor, &c., City of N York, 1 Selden R. 369. And again in Pennsylvania, in Pittsburgh City *v.* Grier, 22 Penn. State R. 63, for allowing pig iron to lie on the wharf, contrary to their own ordinances, by means of which a steamer was lost. The city of Madison was made liable for damages done a tanyard, &c., by the negligence or unskillfulness of agents of the city in the construction of a culvert and embankmeut across a certain run or brook in the public street. Ross *v.* The City of Madison, 1 Carter R. 281. McCombs *v.* Town Council of Akron, 15 Ohio R. 474, is another and strong instance of liability for work done in a negligent manner. In Massachusetts, Maine, Vermont and New Hampshire express provision is made by statute for a recovery of civil damages. Farnum *v.* The Town of Concord, 2 N. Hamp. R. 392 ; Brady *v.* The City of Lowell, 3 Cush. R. 124 ; Mower *v.* Leicester, 9. Mass. R. 250 ; Cobb *v.* Standish, 14 Maine R. 198 ; Johnson *v.* Whitefield, 18 Maine R. 286 ; Rice *v.* Montpelier, 19 Vermont R. 474 ; Baxter *v.* Wenooski Turnpike Co., 22 Vermont R. 121. It is true that in this last case, and in Mower *v.* Leicester, above, the courts say that no action lay at common law, but both vouch, Russell et al. *v.* The Men of Devon, which does not support that position, but only decides that the action will not lie against the inhabitants of the county. The argument of the court in that case shows that the action did not lie, and would not against the county itself, had it been a corporation capable of being sued. But the reason for it does not appear to be so much the want of a statutory provision as the existence of facts showing the county possessed of powers and means, and expressly requiring the specific duty; as was shown against the corporation of Lyme Regis, and in the several cases against the city of New York, all of which were cases of mere neglect to repair ; as was also the case of the mayor of Lyme Regis. The simple deduction which may be drawn from the cases, is, that where a specific duty to repair is fully and completely enjoined, and full and adequate powers and means are provided or put within the power of the person or corporation to provide, the obligation is perfect, and liability for neglect is reciprocal for the special damages occasioned by it. The same rule is adopted in Alabama and Florida. 24 Alab. R. 112 ; 3 Florida R. 19.

Apply these principles to the case before us. We judicially

notice the public charter of the city and its provsions, and in them we find the duty imposed as a matter of public law, as alleged in the declaration. Acts, 1839, p. 9, Art. 5, Secs 9, 10. In the same article power is given to levy a tax of one-half per cent. per annum on all taxable property in the city, (Sec. 1;) to license and tax auctioneers and other dealers, (Sec. 17,) hacks, carriages, &c., (Sec. 18,) tippling houses, (Sec. 21;) to impose fines, &c., (Sec. 34,) with various other powers usually granted to cities, including that of condemning private property for public use, in opening, widening, or altering streets, lanes, avenues and alleys, (Art. 7, Sec. 1,) and a power to tax owners of lots for grading and paving sidewalks, and lighting streets, &c. (Sec. 6.)

All public property of the city is vested in the corporation, with power to cause all male inhabitants of twenty-one years to work three days on the streets. (Art. 8, Sec. 2.) And in addition, the inhabitants are exempted from work on roads outside the city limits, and from taxes for that purpose, and from all county tax on personalty. The city is required to support its paupers, and pay the court and jail expenses of those committing crime within the city.

Here is a specific, full and complete, duty imposed, with powers adequate to discharge it, and means that appear ample to its accomplishment in labor, taxes, fines, &c. An indictment would surely lie for neglect. The non-repair is fully averred, so also are the injury and damage.

Under the strictest rules laid down in this class of cases, this seems clearly to fall within them, and fix the liability of defendant for the injury occasioned by its neglect.

Nor do I perceive that this is in any degree in conflict with the principles and cases which are put upon the principles of the common law in its application to public corporations and public officers solely charged with the execution of part of the details of the law in relation to highways and bridges. Here valuable privileges are granted, with ample resources of labor taxes and fines, with powers to enforce the labor and payments, and exemptions granted from other onerous burthens.

All these considered together exceed the apparant powers and means given to the corporation of Lyme Regis. And I can see no apparent reason for a greater limitations of its liability than was fixed in that case under like circumstances. The duty is also as clear, the power as ample, and the means as ample, apparently, as in the cases against the city of New York. Why the redress and remidies should not be as ample and extensive, both public and private, for the protection of citizens

and others against the negligence of this city as those other cities mentioned, I am unable to discover.

With such lights for our guide, and such authorities for our sanction, we not only feel authorized but required to afford the protection sought. And more especially as we think the decisions based upon sound sense in accordance with strict morality, and keeping pace with the progress of the improvements of the age.

Judgment reversed and cause remanded with leave to defendant to plead.

Judgment reversed.

CHARITY JENNINGS *et al.*, Appellants, *v.* JOHN L. MCCONNEL *et al.*, Appellees.

APPEAL FROM MORGAN.

In matters of gift or contract between client and attorney, the greatest fairness is exacted, and the burthen of proof, as to the rectitude of the transaction, is on the latter; and upon failure to make proof, equity treats it as one of constructive fraud.

Where real estate is conveyed to an attorney, to save him harmless, as against his liability as bail, without an intention to sell, an actual sale by the attorney will not change the character of the proceeds; but these will descend to the heirs, and do not go to the administrator.

A court of equity has general powers over estates, administration, &c.

A BOND for costs was prefixed to the bill in this case, which was filed the 5th of October, 1854, stating that William A. Jennings was prosecuted for larceny in said county, in December, 1852, and was committed to jail because he could not give the bail required of him; that while in costody, he applied to the appellees for professional advice and assistance; that they applied to the Supreme Court, on *habeas corpus*, and bail was reduced to $500, and that was all the service they rendered him, as far as the appellants know; that in contemplation of said McConnel becoming his bail, and to indemnify him as such, said Jennings and his wife (the complainant, said Charity) by an absolute deed, for ostensible consideration of $500, conveyed in fee simple, to said McConnel, a tract of land worth from $700 to $1,000 and, about the same time, to secure to the appellees proper compensation for their professional services, placed in their hands effects worth from $200 to $300, and that the land and other effects were worth at least $1000; that the said Jennings, with said McConnel as bail, entered into recognizance, 11th of January, 1853, for Jennings' appearance at March term

of Morgan Circuit Court in penalty of $500, which was forfeited that *scire facias* was issued on the same and served on McConnel, 4th Aug., 1853, returnable to next October term of said court; that on 16th Aug., 1853, before he was damnified as bail, and without the knowledge and consent of said Jennings, McConnel and wife, at the sacrificing price of $500, cash in hand, sold and conveyed the land in fee simple to a purchaser, without notice; that the said Jennings died at New Orleans, intestate, 21st Aug., 1853, without any other estate than that herein before referred to, him surviving his widow and children, complainants, sole heir and distributees of his estate; that he owed no debts at the time of his death, and no administration had been granted on his estate, and that it was not likely that there would be, until the establishment of the rights of complainants, when the court could suggest to the County Court of Morgan, any trustworthy person to administer; that McConnel, at the October term, 1853, of the Circuit Court of Morgan, pleaded, to the said *scire facias*, the death of said Jennings, and was discharged and exonerated of record from his recognizance; that complainants, being in circumstances of abject poverty, had applied, through one of their solicitors, to McConnel, for a fair settlement and adjustment of premises, and that he refused any settlement; that they were willing that just and liberal allowance should be made to the defendants for all that they were entitled to, and insist that the defendants, on principles of trust and fair account, ought to be holden to respond for any surplus in their hands, or in the hands of either of them. estimating the tract of land at its full and fair value.

The bill prayed that, on the hearing of the cause the defendants should be decreed to pay into court whatever balance they, or either of them, justly and equitably might owe in the premises, to be disposed of, in due course of administration of the estate of the said William A. Jennings, deceased, or for such other and further relief as they may be entitled to.

English filed answer admitting and denying some of the allegations of the bill. McConnel filed motion to dismiss for want of proper security for costs, as also a demurrer. Cause was submitted at March term. At June term, 1855, motion to dismiss allowed, demurrer sustained and bill dismissed. WOODSON, Judge, presided.

Errors assigned — The sustaining of the demurrer and the dismissal of the bill.

SMITH and MORRISON, for Appellants.

M. MCCONNEL, for Appellees.

Scates, C. J. The bill set forth facts which give the Court of Chancery jurisdiction on two different grounds of subject matter. In the relation of client and attorney or solicitor, there is that confidence reposed in the latter which gives rise to very strong influences over the actions, rights and interests of the former, Hence the law, with a wise providence, not only watches over all the transactions of parties in this relation, but often interposes to declare transactions void, which, between other persons, would be good. And this is applicable to contracts or gifts generally, while the confidential relation continues, and is not confined to particular property about which the attorney may have been employed. It is not required that a client should establish fraud or imposition—the *onus* of proof—upon showing the relation when the contract or gift was made, is upon the attorney to show fairness, adequacy and equity ; and upon failure to make proof, courts of equity treat the case as one of constructive fraud. The higest degree of good faith and fairness is expected, and exacted. Story Equ. Jurisp., Secs. 310 to 313 and notes, contains a general and correct summary of the law of this relation. The demurrer here admits the employment, as attorney, the conveyance absolute in fact, but as a security of indemnification, and that the liability has been released without damage ; and yet the property has been sold in violation of the object for which it was conveyed. And now the attorney refuses any account.

Again : a second ground of equity jurisdiction is the general power of courts of equity in matters of administration, concurrent with the county courts in many respects, and to a larger extent in general, as embracing trusts, equitable assets, marshaling assets, and especialy in matters regarding the reality, matters of discovery, fraud, and in the payment of legacies and distribution of the surplus. Story Eq. Jurisp., Secs. 530 to 545.

County courts have ample powers to carry out the ordinary matters of administration and settlement, but will find none to reach the equitable features of trust in relation to the condition of this reality, nor of the equitable relation between the defendants and the intestate. The parties in interest will find that relief to which they are entitled in a court of equity.

The allegations of this bill show that there was no intention of selling this land, or converting it into personality, except upon a contingency, which has not happened ; that was the necessity to save defendant, demurrant, harmless as bail. The actual sale, contrary to that intention, will not change the character of the proceeds. They will be regarded still as reality, and as such descend to the heirs, and do not go to the administrator, except upon petition and decree for payment of debts. The heir and

widow are therefore the proper persons to sue, and it needs no administration to reach this question.

The court will, upon taking jurisdiction of the transaction, investigate and decree upon the whole, embracing the personalty, and, if need be, subject it to a due course of administration. The suggestion that there are no debts and no other estate, might deserve the serious consideration of this court for its interference, were there no other ground for coming here instead of the county court for administrations. But the jurisdiction in this case does not depend upon the general powers of the court to overstep an administration, and we waive its discussion and determination, The defendant, demurrant, should have answered or pleaded to the merits.

There appears to be a full answer from the other defendant, English. But the cause seems to have been dismissed generally, on the demurrer or motion, for want of cost bond, without any determination or even investigation on the issue tendered by the bill and answer. Complainants were not allowed opportunity for issue and proofs.

The decree is therefore erroneous as to both; for issues should have been formed and tried, and, if warranted by the evidence, the account directed.

Decree will be reversed and cause remanded.

Decree reversed.

GEORGE W. TURLEY *et al.*, Plaintiffs in Error, *v.* THE COUNTY OF LOGAN, Defendant in Error.

ERROR TO LOGAN.

The act of the General Assembly, which declares that a county seat shall not be changed, unless upon a petition of a majority of the voters, is merely advisory and does not deprive the legislature of the right so to do without petition.

That a law appears on the statute book, properly signed, is not conclusive that it was passed by a constitutional vote; this may be tested by the journals.

The same legislature which passed a law, may correct its journals, at the same or a subsequent session, so as to make the truth appear: and this shows that a law received the proper note for its passage.

Costs must depend not upon the merits of a case as it was presented, but as it appeared at the final hearing.

AT the session of the General Assembly of 1853, an act passed the legislature, for the removal of the seat of justice of Logan county, by a vote of the people.

In the fall after, the vote was taken, and resulted in favor of the removal.

The complainants filed their bill to restrain the county officers from erecting county buildings at the new location, on the ground that, as appeared by the journal, the act had not been read in the House of Representatives the full number of times required by the constitution ; and so was no law.

The injunction, in the first instance, was allowed.

Afterwards and in Feb. 1854, the same legislature met in extra session, and, on the recollection of members, and by the manuscript minutes of the clerk of the House of Representatives, amended its journal, so that it showed the bill, or act, had been read the requisite number of times.

At the ensuing term of court, the defendants filed their answer, averring that the bill had in fact been read the requisite number of times, and also averring the amendment of the journal as aforesaid, and thereon moved the court to dissolve the injunction.

On the hearing of the motion, the defendants proved the amendment of the journal as aforesaid.

The complainants offered no evidence. The court dissolved the injunction.

Afterwards complainants filed replication, the parties submitted the case to the court for final hearing without further pleading or proof, the proof made by the defendants on the motion to dissolve, to be considered by the court.

The court at September term, 1854, DAVIS, Judge, presiding, dismissed the bill, saying nothing about costs.

Complainants below have brought error.

J. T. STUART, for Plaintiffs in Error.

A. LINCOLN, for Defendant in Error.

SCATES, C. J. The only suggestion of a ground of equitable interference is dependent upon the fact stated, that the act of Feb. 14, 1853, for the removal of the county seat, &c., was not constitutionally enacted, and did not in fact become a law , it not having been read on three several days, nor such readings dispensed with, as is required by Sec. 23, Article 3, of the Constitution ; and that in fact it was but once read. The additional fact is alleged that there was no petition by the citizens of the county, praying for an act for the removal of the county seat, as provided by law. Rev. Stat. 1845, p. 411, Chap. 82.

This latter act is merely directory and advisory, and cannot abnegate or abolish the power of subsequent legislatures, who

may in their discretion legislate without petition, and such legislation, will be an implied repeal of that law, in every such instance. The provision of the constitution is mandatory. But when the number of readings are shown and on the same day, a strong and *prima facie* implication arises, that the legislature deemed it expedient to dispense with the rule fixing several days for the several readings.

The signatures of the speakers and governors are presumptive evidence of the passage of the law. The journals should show the readings, and the passage of the law by a constitutional vote. The printed statute book is not conclusive of the fact. The journals may be examined. Spangler *v.* Jacoby, 14 Ill. R. 297. (*a*)

But while the absence of facts in the journals may rebut the presumptions raised by the signatures of the proper officers, and the publication of the act as a law, still we cannot doubt the power of the same legislature, at the same, or a subsequent session, to correct its own journals, by amendments which show the true facts as they actually occurred, when they are satisfied that by neglect or design the truth has been omitted, or suppressed.

This was done at the second session of the same General Assembly, and the journal was made to conform to the facts as shown by the original minutes of the clerk of the House.

The plaintiffs filed their bill upon the *prima facie* case presented by the absence of the fact in the journal. We cannot however, dispose of the costs—which is really the only question left in the record, a subsequent act of the legislature having settled the main ground—by the apparent, but must decree them upon the true ground made apparent at the final hearing.

In a recent case before the Supreme Court of Missouri, on a mandamus to the Governor, the question involved the passage of a law in relation to the Pacific Railroad of that State, and in which the court refused to look to the journals, but received the signatures of the proper officers, and the publication of the act as conclusive.

We have no doubt of the correctness of this opinion under their constitution and upon general principle, but the provision of our constitution is special, and may no more be disregarded, than any other provision in it, restrictive of legislative power.

Decree affirmed with costs.

Skinner, J. I do not deem it necessary upon this record to decide upon the effect upon acts of the General Assembly, duly

(*a*) M'Connel et al. *vs.* Smith et al. 39 Ill. R. 282, and cases cited ;also 39 Ill. R. 405, and cases cited. Handbury *vs.* Doolittle, 38 Id. 203.

authenticated by the signatures of the presiding officers of the respective houses and the approval of the Governor, of the absence of evidence in the journal as of their *regular* passage ; and upon this point I reserve my opinion.

Decree affirmed.

EDWARD M. PHILLIPS *et al.*, Appellants, *v.* DANIEL F. COFFEE, Appellee.

APPEAL FROM PIKE.

A purchaser at sheriff's sale, who is not a party to the proceedings, having a good deed, will not be defeated in his title by any defect or irregularity ; he relies upon the judgment, levy and deed ; all other questions are between the parties to the judgment and officer.
Such a purchaser has nothing to do with the return of the officer to the execution,
A misrecital of the judgment in the deed will not destroy the title.
A stranger to the proceedings cannot collaterally question the regularity of them.
Where an instrument made by a corporation is duly executed by one having authority, the seal affixed will be presumed to be the proper seal, unless the contrary is shown,

DECLARATION in ejectment by Appellee *versus* Appellants. Plea, not guilty.

September term, 1855 : tried before a jury on said issue. Verdict for appellee :—that he is owner in fee of S. E. 10 acres of N. E. S. W. 26, Town. 4 S., R. 3 W., in Pike county, Illinois, part of premises described in declaration ; that appellants are guilty of unlawfully, &c. Motion for new trial made, on account of admission of improper testimony, and overruled. Bill of exceptions taken ; appeal prayed for and perfected.

Bill of exceptions shows, that Nathan Phillips, on the 29th January, 1833, entered at U. S. land office at Quincy, N. E . S. W. 26, Town. 4 S., 3 W.

Appellee then offered in evidence a certified copy of a record of a judgment in the Morgan Circuit Court, in which the State Bank of Illinois was plaintiff, and Andrew Phillips, Ezra F. Benson, Nathan Phillips and Thomas M. Phillips were defendants.

Judgment rendered in said cause *versus* Nathan Phillips, at March term, 1840, for two hundred and forty-nine dollars and eight cents and costs, and *sci. fa.* for the other defendants.

Also, certified copy of an execution issued from said Morf gan Circuit Court to the sheriff of Pike, dated 10th day o-

April, 1840, commanding sheriff to make \$249.08 damages, and \$7.12 costs, on which is the following return:

"By virtue of this execution, I did levy on the following described real estate, viz.: the north-east qr. of the south-west of Sec. 26, 4 S., 3 W., and pt. of the E. half of the north-west qr. of Sec. 26, 4 S., 3 W., containing in all one hundred and eight acres, more or less.

"By virtue of this execution I offered the above described property, but did not sell for want of bidders, on the sixth day of June, 1840.

JAMES M. SEELY, SHERIFF.
By S. E LOVE, Deputy.

I this day return this execution satisfied in full, by sale of the above described property, this July 11, 1840.

JAMES M. SEELY. SHERIFF.
By S. E. LOVE, Deputy.

Also, a sheriff's deed to State Bank of Illinois, dated 21st July, 1842, for above premises, reciting a judgment of Circuit Court of Morgan county, in favor said Bank *versus* Nathan Phillips, for two hundred and forty-nine dollars and *eighteen* cents, at March term, 1840.

Also, a deed of assignment from State Bank to Manly, Ridgely and Calhoun, dated 31st October, 1848, of all lands and lots, &c., belonging to the bank. Deed is signed Thomas Mather, President, and purports to be under seal of bank.

The deed is not acknowledged, and no proof was made that the seal was the seal of the bank. The signature of Mather was proved, and it was also proved that he was president of the bank at date of deed.

Also, a certificate of A. Starne, Secretary of State, containing what purports to be a copy of a vote of directors of said bank, directing the president and cashier to signify the acceptance of the bank of act of legislature of March, 1847.

Also, a certificate of Secretary of State, of what purports to be the appointment, by the Governor, of Ridgely, Manly and Calhoun, as trustees to charge of assets of bank.

Appellant then offered in evidence a deed from trustees of bank to Charles Hamilton for the land aforesaid, and deed from Charles Hamilton to appellee for said land.

And also proved, that at time of commencement of this suit appellants were in possession of the premises described in the verdict.

At the time of offering each and all said paper titles by appellee, appellants objected to their introduction. The court overruled the objections, permitting each of them to be read, and appellants at the time of said rulings excepted.

The first four errors assigned are: that the court permitted improper testimony to go to the jury to prove title in appellee.

The last error assigned, is the refusal to grant a new trial, on the ground of the admission of improper evidence to prove title.

WM. A. and J. GRIMSHAW, for Appellants.

C. L. HIGBEE and M. HAY, for Appellee.

SCATES, C. J. The several deeds and other evidences of title were objected to, and those objections are presented for our revision, not as involving the power, but the regularity and sufficiency of the proof of the acts of the officers, bank, and assignees.

The judgment, execution, levy and sale, all appear to have been regular, and sufficiently, and strictly in pursuance of the law, (Rev. Stat. 1833, p. 372, Sec. 8,) and a deed made and acknowledged, [Sec. 14, p. 375;] and which deed so made is made evidence "that the provisions of the law in relation to sales of lands upon execution were complied with until the contrary be shown," and "shall be considered as conveying to the grantee therein named all the title, estate and interest of the defendant" in the same, in lands sold, of what nature soever the same be. Act 1841, p. 171, Sec. 7. When plaintiff in execution is the purchaser he shall be chargeable with full notice, and accountable for all irregularities. Harrison et al. *v.* Doe ex dem. Rapp, 2 Blackf. R. 1.

But there are none here alleged.

It is alleged that there is a variance between the judgment and execution read in evidence and that recited in the deed; and that the return on the execution does not show the name of the purchaser; and for which last reason the sale is void under the statute of frauds, for want of a complete memorandum in writing of the bargain and sale.

The variance was a clerical mistake, and amendable, and a stranger to the record shall not be allowed collaterally to question it. Bissel *v.* Kip, 5 John. R. 100; Laroche *v.* Washbrough et al., 2 Term R. 737; Jackson *v.* Walker, 4 Wend. R. 464; Jackson ex dem. Martin et al. *v.* Pratt, 10 John. R. 381. And in this last case the court permitted parol evidence to identify the premises sold and conveyed by the sheriff's deed, they not being described in the sheriff's return upon the execution, declaring such irregularity did not affect the legality of the sale. So under our statute a non-compliance with the statute does not make void the sale, but subjects the officer to a forfeiture. Rev. Stat. 1833, p. 372, Sec. 8. Stewart *v.* Croes et al., 5 Gil. R. 442; 2 Carter Ia. R. 465. Where, as here, the purchaser has a good deed, his title cannot be defeated by a

defective return, nor even if there be no return at all. The purchaser depends upon the judgment, (*a*)the levy and the deed. All other questions are between the parties to the judgment and the officer. The statute of frauds may not be set up by them or strangers, For that would be a question between the officer and the purchaser. Wheaton *v.* Sexton, 4 Wheat. R. 503; Doe *v.* Heath, 7 Blackf. R. 154; Hopping *v.* Burnam, 2 Greene Iowa R. 42; Humphreys *v.* Berson, 1 Greene Iowa R. 199, 215. A want of a return of a levy has been held not to vitiate. (*b*) Evans *v.* Davis, &c., 3 B. Monroe R. 346; McIntire *v.* Durham, 7 Iredell R. 152.

Neither would a misrecital of the judgment in the deed vitiate or destroy the title. (*c*) 10 John. R. 381; Jackson ex dem. Hill *v.* Streeter, 5 Cow. R. 529; Jackson ex dem. Wetherell et al. *v.* Jones, 9 Cow. R. 182.

This court has held that irregularities do not avoid the sale, and that strangers may not interpose collaterally objections which can alone, as between the parties, be made in a direct proceeding by motion or writ of error. Swiggart et al. *v.* Harber, 3 Scam. R. 364; Rigg *v.* Cook, 4 Gil. R. 336. (*d*)

And in Voorhees *v.* The Bank of the U. States, 10 Pet. R. 478, where one had bid off the property and the deed was made to another, that is a matter entirely between those persons, and the defendant in execution has nothing to do with it for his right is extinguished by the sale. Here, as in that case, taking the levy, return and deed together, and a sufficient case is made out under the statute of frauds, and the judgment debtor could have no right to complain, even had he the right thus collaterally to object, much less can these plaintiffs who have shown no title and no connection with that suit. (*e*)

The remaining question is to the admissibility of the deed of assignment by the bank to the trustees, and for want of proof that the seal thereto was the seal of the bank. This is unnecessary here. Its execution by the president of the bank is shown, and the seal affixed affords *prima facie* evidence that it is the seal of the bank. And this rule does not dispense with evidence that the seal is the seal of the corporation, but adopts as a rule of *prima facie* evidence that when an instrument is duly executed by one having authority, that the seal he attaches is the seal of the corporation, until it is impeached and shown otherwise. Ang. and Ames on Corp., pp. 192-4, Secs. 6, 7, and references; Lovett *v.* Steam Saw Mill Asso'n et al., 6 Paige R. 54; Mill Dam Foundery *v.* Hovey, 21 Pick. R. 417; Flint

(*a*) Douglas *vs.* Whiting, 28 Ill. R. 362; Pickets *vs.* Hartsock, 15 Ill. R. 279; Durham *vs.* Heaton, 28 Id. 272.
(*b*) Bryan *vs.* Dana; Gil. R. 343.
(*c*) Loomis *vs.* Riley, 24 Ill. R. 309; Hays *vs.* Bernard, 38 Ill. R. 303.
(*d*) McCormick *vs.* Wheeler, 36 Ill. R. 119.
(*e*) Ante. 50 and notes.

v. Clinton Co. and Trustee, 12 N. Hamp. R. 430 ; Reynolds' heirs *v.* The Trustees of Glasgow Academy, 6 Dana R. 37 ; Corrigan *v.* The Trenton Delaware Falls Co., 1 Halsted R. 52 ; Johnson et al. *v.* Bush et al., 3 Barb. Ch. R. 207. And it is held in some of the above cases that when the seal is proven to be the seal of the corporation, and to have been set to the deed by the agent, it is *prima facie* evidence of his authority to do the act.

The ancient strictness of proof of the seal being the device and seal adopted by the corporation, has been greatly relaxed. And this is indeed indispensable under the very great multiplication of corporations of a public and private nature, which have become the most desirable and convenient mode of association of capital for the varied transactions in manufacturing, carrying, and trading. It would in most instances be difficult, and in a great many impossible, for persons with whom they deal, strangers to the proceedings of corporate boards, to prove that a particular device had been adopted by them as a seal. More particularly in such cases as those in Kentucky, where a scroll with ink is allowed as it is with us. It might be impossible to prove this to be the device adopted otherwise than by its use, and its being affixed as such by a proper officer or agent. This should be received as *prima facie* evidence, and the company required to answer and rebut it. I know that stricter proof is required in England, and in some of the States. See 21 Eng. C. L. R. 447 ; 7 Serg. and Rawl. R. 312 ; 2 Sand. Ch. R. 257 ; 1 Mo. R. 460 (646).

It is needless to multiply authorities, nor do I propose to discuss the rule or the soundness of the rule of relaxation in the proof. Whatever of danger there may be in it to corporations is no greater than that to others in the strict rule, in the multiplied transactions of the present day. Similar modifications have been made in our notions of the very reason itself for a sealing in modern times when almost all can write.

We can, under this view, find no valid objection to any of the proof offered.

Judgment affirmed.

JAMES CANNADY, Plaintiff in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO GREEN .

In an indictment for selling whisky in a less quantity than one gallon, the name of the purchaser, or an averment that he was unknown is not necessary.
The general averment of an illegal sale is sufficient; the kind of liquor sold need not be specified.

When statutes create offences, indictments should contain proper and sufficient averments to show a violation of the law, and to enable the accused to meet the charge; beyond this, particularity of specification may furnish a means of evading the law, rather than defending against an accusation.

THE plaintiff in error was indicted in selling liquor without a license. He was tried at August term, 1854, of the Green Circuit Court, WOODSON, Judge, presiding, and found guilty, and fined ten dollars. A motion in arrest, was overruled.

The indictment charges that Cannady, not having a legal license to keep a grocery, did then and there unlawfully sell spirituos liquor, to wit: whisky, by a less quantity than one gallon, contrary to the form of the statute, &c.

PALMER and PITMAN, for Plaintiff in Error.

C. EPLER, District Attorney, for The People.

SCATES, C. J. The only question is whether an indictment for selling whisky in a less quantity than one gallon, without a legal license to keep a grocery, is substantially defective for want of the name of the purchaser, or an allegation that he was unknown.

We think not. The general averment of an illegal sale, is in this respect sufficient, and this we think warranted, not only by the authorities, but the good sense of requiring only substantial facts necessary to enable the plaintiff to know the charge, and to prepare his defence.

The existing provision on the subject, has fixed the minimum quantity to be sold without license at one gallon. Sullivan *v.* The People, 15 Ill. R. 233; Bennett *v.* The People, 16 Ill. R. 160. And kind need not be specified. Zarresseller *v.* The People, 17 Ill. R. 101. Where statutes create offences, indictments should contain proper and sufficient averments to show a violation of the law. An indictment charging embezzlement by an agent of a co-partnership, is not sufficient under a statute for the punishment of embezzlement by the agent of a corporation. Hamuel *v.* State of Missouri, 5 Mo. R. 260. So under the act defining a riot to be an unlawful assault, an indictment was held insufficient which charged a forcible and violent beating, &c. McWaters et al *v.* State of Missouri, 10 Mo. R. 168—and the indictment must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it. Id. 169; 9 Mo. R. 287. But in The State *v.* Bray, 1 Mo. R. 180, it was held not to be a part of the definition, although used in the statute in relation to assault and battery.

The general rule in such cases, as to certainty, is recognized

in the Commonwealth *v.* Thurlow,, 24 Pick. R. 381. But another distinction was taken in relation to necessary averments. In the Massachusetts statutes there are two offences defined, and different penalties imposed. One against *common* sellers, or retailers, and the other against persons guilty of a single act, without a license. Where the indictment charged the latter offence, the court held it necessary to charge the time, place, and to a person named, or that the name was unknown. Id. 379. But in an indictment against a *common* seller, &c., it was unnecessary to name the person. Commonwealth *v.* Odlin, 53 Pick. R. 279; nor the kind of l quor, as the kinds were merely put in the statute "by way of instance" of the larger term, "spirituous liquors," "as to give efficiency to the rule of construction, *ejusdem generis*, and qualify those more general words." To the same effect as to averments of the kind of liquor and persons to whom sold, is the case of State *v.* Munger, 15 Vermont R. 294, and the Commonwealth *v.* Dove, 2 Va. Cases 26, as to the name of the persons purchasing. In The People *v.* Adams, 17 Wend. R. 476, the court held it unnecessary to allege the name of the person purchasing—the offence consists in the *act of selling*, and therefore the designation of the person is no way material(*a*) And as a question of pleading, certainty to a common intent does not require it. The precedents all appear the other way, as set forth in 2 Burns' Justice 185, et seq. 4 Wentworth 504; 1 Burns 23, 24; 2 Chit. Crim. Law 434.

The rule is abundantly sustained by the American decisions as collected: Wharton's Crim. Law 815 to 820; though a contrary rule is adopted in some of the states.

The like is held in Virginia for selling to slaves, that the name of the owner need not be averred. Commonwealth *v.* Smith, 1 Gratt. R. 553; though it is ruled otherwise in Commonwealth *v.* Cook, 13 B. Monroe 149, because the defendant may prove permission from the owners to sell, and should be advised who he should call to establish the license—and a very good reason for a distinction.

These great niceties, and strictness in pleading, should only be countenanced and supported, when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparation for his defence, for want of greater certainty or particularity in the charge.

Beyond this, it tends more to the evasion than the investigation of the charge, and becomes rather a means of escaping punishment for crime, than of defence against the accusation.

Judgment affirmed.

SKINNER, Justice, dissented.

(*a*) Rice *vs.* People, 38 Ill. R. 435.

In the matter of JAMES WELSH, on Petition for *Habeas Corpus.*

The constitution does not restrict the power of the legislature as to the number of justices of the peace which may be created. That body may create as many districts for and prescribe the jurisdiction of, justices of the peace as public policy requires, and without making their jurisdiction uniform.(a)

The Recorder's Court of the city of Chicago is a constitutional tribunal, not repealed or affected by the Act of 27th February, 1854, providing for the better government of towns and cities.

THIS application for an *habeas corpus* was made to the court, in session at Mount Vernon, and the writ, by consent of the petitioner, was made returnable to the court in the second division.

The petition stated that Welsh and two others had been convicted, in the Recorder's Court of the city of Chicago, of larceny, and sentenced to the penitentiary for three years, from the 26th of September, 1855, and that he was now detained under such sentence and judgment. Upon the issuing of the writ, the warden of the penitentiary returned the facts in the case and submitted himself to the decision and order of the court. Welsh was remanded to the custody of the warden of the penitentiary, to serve out the residue of the time in conformity to the sentence.

W. T. BURGESS, for the Application.

T. HOYNE, *Contra.*

CATON, J. The questions presented in this case demanded, and have received, the most attentive consideration of this court. They do not in the least involve the question of the guilt or innocence of the prisoner, but relate entirely to the authority of the court before which he was tried.

The constitutionality of the Recorder's Court was sustained by this court, in the case of Perry *v.* The People, 14 Ill. 497. It was there determined that that court *was* an inferior local court of civil and criminal jurisdiction, which the legislature was authorized to establish within the cities of the State, by the first section of the fifth article of the constitution; and that the power there conferred might be well exercised by establishing a single court in a single city of the State; but that when the legislature undertook to exercise the same power in reference to other cities, by establishing courts in those cities, care would be taken to make this court and the courts thus to be created in other cities conform to each other in regard to their organization and jurisdiction; for that section of the constitution says that "such

(a) See People *vs.* Evans, 18 Ill. R. 361 and notes, and post 169.

courts shall have a uniform organization and jurisdiction in such cities." By the act of the 27th February, 1854, entitled "An act for the better government of towns and cities, and to amend the charters thereof," it is provided that, in each town or city in the State, the population of which shall not exceed six thousand, an officer shall be elected, styled "police magistrate;" and in each city exceeding six thousand, and not exceeding twelve thousand, two such officers shall be elected; and in cities exceeding twelve thousand, three are to be elected. These magistrates were to be elected at the next regular town or city election, and every four years thereafter. The third section of the act provides that "said police magistrates, when elected, shall be commissioned and qualified in the same manner as other justices of the peace are and shall have in their respective counties the same jurisdiction, powers and emoluments as *other* justices of the peace in this State; and they shall also have jurisdictions in all cases arising under the ordinances of their respective towns and cities, and for breaches thereof, where the amount claimed does not exceed one hundred dollars," &c. The same section also provides for change of venue from one of these magistrates to another, in places where there are more than one; and in places where there is but one, then to the nearest justice of the peace, in the same manner as changes of venue are taken from one justice of the peace to another. The fourth section provides that the rules of practice before these magistrates shall be the same as before justices of the peace, except where it shall be changed by the charters of their respective towns or cities. The fifth section of the act provides that the city marshals, police constables and constables of the county, may serve the process issued by such magistrates. And the sixth section of the act provides that appeals shall be taken from their decisions, in the same manner as from the decisions of justices of the peace.

The passage of this act, it is insisted, was the exercise of the power conferred upon the legislature by the first section of the fifth article of the constitution and established a class of inferior local courts in the several cities of the State, of a different organization and jurisdiction from the Recorder's Court of Chicago, which had been previously established under the same provision of the constitution; and as both cannot exist together under the constitution, it is insisted that the last act, by implication, repealed the former law establishing the Recorder's Court. If the officers created by the last act are anything more than justices of the peace,—if the courts thereby created are not justices' courts, then the legislature had no authority to pass the act, except by virtue of the clause referred to; and we should be

obliged to hold, either that the last act is void, or that the former has ceased to operate.

One thing is very certain, that the legislature did not intend to repeal and did not suppose they were repealing the Recorder's Court out of existence. Not only is there not the least intimation on the face of this law of an intention to supersede the Recorder's Court, but on the very next day the same legislature passed a law in terms amending the "act to establish the Recorder's court of the city of Chicago," thereby recognizing its continued existence in the most authoritative and solemn form possible, as much so as if they had said that they did not intend and did not thereby repeal the law establishing the Recorder's Court. The legislature also on the same 28th day of February, passed another law, the seventh section of which makes provision for the punishment of criminals convicted in this same Recorder's Court. (Session Laws 1854, page 218.) I repeat, then, that it is very certain that there was no intention on the part of the legislature to repeal the former law, and if they did so, they did it against their express will—and yet if they intended to establish another city court under the clause of the constitution above referred to, of a different organization and jurisdiction from the Recorder's Court, they must have intended to repeal that court out of existence, or to have violated the constitution, or else they were ignorant of it. These last suppositions are totally inadmissible, and, as the first is plainly contradicted by their legislation on the subject, we are forced to the conclusion that the legislature created these police magistrates in the exercise of a power conferred by some other part of the constitution. That can only be found in their authority to create justices of the peace. As to these officers there is no limit placed by the constitution upon legislative power. They may create as many as they please, in such districts as they please, and prescribe their jurisdiction as they please, nor is it necesasry that all the justices of the peace of the State should have a uniform jurisdiction, as in the case of the city court. There is nothing in the constitution to prohibit the legislature from giving to one justice of a town exclusive jurisdiction in criminal matters, another of civil actions *ex delicto*, and another of actions *ex contractu*. Here, at least, the constitution seems to presume that the legislature may be entrusted with some, though it be but a very limited discretion. We are thus led to the conclusion that the legislature passed the law with the intention to exercise their power to create justices of the peace, and that hence they supposed that they were creating nothing more than justices of the peace. They certainly intended to do nothing else unless they intended to transcend their constitutional powers. Now, are these magis-

trates anything but justices of the peace? Did the legislature create a greater or a less magistrate than they intended? Most clearly not. They have all the characteristics of a justice of the peace. They are elected and commissioned in the same way, have the same tenure of office and the same jurisdiction; they have the same practice and rules of proceedings, and their judgments have the same force and are appealed from in the same way. But they are not called justices of the peace. They are designated as police magistrates. Can this, in a constitutional point of view, make any substantial difference? Suppose the statute had said "there shall be elected an officer in each of the towns and cities of this State," &c., and in all other respects provided as it now does, would any one doubt that such officer would have been nothing more or less than a justice of the peace? Or, suppose he had been called a *magistrate* instead of an officer, would that have made any difference? And if not, does the prefixing of the word *police* to the magistrate make a constitutional difference in the character of the officer created? Is it true that the constitutionalty of a law has to be determined by a mere name, which may have been accidently or intentionally used while the substance of the thing is manifest? Shall we find ourselves stickling about a name when the meaning of the legislature is perfectly obvious, and the results undeniably legitimate? It would hardly comport with the dignity and solemnity expected of a tribunal of the last resort, when deliberating upon grave constitutional questions of the most momentus public importance, to fasten upon an unsubstantial cognomen, and let go the entire substance of the statute upon which we are called to adjudicate. If these magistrates had been called justices of the peace, no one would ever have thought of raising the questien that they were justices of the peace in fact as well as in name. But there is in realty nothing in the name incompatible with that of justices of the peace. The word magistrate is but a generic term, embracing within its meaning justices of the peace as well as other civil officers, and there can be no constitutional objection to the legislature using this generic term, instead of the specific designation of the officer which they were creating. It is the substance and the life of the law we should regard when determining upon its legal effect. Nor is the qualifying term *police*, which is prefixed to the word magistrate, objectionable in a constitutional point of view. As before stated, it was competent for the legislature to designate any one or more of the justices of the peace in any town or city who should have exclusive jurisdiction of complaints for violating the ordinances of the town or city, and had a law making scuh provision prefixed the adjective *police* to the magistrate

thus designated, it could hardly be contended, with a show of reason, that he would thereby have ceased to be a justice of the peace. Of this we have a striking example in the law passed under the constitution of 1818, creating probate justices of the peace. Under that constitution no judical officers except justices of the peace could be elected by the people, and yet this law created *probate* justices of the peace, which were so called, as it was said in the act, "by way of eminence and distinction," and vested in them, in preference to all other justices of the peace, exclusive jurisdiction of all probate matters and these officers were made elective by the people, and they exercised that jurisdiction for many years, and no question was ever raised of the constitutionality of the law.

But if a legislative designation could be supposed necessary to make these magistrates justices of the peace, even that is not wanting in the law now under consideration, for it provides that they "shall have in their respective counties, the same jurisdiction, powers and emoluments as *other* justices of the peace in this State." Other provisions of this law might be referred to in support of this view, as that which provides for a change of venue from these magistrates to other justices of the peace, which applies as well to suits brought for the violations of ordinances as to other cases, but we deem it unnecessary. We have no hesitation in saying that this law was passed, not in the exercise of the power conferred upon the legislature to establish inferior local courts of civil and criminal jurisdiction in the cities of this State, but under the power conferred upon them to create justices of the peace, and that it did not repeal by implication or supersede the law establishing the Recorder's Court of the city of Chicago.

There is but one other act to which it is necessary to advert, and that is the one of the sixth of February, 1855, by which the Court of Common Pleas of the city of Cairo was provided for. This act was no doubt passed in the exercise of the power conferred upon the legislature to establish inferior local courts in the cities, but the existence of that court is by no means inconsistent with the continuance of the Recorder's Court of the city of Chicago, and it was distinctly admitted on the argument that it was not thereby abolished, but that by force of the constitution the jurisdiction of the Recorder's Court may be extended so as to make it uniform with that of the Cairo court. But it is unnecessary to examine that question, for we are now dealing alone with the question of repeal, which it is not pretended was effected by this last act.

We are of opinion that the prisoner was convicted and sentenced by a court of competent jurisdiction, and that he must be

remanded to the custody of the warden of the penitentiary in execution of that sentence.

SKINNER, Justice. I concur in the judgment of the court remanding the prisoner.

Application denied.

JACOB ARMSTRONG, Plaintiff in Error, *v.* R. A. MOCK Defendant in Error.

ERROR TO MENARD.

Proceeding to trial without a formal issue, is, after verdict, treated as a waiver of the plea or issue.

Exceptions to the refusal of the court to give instructions, must be taken at the trial, and this must be shown by the record, or this court will not examine them.

THIS was an action of replevin, commenced by Mock *vs.* Armstrong, in the Circuit Court of Menard county, at the May term thereof, 1855, for one hundred and forty-one head of cattle. The affidavit for the replevin and the declaration are in the usual form of taking and detention, and to the declaration, the defendant filed several pleas, to-wit: that defendant did not take—that defendant did not detain—property out of plaintiff, and in defendant—property in defendant alone. There was issue proved on three of these pleas, but not to the fourth one. A jury was called, and found for the plaintiff. The defendant made a motion for a new trial, which was overruled by the court.

This cause was heard before WOODSON, Judge, at May term, 1855, of the Menard Circuit Court.

LINCOLN and HERNDON, for Plaintiff in Error.

STUART and EDWARDS, and A. BROOKS, for Defendant in Error.

SCATES, C. J. The parties went to trial without a formal joinder of issue on fourth plea. The substance of the plea was property in defendant below, plaintiff here. The third plea put the same fact in issue. Proceeding to trial without a formal issue, is, after verdict, treated as a waiver either of the issue or the plea; and verdict will not be set aside, if there were no plea. Brazzle et al. *v.* Usher, Breese R. 14 ;(*a*)Ross et al. *v.* Reddick, 1 Scam. R. 74. It is based upon the supposition, and doubtless founded in truth, that the real merits in controversy

(*a*) Kelsy *vs.* Lamb, 21 Ill. R. 559 ; Voltz *vs.* Harris, 40 Id. 158.

have been tried and determined. But this reason would not apply, and the rule is otherwise in cases of immaterial issues. Woods *v.* Hynes, 1 Scam. R. 103.

The instructions given at the instance of plaintiff below, although excepted to at the time, are not assigned for error. Those asked by defendant below, have been assigned for error, but no exception to their refusal was taken at the trial.

The court have repeatedly held, that the exception must be taken on the trial, and that fact must appear on the face of the record. 3 Scam. R. 17, 23, 63 ; 5 Gil. R. 453 ; 11 Ill. R. 72 ; 1 Scam. R. 252.

No question is, therefore, presented for revision in this record.

Judgment affirmed.

THE PEOPLE of the State of Illinois *ex relatione* ANDREW AKIN, JOHN KING, jr., and EPHRAIM WARD, *v.* JOEL A. MATTESON, Governor of the State of Illinois, and ALEXANDER STARNE, Secretary of State.

APPLICATION FOR MANDAMUS.

In contested elections, the intention of the voters in casting their ballots should control ; and effect must be given to that intention.

In this State. " police magistrates" and " police justice" are equally within the meaning of the constitution, and the intention of the law, passed for the better goverment of towns and cities, approved February 28th, 1854 ; and votes given for persons to fill those offices, under either designation, should be counted and returned in favor of the persons for whom they may have been cast.

The right of a party to exercise an office, should be determined by quo warranto. (a)

THIS was an application for a peremptory mandamus, founded upon the following agreed case :

That at a regular election for city officers, held in the city of Chicago, in the county of Cook, in the State of Illinois, on the 6th day of March (first Tuesday), A. D. 1855, an election was also held for the purpose of electing three police magistrates, under and by virtue of the provisions of an act, entitled " An act for the better government of towns and cities, and to amend the charters thereof " approved February 27th, 1854.

That at such election, the votes were cast as follows : For " Police Justices " —Andrew Akin, 3158 ; John King, jr., 3140; Henry Magee, 2675 ; Ephraim Ward, 3154 ; William H. Stickney, 2757 ; F. A. Howe, 2722 ; that the votes, so given for said Akin, King and Ward, were those of a majority of the legal voters of said city voting at said election.

(a) People *vs.* Rives, 26 Ill. R. 246.

Votes were also cast at said election, as follows : " Magistrates " —Calvin D'Wolf, 13 votes ; Nathaniel Allen, 2 votes ; William H. Stickney, 2 votes.

" Police Magistrates of the city of Chicago " — William H. Stickney, 10 votes ; Calvin D'Wolf, 10 votes ; Nathaniel Allen, 10 votes.

If the votes cast for " Police Justices " are counted as properly given, then the relators are duly elected, and entitled to commissions under the aforesaid act.

It is admitted that said election was held, and said votes cast, under the provisions of said act ; it being, however, contended that the ballots having been for " Police Justices, " and not " Police Magistrates " (the term used in the act], said votes are illegal, and should not be counted. Now, it is hereby agreed to submit the question to the Supreme Court aforesaid, to be decided in the same way as if the application had been made in due form, the said Joel A. Matteson and the said Alexander Starne waiving the issuing of a writ and entering their appearance ; also waiving all questions of form, either in relation to the mode of proceeding or otherwise. If the Supreme Court shall be of opinion that the votes given for " Police Justices " as aforesaid are not illegal, for the reasons above stated, then they are to decide in favor of the relators, and a writ of peremptory mandamus may be issued. This agreement is to be deemed and taken for and have the same effect as a petition, writ and return thereto, and as if all the regular proceedings and steps had been taken to obtain a peremptory mandamus. It is further agreed as part of this case, that the relators have severally complied with all the requisites of the law to entitle each of them to a commission, if legally elected. It is likewise agreed that commissions were issued March 14, 1855, to Calvin D'Wolf, Wm. H. Stickney and Nathan Allen, as " Police Magistrates" of the city of Chicago, and that they have qualified and entered upon the discharge of the duties of said offices. And the commissions so issued to them were based upon the return of the city clerk, herein above mentioned.

STUART and EDWARDS, for Relators.

W. T. BURGESS, for Respondents.

CATON, J. The statute referred to in the agreed case, and under which the election was held, provides for the election of " Police Magistrates. " This court, in the case of Welsh on habeas corpus, decided that law was passed under that provision of the constitution which authorized the legislature to pro-

vide for the election of justices of the peace; so that, although law designates them under the generic term of magistrates, yet the strict constitutional name of the officer is "justice of the peace." This term is not used in the ordinance ordering the election, but that follows the statute; and so do the ten votes given for Stickney and the two others, to whom commissions were issued, while over three thousand votes were given for the relators for "police justices;" and we are asked by them and the executive to decide whether those votes should be counted for the relators, for the office to be filled at that election. Upon this point we cannot for a moment doubt.(*a*)

In election contests, as in other cases, the question to be determined depends upon facts to be ascertained; and here we are simply called upon to determine, from the evidence before us, the simple fact of the intention of the voters who cast their votes. Did they intend to vote for the relators, to fill the offices for which this election was ordered? No rational mind can doubt upon this simple question of fact, as to the purposes for which these votes were cast. That is so palpable, that we shall not attempt its discussion. And yet the law is well settled that the court must be governed by the facts thus found, although there may have been some technical omission or informality in the wording of the vote which is cast. The question is: does the informality leave the intention of the voters doubtful? In this case, we think there is no doubt. The voters cast for the relators designate the office with as much technical precision, as fixed by the constitution, as do those given for the three who are said to have been commissioned, and even more so, although the latter follow the statute more closely. In construing this statute in the case above referred to, we sought to get at the intention of the legislature, when the words *police* magistrates were used; and, on that question of fact, we had no doubt but that justices of the peace were intended, and so held; that the legislature had a right to pass the law under that clause of the constitution. The same rule applies, when we ascertain the intention of the voter. When we are satisfied on that point, we are bound to give effect to such intention.

It was suggested at the bar, on behalf of those who received the commissions under this election, that mandamus will not lie, to admit the relators to an office which is already filled. We recognize the rule as unquestioned, that, ordinarily at least the court will not, by mandamus, turn out one officer and admit another in his place. This we do not propose to do. We have nothing to do with those parties, who are not now before us. This decision does not affect their rights to their offices, one way or the other. If they were holding their offices rightfully be-

(*a*) Town of Lewiston *vs.* Procter, 23 Ill. R. 535.

fore, they will do so still. And if they had no legal right to the offices before, but were merely holding by color of office, this decision makes them no less officers *de jure.* Their right to the offices can be determined directly by *quo warranto.*

The writ must issue as stipulated.

Mandamus awarded.

GUSTAVUS SKELLEY, Plaintiff in Error, *v.* SOLOMON KAHN, Defendant in Error.

ERROR TO LOGAN.

A bailee without reward, is required to use such care and discretion in the performance of a duty, as may be expected of all men of common prudence in their own affairs; and will be liable only for bad faith or gross negligence.

If he undertake to convey or pay money, he is bound to perform his undertaking, with the care and responsibility incident to such an obligation.

The question of negligence, is a question of fact, to be passed upon by the jury.

THIS was a suit brought originally by the plaintiff in error, before a justice of the peace in Logan county, and taken up by appeal, by the defendant in error, to the Circuit Court of that county, and tried by DAVIS, Judge, without the intervention of a jury, at April term, 1854, of the Logan Circuit Court. The record shows that the plaintiff in error, who was sub-mail contractor, placed in the hands of the defendant in error $30, to give to a Mr Sartain, who was the principal contractor—this sum of money being due from the plaintiff in error to "Sartain." A boy in the employment of "Sartain," who was carrying the mail for him from Waynesville to Middletown through Boatville, of which latter office defendant in error was postmaster, called upon defendant before the money had been deposited by plaintiff, and told him he had been authorized by "Sartain," to get the money. Defendant informed plaintiff of this fact, to which he replied that he had not then collected the money, but would do so soon, and did so, and gave it to defendant before the boy made his next trip. He made no objection whatever to defendant giving the money to the boy. Defendant gave the money to the boy when he made his next trip, and informed plaintiff that he had done so, to which he replied that it was all right, or words to that effect. After the boy received the money he went to Middletown, the end of the route, and there left the mail bags, and has not since been heard of.

Some time after it was ascertained, that the boy had absconded, plaintiff demanded the money of defendant, and upon his refusal

to pay it, sought to make him liable in a suit. The court below, decided that appellee was not liable, and gave judgment against the plaintiff below for costs of suit, which decision has been assigned as error and the cause brought to this court.

SCATES, C. J. The undertaking of the defendant, was gratuitously to carry the money to Sartain to whom it belonged; designated in the law of bailments as a *mandatum*, and under which there may be a simple custody, or labor in carrying, or other character. Whether under that law, the bailee would, or would not, under any circumstance be liable for non-feasance of a bailment once undertaken, from which the bailor might be damaged, as a failure to present bills for acceptance or payment, and give notice, &c., I shall not here inquire, as the defendant did not decline to act. But the question arises upon the manner in which he performed the act. The general principle laid down on this subject is applicable to this case; and there is little or no controversy as to what that principle requires.

A mandatory or bailee, who undertakes, without reward, to take care of the pledge, or perform any duty or labor, is required to use in its performance such care as men of common sense and common prudence, however inattentive, ordinarily take of their own affairs, and they will be liable only for bad faith, or gross negligence, which is an omission of that degree of care. Tracy et al. *v.* Wood, 3 Mason R. 132; 2 Kent Com. 568 to 573; 17 Mass. R. 479; 8 Metcalf R. 91; Story on Bailments, Secs. 174, 175; 2 Hawk. N. C. R. 145; Doorman *v.* Jenkins, 2 Adolph. and Ellis R. 256; Coggs *v.* Bernard, Ld. Raymd. R. 909; 11 Wend. R. 25; 14 Serg and Rawl. R. 275.

If the mandatory undertake to carry or pay money, or transmit it, and the money is delivered to him for that purpose, he is bound to perform his undertaking, under the degree of care required, and subject to the degree of responsibility attached to such an undertaking. Story on Bailments, Secs. 171*a*, 171*b*, 171*c*; 11 Wend. R. 25.

Whether there is gross negligence or not, seems to be a question of fact, for a jury upon all the circumstances; Story Bail. Sec. 174, notes; and the line of distinction, between what is and what is not sufficient diligence in the bailee, under the circumstances, is nice and difficult to draw. See Jones on Bailments 62. Rendberg's case, 6 Rob. R. 142, 155; Tracy *v.* Wood, 3 Mason R. 132.

The difficulty in this case, is not in the principles of law which govern, but in the facts; and this is made more apparent, by the fact that the issue has been found in favor of such party.

From the view we take of the facts, we cannot sustain the finding of the court. But by no standard of common prudence in common affairs can we say, that it was not a gross negligence to hand money to a strange boy, and especially under the suspicious circumstances, that he had demanded all the money coming to his employer from defendant's post office within three or four days after he commenced carrying the mail.

Had Sartain usually, or ever, sent for money in that way before, or without sending the drafts or an order, this conduct might not have appeared so gross ; but the contray is in proof ; and such seemed to have been the effect upon the postmaster at Kickapoo, who demanded a draft or an order. If the defendant was imposed on by these circumstances, and the simple fact that the boy was employed as mail rider, he has shown a degree of stupidity and carelessness at variance with all prudence. It is true, the money might have been safely carried by the boy, but there was not one circumstance to warrant any one having the slightest degree of prudence, to rely upon or expect it.

There is nothing shown in the plaintiff's conduct, assenting to any more than what defendant recommended by his own conduct in the matter.

If we could feel satisfied upon any veiw of defendant's case in this matter, we should affirm the judgment. But we cannot, and therefore the judgment must be reversed and the cause remanded for another trial.

Judgment reversed.

CATON, J. I think this judgment should be affirmed.

THOMAS H. LAWRENCE, Plaintiff in Error, *v.* THE PEOPEE, Defendant in Error.

ERROR TO MADISON.

A scire facias on recognizance stands in the place of a declaratien, and fills the same office.

It is sufficient to state a recognizance, according to its operation and legal effect; or it may be set out verbatim, and the court will decide upon its effect.

The certificate of the justice, before whom a recognizance is taken. is essential to its validity, and implies its approval by him; no form of words is necessary to this end; if the officer took and accepted the recognizance for the purposes contemplated by the law.

A *scire facias* was issued out of the Circuit Court of Madison county, Illinois, on the 23rd day of August, 1855, setting forth, that, on the 12th of March, A. D. 1855, Thos. J. Lawrence, John P. Lawrence and Thomas H. Lawrence did personally appear before John A. Maxey, an acting justice of the peace of said county, duly elected, commissioned and qualified, and then and there, before said justice of the peace, did enter into, sign, seal and deliver, a certain recognizance, which recognizance is set out in full in said *scire facias*, to which the justice attached the following certificate:

"Taken and acknowledged before me, the 12th day of March, A. D. 1855.
JOHN A. MAXEY, *J. P.* [SEAL.]"

And that said recognizance was returned by said justice, to the Circuit Court of said county, and filed therein on the 27th day of March, A. D. 1855. And that an indictment was returned into said Circuit Court, by the grand jury, at the April term, 1855, against Thomas J. Lawrence, on a charge of larceny, which indictment is set out in full in said *scire facias*, with the endorsements thereon; and that the same was filed in said court, on the 4th day of April, 1855; and that afterwards, at said term, an order of the Circuit Court was made, which order is set out in full. The *scire facias* then concludes in the usual manner.

The said Thomas H. Lawrence was served with process on the 24th day of August, A. D. 1855 — the other parties not found—afterwards, on the 6th day of September, 1855, the said defendant, Thomas H. Lawrence, filed a general demurrer to said *scire facias*, which the Circuit Court overruled and entered judgment against Lawrence for the penalty of the recognizance and costs of suit.

J. and D. GILLESPIE, for Plaintiff in Error.

A. W. METCALF, for The People.

SKINNER, J. This was a *scire facias* upon a recognizance Thomas H. Lawrence, one of the cognizors, appeared and demurred to the *scire facias*. The demurrer was overruled, judgment of execution rendered against him, and the suit was continued as to the other cognizors, who were not served.

It is objected that the *scire facias* is insufficient, because it does. not contain an averment that the obligation was approved by the justice of the peace before whom it was taken. The obligation is set out in the *scire facias*, and shows on its face the following certificate:

"Taken and acknowledged before me, this 12th day of March, A. D. 1855.
JOHN A. MAXEY, *J. P.* [SEAL.]"

The statute provides that "all recognizance that have any relation to criminal matters, shall be taken to the people of this State, shall be signed by the person or persons entering into the same, shall be certified by the judge, justice of the peace, or other officer taking the same, and delivered to the clerk of the Circuit Court," &c. R. S. 191, Sec. 205.

The *scire facias* stands in the place of a declaration, and, for the purpose of pleading, fills the same office. The certificate of the justice is a part of the recognizance and essential to its validity.(*a*)

It was sufficient to state the recognizance according to its *operation* and *legal effect*, or to set it out in its *very words*, leaving it to the court to determine upon its *legal effect*. 1 Chitty's Pl. 335. The pleader chose the latter course, and hence what appears from the recognizance need not be again averred. If the *scire facias* had averred that the recognizance was "taken and *approved*" by the justice, the recognizance itself would have proved the averment, for such is the legal effect of the certificate.

All that is important to the validity of the recognizance, in this respect, is, that it appears therefrom that it was taken before and certified by the officer authorized to take the same. The taking and certifying the instrument officially, as a reconnizance, necessarily involves an *approval*. No form of certificate is given by the statute, and it is not material what language is used, so that it appears that the officer *took* and *accepted*, the recognizance for the purposes contemplated by the law. The case of Bacon et al. *v.* The People, 14 Ill. 312, is relied upon by the plaintiff in error. In that case, it does not appear that the recognizance was set out in the *scire facias*, and the averment was that the cognizors "executed and delivered to the justice a certain bond or recognizance whereby" &c.; and this court held that the averment was not sufficent to show that the obligation was taken and approved by the officer.

In this case, the *taking* and *approval* appear from the recognizance set out in the *scire facias*, and this is equivalent to such averment.

Judgment affirmed.

(*a*) Wood *vs.* People, 16 Ill. R. 172.

BEBEE BOOTH *el al.*, Plaintiffs in Error, *v.* GEORGE. W. RIVES, Defendant in Error.

ERROR TO EDGAR.

The Supreme Court will not reverse a judgment as being against evidence, unless the finding of the jury is clearly so.

THIS was an action of assumpsit brought by Rives against Martin and Booth. Plea, non-assumpsit. Jury waived. Trial by the court, HARLIN, Judge, presiding, at October term, 1853, of the Edgar Circuit Court.

On the trial the plaintiff proved by Robert M. Rhae that from the first of June to the first of September, 1847, plaintiff was absent from home. That plaintiff and witness owed a joint note falling due first August of that year; plaintiff's part of said note being seven hundred dollars or more. Plaintiff, when he left home, left the money to pay his part of the note or the greater part of it, with his wife, and directed witness to call on her when the note became due, get the money and pay it off. A few days before the note became due, witness went to plaintiff's house together with defendant, Martin, who fell in company with him on the way. Witness only got from plaintiff's wife three hundred or three hundred and fifty dollars. Witness wanted more, but Mrs. Rives said that was all she had. On their way home witness spoke harshly of plaintiff, for having assured witness that his plaintiff's share of the money to pay the note was left with his wife, and when he called he could only get the amount he did. Defendant Martin, replied to witness, " you should not blame Rives for that, he was owing us about six hundred dollars, we wanted the money; since he left I went to his wife and got from her three hundred or three hundred and fifty dollars, (which sum witness cannot recollect, but believes it was three hundred and fifty,) on account, against Rives." Witness further testified that defendants were at that time, and before and since, partners in merchandise in Paris. Witness further testified that some years afterwards, he believed in 1851, but it might have been in the spring of 1850, witness and Rives settled their accounts, and among the rest the note aforesaid; when, for the first time, he informed plaintiff of the amount of money he had got from Mrs. Rives, and Martin had got the balance. Plaintiff further proved by George Harding that in the year 1848 he heard defendant, Martin, say, " Rives was owing me, and I went to his house and got fron his

wife some money." Defendant named the sum,—witness does not recollect the amount, but it was a considerable sum. Jonathan May testifies to the same statements made by defendant in 1850.

Plaintiff further proved by Georg Hoge that in 1847–8 and hitherto, he was a clerk in the store of the defendants. Plaintiff had frequent access to the books of the firm, and examined his own accounts previous to 1851; witness identified the books of the firm. Said books were introduced, and showed no credit in 1847 for $300 or $350, nor for any sum that year exceeding $200, (in February,) but the books showed a credit of $300 in February, 1848. This was all the plaintiff's evidence.

Defendants then proved by Newton Booth that in all the year 1847, and until April, 1848, he was a clerk in the store of defendants; was their book-keeper, and had daily access to the money drawer, books and accounts of the firm; that sometimes when defendants lent money to their friends, and the transaction was a short one, to be repaid in a few days, noted the amount on a slip of paper and dropped it in the money drawer as cash, and when the money was paid they tore up the slip of paper and no entry was made on the books; but sometimes such transactions were entered on the book.

That no such slip of paper could have been in the drawer, and escaped his notice, as he believed. That he had never heard of such slip of paper, or of the receipt of $300 or $350 for the year 1847, and the books showed no such transaction for that year. The first he had ever heard of any such transaction was from the witnesses on the stand at this trial.

The defendants proved by Thomas J. Martin that in February, 1851, he was present at a settlement between defendants, Martin and Rives, for house rent due to Martin individually. On settlement Rives fell in Martin's debt $32, for which he gave his note to Martin. Defendant, Martin, or the firm it did not appear which, had bought a note on plaintiff, on which Robert Clark was security, which they held. The book account of plaintiff with the firm was then examined, afterward the notes were sued on, and judgment obtained; the account and judgment against plaintiff were paid off; plaintiff, on the day of settlement had access to and did examine the books of the firm, but neither on that or any other occasion did he make any mention of the error of $300 or $350, as shown by the books.

Defendants proved by James Clark that in 1851 he heard plaintiff say that defendants knew he was embarassed, and were crowding him too hard; he was able to pay, but wanted time; that they had better not crowd him so hard, there had

been large money transactions between them which had been loosely kept; that he had the advantage of them, and if they did not cease to oppress him, he would have his revenge.

The defendants proved by Robert Clark that in 1851 he heard plaintiff say that defendant, Martin, was oppressing him; that their money transactions had been kept very loosely, and that he had an advantage of defendant, Martin, but he would pay him off and be done with him. This was all the evidence in the cause on which a verdict was found for the plaintiff for $380; defendants thereupon moved for a new trial, which motion was overruled by the court, and judgment was rendered for plaintiff against defendants for $380 and costs; to which defendants excepted.

And the plaintiffs in error assign for error:

1st. That the court erred in overruling their motions for a new trial.

2nd. The court erred in finding for plaintiff in the court below and rendering judgment for him on the evidence in the cause.

3rd. The court erred in not finding for and rendering judgment in favor of the defendants in court below.

S. T. LOGAN, for Plaintiffs in Error.

A. LINCOLN, for Defendant in Error.

CATON, J. The controversy in this case is purely one of fact, and we think the finding of the court is sustained by the evidence. It is not controverted that the money sued for was received by the defendants below, of the plaintiff's wife, in 1847. And the proof is positive that it was not placed to the plaintiff's credit on the defendant's books at the time; and it is altogether probable that it never was. The weight of evidence clearly is, that the amount received was $350. Some six months after, there was placed to the defendant's credit $300; and in the course of the year other considerable sums; what these credits were for does not appear. It may or it may not be that this three hundred dollar credit was for the money got of Mrs. Rives, but we cannot say that it was so, nor is there any strong presumption that such was the case; and indeed we think the probability is the other way. The credit is for a less sum and at a much later period. Afterwards the parties had a settlement, and nothing was said about the money obtained from Mrs. Rives.

In 1847, when the plaintiff left home to be absent for some time, he left with his wife seven hundred dollars to pay his

share of a note which he had executed jointly with one Rhea, which was to fall due before the plaintiff was expected to return. Rhea was to call on the plaintiff's wife and get the money and pay the notes. At the proper time he did call for the money, but Mrs. Rives said she had for him but three hundred and fifty dollars, which he got. When complaining of this, one of the defendants explained that he had previously got the other three hundred and fifty dollars of Mrs. Rives, and applied it on the indebtedness of the plaintiff to the defendants. Rhea never informed the plaintiff of this till their final settlement several years after, and long after the final settlement which had taken place between the plaintiffs and defendants, and at which no mention was made of this money obtained from Mrs. Rives, so far as we are informed. The probability that Rives was informed of this payment to the defendants on his return home and before his settlement with the defendants is no doubt entitled to weight; and some vague threats made by the plaintiffs when complaining of the conduct of the defendants, are also entitled to consideration. But we do not think these entitled to such weight as to justify us in reversing the finding of the court below setting in the place of a jury. It is at any rate not that clear case of a finding against the evidence as the rule of law requires to justify this court in reversing the judgment.

The judgment must be affirmed.

Judgment affirmed.

JOSHUA DICKERSON, Appellant, *v.* TRUELOVE SPARKS Appellee.

APPEAL FROM MACOUPIN.

In an action for corn sold and delivered, it is for the jury to determine from the evidence the quantity sold, and the plaintiff need not necessarily prove the exact quantity delivered.

The competency of evidence is for the court to decide, and the jury will pass upon it according to its weight and preponderance when it has been submitted to them.

THE only question submitted to the court by this record is fully stated in the opinion.

D. A. SMITH, for Appellant.

J. M. PALMER, for Appellee.

SKINNER, J. Assumpsit by Sparks against Dickerson, to recover for corn sold and delivered.

The defendant below asked for the following instruction, which the court refused to give: "That before the plaintiff can recover in this case on a contract for sale and delivery of corn he must prove clearly and specifically by competent evidence the quantity of corn, and that the statement of plaintiff's witness that his father had exhibited a memorandum book of the quantity of corn, is not such evidence.

The court properly refused the instruction. The plaintiff had proved the sale and delivery of corn by him to the defendant, but the precise *quantity* so delivered, did not from the evidence with certainty appear. It was for the jury from the evidence to determine as to the *quantity*, and it was not necessary to a recovery, that the plaintiff should prove the *exact* quantity of corn delivered.

It would be equivalent to a denial of justice in suits arising out of transactions of daily occurrence, to lay down such a rule. The language of the instruction, "clearly and specifically, and by competent evidence," is objectionable and well calculated to deceive and mislead a jury, and should upon that ground have been refused.

The competency of the evidence was for the court, and the jury were to determine the questions of fact submitted to them from the evidence, and according to its weight and preponderance.

This is the only question presented by the record for decision of this court.

Judgment affirmed.

GEORGE MYERS *et al.*, Appellants, *v.* WILLIAM TURNER, Appellee; and

SAME *v.* SAME.

APPEAL FROM LOGAN.

The assignment of an interest in a patent, granted for an ornamental design for an "horological cradle," is a sufficient consideration to enable a party to recover on promissory notes given therefor, although the invention may be practically of but little value.

That although the assignment described the patent as being for "an horological cradle," it will be understood as of the thing patented, without reference to all the parts which constitute a cradle.

Where the patent assigned is referred to by date it, may be presumed the purchaser examined it for himself. The maxim of "*caveat emptor*" would apply to such a transaction.

These were actions of assumpsit on promissory notes. The sole defence goes to the consideration of the notes. It is presented by three pleas.

1st, That the notes were given for an interest in a supposed patent for an " horological cradle, " whereas there was no such patent, but only a patent for an " ornamental design" for an " horological cradle."

2nd, That said notes were given for an interest in a supposed patent, which interest said Turner was supposed to hold by an assignment from the patentee, and that no such assignment had been recorded according to law.

3rd, That said notes were given for an interest in a supposed patent, and that said patent contains more than is necessary to produce the described effect, which addition was made for the purpose of deceiving the public.

Pleas traversed and trial by court by agreement, Davis, Judge, presiding, at September term, 1855, of the Logan Circuit Court. The defendants below gave in evidence an instrument in writing made by one Alexander Edmunds, purporting to transfer to the plaintiff and one McCarty Hildreth, a certain interest under a patent to said Edmunds, of date Feb. 23, 1853, for an "horological cradle," which instrument is an assignment of said Turner's interest therein to the defendants below.

Defendants also gave in evidence a patent and specifications to Alexander Edmunds, of date Feb. 22nd, 1853, for an " ornamental design" for an horological cradle.

Defendants also proved by said Edmunds that this is the only patent ever issued to him, and that the notes herein were given for the supposed transfer evidenced by the two successive assignments herein before mentioned.

This was all the evidence.

The court gave judgment for the plaintiff below, and defendants appeal and now assign for error that the court below erred in rendering judgment for the plaintiff below.

Stuart and Edwards, Lincoln and Herndon, for Appellants.

L. P. Lacey, for Appellee.

Caton, J. These actions are upon promissory notes, to which the defendant pleaded a want of consideration. On the trial was given in evidence by the defence a patent issued by the United States to Alexander Edmunds, bearing date the 23rd day of February, 1853, for " a new and useful design for a cradle." The *claim* set forth in the specification, and which is referred to

and made a part of the patent, is as follows: "What I claim as my production, and desire to secure by letters patent, is the design and configuration of the ornaments above described and set forth, forming together an ornamental design for an Horological Cradle," A conveyance was also shown from Edmunds to Turner and Hildreth of the right to certain specified territory of the United States. This conveyance or assignment recites that, "whereas, Alexander Edmunds, of Mt. Pulaski, in the county of Logan, and State of Illinois, did obtain letters patent of the United States for an Horological Cradle, which letters patent bear date the 23rd day of February, 1853." It then assigns to Turner and Hildreth "all the right, title and interest which I have in the said invention as secured to me by the said letters patent, for, to and in the States," &c. On the back of his conveyance they also showed an assignment by Turner of his interest therein to John and George Myers, for which the notes on which these actions were brought were given; and the real question in these cases is, whether this assignment conveyed an interest in the patent issued to Edmunds, as it purported to do. If it did convey such interest as it professed to, then such conveyance constituted a consideration for the notes, although it may be true that the invention was practically of little or no value. The pecuniary value of an ornamental design must, to a great extent, depend on the public taste or fancy, of which the purchaser must be the judge. *Caveat emptor.* The objection is that the assignment was of a patent "for an Horological Cradle;" whereas the patent granted was for an ornamental design for an horological cradle. To us the answer is obvious and satisfactory. The assignment does not pretend to use any technical words of description of the thing or right assigned, nor does it pretend to quote from or use the words of the patent in describing the right sold. In ascertaining whether the assignment was void, we must consider the case the same as if Edmunds were now prosecuting the assignees for an infringement. And in such a case, I am sure he would stand but a poor chance with either court or jury. The subject matter of the transfer was beyond all doubt the right secured to Edmunds by the patent; such is the express language of the assignment.

In describing the thing patented, language in most common use is used. It is universal in speaking of an invention applied to a particular machine to speak of the machine, as being the subject matter of the patent, as Danforth's Patent Mowing Machine, or Manney's Patent Reaper, or Wood's Patent Sawmill, or Woodworth's Patent Plaining Machine; and yet, in almost all cases the part of the thing patented is very insignificant as compared with the whole. The right to make and use nineteen-

twentieths of the very thing thus spoken of as patented, being common to all men; and yet it would hardly be denied that an assignment by the patentees, in such general terms as are usual in speaking of the thing to which the patented part is attached, would convey the right to make and use the thing actually patented. Now would it be pretended that the purchaser would suppose he was getting the exclusive right to make the entire machine and every part of it. So of the cradle. The novelty invented might have been in the propelling power which keeps it in motion, or some particular part of it, in the form of the bed of the cradle, or the frame to which it is attached, and by which it is supported; or it might have been in the manner of attaching the body of the cradle to the mtoive power, had there been any novelty in these, or in any other part of the entire thing, whether of great or of little importance, or whether really useful, or only ornamental. In either case, in common acceptation, the cradle to which such improvement would be applied would be called the patent cradle; and yet, by such designation, no one would suppose that every part and parcel of the cradle was new and patented. To find out the real extent of the new invention for which the patent was issued, resort would necessarily be had to the patent itself. Without such reference it is not probable that in one case in a thousand, where the purchaser, from a mere inspection of the machine, or the name given it by the inventor, would be able to determine, with any decree of certainty, what is covered by the patent. If the patentee sells the right to make such machines by the name which he gives it, or by any other designation or description which shows satisfactorily that he designed to sell to the assignee, the rights which were secured to him by the patent, the assignment would, as a matter of course, convey the right the same as in the sale or transfer of any other right, interest or property.

Had the subject matter of this conveyance been anything else which may be the subject of transfer, it would hardly have been contended that no title passed by reason of any supposed misdescription in the assignment; and yet, in this case, there is no provision of law requiring any technical or particular description of the thing sold. It is, as in all other cases, still a question of fact. What did the party design to sell, and what did the purchaser expect to get? No one can doubt that the patentee designed to sell his patent right secured by the patent referred to; and the purchasers could not, as reasonable men, have expected they were purchasing the exclusive right to make every part and member of the cradle which, was known by the designation of Edmund's Horological Cradle, for the form of

some parts of it at least, must have been familiar to them from childhood, and they could not have supposed Edmunds the original inventor; and, indeed, this remark will apply to by far the greatest portion of the machine. Of some parts at least, they did not suppose they were purchasing the exclusive right to make. Then what parts did they suppose they were purchasing the right to make? If they could form no definite idea from an inspection of the machine itself, necessarily they had to resort to other means of information. This case does not show that they had any other representations or means of information except the patent itself. Had this patent proved of vastly more value than the price paid for it, by which the defendants were accumulating rapid fortunes, they would have been slow to perceive any defect in the description by which they were to be stopped in their career of success. If we could not in that case hold the assignment void for a misdescription, we cannot now say that the assignees did not get the right which, by the patent, was granted to the patentee. If they did, then that of itself, whether really valuable or not, constituted a sufficient consideration for the notes sued on. The notes then were not given without consideration.

On the agrument it was suggested, and even pressed, that if a failure of consideration is not shown, a case of fraud is made out which should entitle the defendants to judgment. Much that has already been said will as well apply in answeriug this position and need not now be repeated. There is no evidence of any false representation by the plaintiff or by Edmunds in any way or at any time, unless it is found in the assignment itself, the provisions of which, as to this point, have already been considered. The assignments refer specifically to the patent by date, and it may not be a very violent presumptien to suppose that the purchasers examined it to see what they were buying. Should I buy a piece of land of a party by some general description which, without some reference to something else, would be unintelligible, but in my deed reference is made to the original patent by which it was conveyed by the government to my grantor, the description would become as certain, definite and satisfactory as if that description were copied into my deed; and nothing short of positive proof of a fraud or clear mistake would remove the presumption that I had examined or understood the contents of the patent. There is not near as much suspicion of fraud in this case as there was in Edmunds *v.* Myers, 16 Ill. 207, and yet in that case we reversed the decree and dismissed the bill because the charge of fraud was not sustained. That suit grew out of this same transaction.

The judgment must be affirmed.

Judgment affirmed.

McCarty Hildreth, Appellant, *v.* William Turner, Appellee.

APPEAL FROM LOGAN.

The act of Congress requiring a transfer of letters patent, to be recorded in the Patent Office within three months, is directory only as between the parties.

This was an action of assumpsit on a promissory note. The sole defence goes to the consideration of the note. It is presented by two pleas: 1st. That the note was given for an interest for a supposed patent for an "Horological Cradle;" whereas there was no patent, but only a patent for an "ornamental design" for an horological cradle. 2nd. That the note was given for an interest in a supposed patent, and that said patent contains more than is necessary to produce the described effect; which addition was made for the purpose of deceiving the public.

Pleas traversed, and trial by the court by agreement.

The defendant below gave in evidence an instrument in writing, made by one Alexander Edmunds, purporting to transfer to the plaintiff and defendant herein a certain interest in a patent to said Edmunds, of date February 23rd, 1853, for an "horological cradle."

Defendant also gave in evidence a patent and spcifications to Alexander Edmunds, of date February 22nd, 1853, for an ornamental design for an horological cradle. Defendant also proved by said Edmunds, that the foregoing is the only patent ever issued to him, and that the note was given for the supposed transfer, evidenced by the instrument in writing aforesaid. This was all the evidence.

The court gave judgment for the plaintiff below, and the defendant appeals, and now assigns for error that the court below erred in rendering judgment for the plaintiff below.

Stuart and Edwards and Lincoln and Herndon, for Appellant.

L. P. Lacey, for Appellee.

Caton, J. The first question in this case is precisely like that decided in Myers *v.* Turner, *ante*, and is determined in the same way, for the reasons there assigned.

This record presents the additional question: whether the assignment or transfer of a patent right is operative, until it is recorded as required by the patent laws of the United States. The assignment was, by the act of Congress, required to "be

recorded in the patent office within three months from the execution thereof." This act has been repeatedly held by the federal courts to be merely directory as between the parties; and, like our ordinary registry laws, designed for the benefit of subsequent *bona fide* purchasers. The reasons assigned for this construction by Story, J., in *Pitts* v. *Whitman*, 2 Story R. 609, are conclusive. He says: "In the first place, it is difficult to say why, as between the patentee and the assignee, the assignment ought not to be held good as a subsisting contract and conveyance; although it is never recorded by accident, or mistake, or design. Suppose the patentee has assigned his whole right to the assignee, for a full and adequate consideration, and the assignment is not recorded within the three months—and the assignee should make and use the patentee machine afterward—could the patentee maintain a suit against the assignee for such making and use, as a branch of the patent, as if he had never parted with his right?" But it is unnecessary to quote the whole of his reasoning. It is sufficient that the question has been settled by the federal courts, whose peculiar province it is to construe the acts of Congress. We follow these decisions, not only because they are authority, but also because we are satisfied they are sustained by sound legal reasoning.

The judgment must be affirmed.

Judgment affirmed.

JOSHUA MOORE, impleaded with Ira Y. Munn, Appellant, *v.* GEORGE VAIL, to use of A. Melick, Appellee; and SAME, Appellant, *v.* MOSES DODD, Appellee.

APPEAL FROM MORGAN.

If, at the time a conveyance is made, the premises conveyed are actually in the possession of a third party, claiming under a paramount title, it amounts to an eviction *eo instanti*.

Upon the common covenant that the vendor his heirs &c., "will warrant and forever defend the title to said lots to" &c., there must not only be a want of title in the vendor, but there must be an ouster under paramount title, before action will lie.

Such ouster may be established by showing that there was, at the time the covenant was made, a person in possession, holding under a parmount title. A party is not required to take actual possession of premises; but may even yield his possession, where another claims the premises under such a title, if presented and insisted upon.

A covenantee, if he relinquishes possession, must take the burthen of showing the necessity for doing so.

Where lands are unoccupied, as may be in this State, the legal title draws after it constructive possession, which will continue until actual eviction; and when possession is actually taken by one having paramount title, an action arises under the covenant, and the limitation commences to run from that time.

THE actions in this case are precisely similar in pleadings and proofs, both being in covenant on a deed, by which the parties covenanted, "that they, their heirs, executors and administrators will warrant and defend the title to the said premises (conveyed) to the vendee, his heirs and assigns for ever, against the claim of all and any person or persons whatsoever."

The cases were submitted to WOODSON, Judge, of the Morgan Circuit Court, without the intervention of jury; and a judgment was rendered against Moore for a breach of the covenant. The issue was found in favor of Munn, the other defendant, upon his plea of discharge in bankruptcy. Moore appealed, and insists that there was a legal eviction, as soon as the deed was made, by the actual possession and vald title of M. and F. Collins, and that he is now protected by the statute of limitations.

September 1, 1836, is the date of the deed sued on.

The deeds were made by *Charles* Collins, Munn and Moore, to Vail and Dodd respectively.

At the time, *Charles* Collins, Munn and Moore had not, nor had either of them, any title whatever; but M. and F. Collins then held the legal title, and were in the actual possession of the premises.

November 26, 1836, M. and F. Collins conveyed to *Charles* Collins, Griswold and Leslie, and delivered the possession to them, taking, simultaneously, a mortgage to secure the purchase money.

Shortly after, the possession was abondoned, and the premises lay vacant for a time.

Afterwards the mortgage was foreclosed; and, under the foreclosure title, one Abrams took possession in 1848.

Vail and Dodd never had actual possession, and never sought to obtain it, by suit or otherwise.

May 3, 1855, these suit were brought in the court below, by Vail and Dodd, respectively, against Munn and Moore, Charles Collins being dead.

The *eviction*, insisted on by the plaintiff below, is the taking possession, with title, by Abrams, in 1848. But it is alleged, in the alternative, that the lots are not on Sec. 12, but on 13.

In this view, one Lynch was the true owner of the land, when, in 1835, certain judgments were obtained against him, and became liens on the land.

In January, 1836, the land was sold on execution, to satisfy these judgments.

In April, 1836, right of redemption not having expired, Lynch, remaining in possession, conveyed to Charles Collins.

June 4, 1836, Charles Collins conveyed an undivided third to Munn, and an other third to Moore.

September 1, 1836, Charles Collins, Munn and Moore made the deeds now sued on.

Lynch continued in actual possession till the spring of 1837.

In 1837, a person was in possession, supposed to be as tenant to Charles Collins.

In 1839, the land, not having been redeemed from the execution sale, was conveyed, by the sheriff, to the purchaser.

In 1842, Mrs. Lynch, under the execution title, took possession, and this is the supposed eviction, on which the plaintiffs below proceed.

D. A. Smith and A. Lincoln, for Appellant.

M. McConnel, for Appellee.

Caton, J. With the view we take of the facts in this case, it is unnecessary to enter upon an examination of the questions which were argued, upon the supposition that the premises in question are situated on the east half of south-east quarter of Section 12, for, we find from the record that they were situated on the east half of the north-east quarter of Section 13. Taking the parol evidence as contained in the record, in connection with the recorded plat, and it is very uncertain on which quarter Collins' addition to the town of Naples was situated; although from this alone, considering the statements of Collins, made to Murry, I should think the preponderance would be that it was on Section 12. The plat of that addition does not determine on what tract of land the addition was laid out, nor did any witness ever see it laid out on the ground. Nor is it at all probable, to my mind, that it ever was actually surveyed on any tract of land adjoining Naples, according to the plat as recorded. It is altogether probable that it was merely platted on paper, and recorded without an actual survey; so that it might be as well supposed to be on one track as on another. But Collins pointed to the east half of south-east of Sec. 12, as his addition to Naples. That might be conclusive against him, as to any person who purchased on the faith of that representation; but as to the plaintiff in this case, and all others who purchased lots in that addition, of Collins, Moore and Munn, he made a different representation, and that, too, in a much more solemn form. On the 4th of June, 1836, Collins sold and conveyed, by two separate deeds of warranty, of that date, to Moore and Munn each, "The following described real estate, situated in Morgan county, in the State of Illinois, and immediately adjoining the old town of Naples, and including Charles Collins' addition to said town, to-wit: one equal undivided one-third of eighty acres

I bought of P. Lynch, being the north-east quarter of Section thirteen, in township fifteen north of range fourteen west." On the 18th of April previous, Lynch had conveyed this tract to Collins; and Lynch derived title from one Keyes, who was the patentee from the government. Those deeds from Collins, to Moore and Munn, are muniments of title under which the plaintiff received his conveyance. They affirm to all who purchase lots in Collins' addition under them, that the addition is situated on Section thirteen. They have as much right to insist that it is on Section thirteen, as Moore and Munn would have as against Collins, or as much as if their deed had contained the same statement that it was on this lot. We take it, then, as conclusively settled for the purpose of this action, that the premises in question were situated on the east half of the north-east quarter of Section thirteen, which Collins purchased of Patrick Lynch on the 4th of June, 1836. How, then, stand the other facts of the case? There is no dispute that Lynch derived a good title from Keyes. But at the time he sold to Collins, there were certain judgments against him, which were liens upon the land, and under which the premises were sold to one Bonesteel, who took a sheriff's deed in 1839, from whom, through a regular series of conveyances, the title was vested in Catherine Lynch; who, in 1842, took possession of the premises, which at that time were vacant. At what time the premises became vacant, does not appear; but the evidence does show that, at the time he sold to Collins, Lynch was in possession, and continued that possession till after the execution of this deed from Collins, Munn and Moore, to the plaintiff in this action, for the breach of the covenants of which this action is brought. The defence now insisted upon, is the statute of limitations. It is not denied that the title has failed, and that there has been, in contemplation of law, an eviction, so as to give the right of action on the covenants; but it is insisted that the title failed, and that a technical eviction accrued on the first day of September, 1836, the moment the deed was executed, which was more than sixteen years before this action was brought. We admit the principle of law as claimed, that if, at the time this conveyance was executed, the premises were actually in the possession of a third party, claiming under a paramount title, that of itself amounted to an eviction, *eo instanti*. Rawle on Covenants of Title. From the facts already stated, does it appear that on the 1st of September, 1836, Lynch held possession of the premises under an adverse paramount title? The presumption is that he held, in subordination to the title which he had conveyed to Collins, and there can be no doubt that he might have been dispossessed, under the deed of conveyance on which this suit brought is by an action of

ejectment. The continued possession of Lynch not being under paramount title, nor even adverse to the plaintiff's title, did not constitute an eviction so as to give the plaintiff a cause of action on his covenant of warranty. But it is insisted that there is a stipulation on file, which deprives the party of the right to insist upon the facts as they are shown by the proofs in the record. That stipulation is: "That said Collins, Moore and Munn had no good title to the land when they so sold and conveyed, and that their said title has failed, as charged in the declaration." The fair construction of this stipulation is perfectly consistent with the facts. The stipulation is, not that they had no title at all, but that they had no good title. This is literally true. They had a title, but it was not a good one, by reason of the incumbrance by which it was subsequently destroyed. It might have been rendered good, by a removal of that incumbrance before it ripened into a paramount title. But, admitting that the stipulation must be construed that they had no sort of a title at the time they sold, and that would not necessarily create a present liability, upon this common warranty in their deed. A mere want of title is no breach of this covenant. There must not only be a want of title, but there must be an ouster under a paramount title. Such ouster might be established by showing that there was, at the time the covenant was made, a person in possession holding under a paramount title; but the stipulation is silent on that subject, and the proof is positive that Lynch was not holding under any adverse title to that of the covenantors. There was, then, no breach of the covenant at the time it was made; consequently, as no cause of action then accrued, the statute of limitations did not commence running at that time; nor that there was a legal ouster, which could amount to a breach of the covenant.

Such eviction did occur, when Mrs. Lynch took possession of the premises in 1842. These are the facts, as before stated. At the time Patrick Lynch sold to Collins, certain judgments were existing against him, which were liens upon the premises, and under which they were sold to Bonesteel; who, after the redemption expired, took a sheriff's deed; and thus, for the first time, was created an absolute and paramount title to that which P. Lynch had conveyed to Collins. This title, by a regular series of conveyances, passed to Mrs. Lynch in 1842, who then, finding the premises vacant, took possession under her paramount title. How long P. Lynch continued the possession after he sold to Collins, does not appear; nor does it appear when the premises became vacant, or whether Collins or his grantees ever did take possession. Certain it is, however, that the premises were vacant when Mrs. Lynch took possession, under a paramount title, in

1842. There is no pretence of an actual physical eviction of the plaintiff. He must rely upon a constructive eviction, or eviction *in pais*. Few more interesting questions than this could be raised upon real covenants; but this subject has been so well examined upon authority, by Mr. Justice Koerner, in the case of Beebe *v.* Swartwout, 3 Gil. 162, that I shall forego my inclination to go over that ground again. The older authorities undoubtedly hold, that there could be no breach of a common warranty of title, or warranty for quiet enjoyment, until the covenantee had been actually evicted or turned out of the premises. The spirit of such a covenant, and the manifest justice of the matter, soon began to prevail over such an extremely literal interpretation of the intention of the parties. And it was held that, where, at the time of the execution of the covenantee, the premises were in the actual possession of another, who held them under a paramount or perfect title, then the covenant was broken as soon as it was made; for the party should not be put to the useless expense, delay and trouble to bring ejectment to get the possession, when it would certainly prove unavailing; nor should he be required to commit an actual trespass upon the real owner, in order to get possesssion, that he might himself be turned out of possession. But this is not the only case of constructive eviction which may now be considered as well settled by authority, and sustained by sound principles of morality and justice. If the covenantee be in the actual possession of the estate, he has the right to yield that possession to one who claims it under a paramount title, without resisting him by force or by litigation; and this is sustained by the same reasons of justice and good government which are applicable to the first exception. This, however, is not to be understood as holding that the mere existence of a paramount title constitutes a breach of the covenant, or that it will authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do so peaceably, and then claim that, by reason of such paramount title and his want of possession, the covenant is broken; nor will it justify him in abandoning the possession, without demand or claim by the one holding the real title. His possession, under the title acquired with the covenant, is not disturbed by the mere existence of that title; and he has no right to assume that it ever will be, until he actually feels its pressure upon him. He must act in good faith towards his covenantor, and make the most of whatever title he has acquired, until resistance to the paramount title ceases to be a duty to himself or his covenantor. While he is not bound to contest, where the contest would be hopeless, or resist, where resistance would be a wrong, yet always, where he yields without a contest or resistance, he must

take upon himself the burthen of showing that the title was paramount, and that he yielded the possession to the pressure of that title. Whenever he does yield quietly, he does so at his peril.(*a*)

In this country, where so much of the land which is the subject of sale and transfer is actually wild and unoccupied, rules on the subject of eviction, as well as of possession, must be determined in reference to such a state of things. Although in this case,it does not appear that the covenantee was ever in the actual possession of the premises, yet he certainly once held the legal title ; and, the lands being then actually vacant, such legal title drew after it the constructive possession ; and this constructive possession continued until it was actually interfered with by the owner of the paramount title. Until that time, he might peaceably have entered upon and enjoyed the premises, without resistance or molestation, which was all his grantors covenanted he should do. They bid not guarantee to him a perfect title, but the possession and enjoyment of the premises. There was no interference with this, till Mrs. Lynch entered and took possession of the property, in 1842. This entry being by paramount title, although peaceable and without opposition from the covenantee, was at least a constructive ouster and a breach of the covenant. Then, for the first time, an action accrued upon this covenant, and not till then did the statute of limitations begin to run. Since then, sufficient time has not elapsed to bar this action.

The judgment must be affirmed. *Judgment affirmed.*

ARCHIMEDES C. DICKSON, Appellant, *v.* THE PEOPLE, on the relation of George T. Brown, Appellee.

APPEAL FROM MORGAN.

A director of the State institution for the education of the deaf and dumb, appointed by the Governor with the advice of the Senate, holds an "office of honor," within the meaning of the twenty-ninth section of the third article of the constitution, which will be vacated by an acceptance of an appointment as Marshal by authority of the United States.

A judgment of ouster upon a proceeding by quo warranto will not be reversed, because formal leave to file the information had not been first obtained, if it appears that there was an acquiescence in the proceeding.

A director in the same institution (for the education of the deaf and dumb) has sufficient interest to entitle him to make the information in such proceeding.

DICKSON, the appellant, in January, 1853, was appointed by the Governor and Senate of Illinois, director for the Illinois

(*a*) Baily *vs.* Moore, 21 Ill. R. 170 ; Harding *vs.* Larkin, 41 Id. 414 ; Brady *vs.* Spurk, 27 Id. 479.

Institution for the Education of the Deaf and Dumb, and entered upon the duties of said appointment.

Subsequently to this appointment and acceptance, the said Dickson was appointed, by the President of the United States, Marshal for the southern district of Illinois, under the laws of the United States, and said Dickson accepted and entered upon the duties of said office.

George T. Brown, in October, 1855, filed against said Dickson, in the Circuit Court of Morgan county, an information, the object of which was to remove him from said appointment as director of said institution, averring that the two appointments aforesaid are incompatible, and that the acceptance of the office of marshal, was a virtual surrender of the said trust in said institution.

To sustain this information, the following clause in our State constitution is relied on: "No judge of any court of law or equity, secretary of State, attorney general, attorney for the State, recorder, clerk of any court of record, sheriff or collector, member of either house of Congress, or person holding any lucrative office under the United States or of this State, (provided that appointments in the militia or justices of the peace, shall not be considered lucrative offices,) shall have a seat in the General Assembly; *nor shall any person holding any office of honor or profit under the government of the United States, hold any office of honor or profit under the authority of this State.*"

The information alleges the appointment of Dickson to said directorship in said institution, but does not allege the same to be an office of honor or profit under the authority of the State of Illinois. The information does not show any interest in Brown, the relator, in said office or in the question made by said information.

Dickson was summoned and appeared in the Circuit Court, and made a motion to quash the writ and proceedings in said case, for the reasons following:

1st. That no affidavit was filed as to the truth of the said information; the charge against Dickson being in the nature of a criminal charge in favor of the people, for violating a criminal law of the State.

2nd. No notice was given to said defendant of the time and place of asking leave for suing out said writ of *quo warranto* to show cause against the leave to do so.

3rd. Said writ was unaccompanied by a copy of said information, and,

4th. Said writ and proceedings were insufficient to enable said relator to call upon said Dickson to answer.

This motion was overruled by the court, and the defendant ordered to answer said information.

The defendant then filed a general and special demurrer to said information, assigning, as a special cause of demurrer, that said office of director is not an office of honor or profit in the spirit and meaning of the State constitution.

The court, WOODSON, Judge, presiding, at October term, 1855, of the Morgan Circuit Court, overruled this demurrer, and rendered a judgment upon said information that Dixon was guilty of illegally intruding himself into said office of director, and that he be ousted therefrom and pay the cost.

Dickson took an appeal to this court, and assigns all those opinions and decisions of the Circuit Court for error.

M. McCONNEL and J. GRIMSHAW, for Appellant.

W. BROWN and D. A. SMITH, for the Relator.

SCATES, C. J. On the 17th of February, 1853, plaintiff was duly appointed by nomination of the governor, and with the advice and consent of the Senate, a director of the Illinois institution for the education of the deaf and dumb, for six years, and on the — day of March, 1855, he was duly appointed United States Marshal for the southern district of Illinois; and the only question is the incompatibility of the two offices under the provisino of iSection 29, Article 3, of our State constitution.

The court is of opinion that the directorship of the institution is na office honor, within the meaning of that section, and that plainiff vacated it by his acceptanee of the marshalship.

The section provides that "no judge of any court of law or equity, se cretary of State, attorney general, attorney for the State, recorder, clerk of any court of record, sheriff or collector, member of either house of Congress, or person holding any *lucrative* office under the United States or of this State—provided that appointments in the militia, or justices of the peace, shall not be considered lucrative offices—shall have a seat in the General Assembly; nor shall any person holding any office of *honor* or *profit* under the government of the Uuited States, hold any office of honor or profit under the authority of this State.

To comprehend the true sense of the convention in what they mean by "office" here we must look to the whole instrument, and to circumstances, to ascertain the evil or danger to be guarded against. It is founded on revealed truth: "no man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other" (Math. 9: 24); and confirmed by observation and expe-

rience. Therefore to prevent a sacrifice of one of two interests under the same authority, the powers of the government are divided into three departments—and "no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others." (Article 2, Secs. 1, 2.) It is intended to cut up the evil by the roots, without any speculation or experiment as to what might be the tendency of certain powers or places which seem, or might seem, to offer no inducement to abuse.

But there are offices and powers necessarily conferred and exercised for the public good, not strictly assignable to either department of the government, and such is the one before us, and such was intended to be reached and provided for in the 29th section referred to. This view is further strengthened by other provisions. Article 4, Sec 3, makes the governor ineligible to any other office until after the expiration of the term for which he was elected, nor shall he receive any emolument from the United States during the same time. (Sec. 5.) He shall appoint to all offices created by the constitution or law, when not otherwise provided for, (Sec. 12,) and might appoint himself to this directorship, if it be not an office within the constitution.

It is objected to this construction of the constitution, that if such unimportant offices as these, are included within the meaning of the constitution, it will subject the incumbent to impeachment under the 26th section of the 4th article, which declares that the governor and all other civil officers, shall be so liable, and it never could have been intended to use so dignified and expensive a tribunal and mode of trial for every little misdemeanor, in every petty office. While the constitution authorizes this mode of trial, it does not enjoin it mandatorily, but other modes may also be adopted, according to the dignity of the offender, and the degree of the offence.

"Every person who shall be elected or appointed to any office of profit, trust, or emolument, civil or military, legislative, executive, or judicial," shall take the oath against dueling,(Sec. 26, Art. 13); and any person who shall fight a duel, send or accept a challnge, or aid or abet in fighting a duel, shall be deprived of the right of holding any office of honor or profit, (Sec. 25, Art. 13): and finally, "no person" shall be elected to *any office*, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next before the appointment. (Art. 6, Sec. 7.) These various provisions are adverted to, to show that there was design in varying the terms of qualification in different provisions. The governor is ineligible to *any* other office, and persons not citizens to *any office*.

The duelist is disqualified from any office of *honor* or *profit*, and every person shall take an anti-dueling oath, as a qualification into any office of *profit*, *trust*, or *emolument*, civil or military; yet justices of the peace and militia offices, are not to be deemed *lucrative*, in the same section which excludes from double offices of either honor or profit. (Sec. 29, Art. 3.) It may not need an argument to show that the terms offices of honor and offices of trust are used in a synonymous sense in the sections disfranchising the duelist and prescribing the anti-dueling oath; and in the latter, profit and emolument will leave the sense of the latter term, as merely enlarging the sense of the former, to all offices having pay or perquisites, whether profitable or not.

And indeed so I must understand the terms in the 29th section, *lucrative* and *profit*. The former only disqualifies for a seat in the General Assembly, and under the former constitution (Art. 2, Sec. 25) the office of postmaster was excepted from lucrative offices. But an office of profit, whether lucrative, or profitable, or not—shall not be held under one government, and another of profit, or even mere honor, under the other government.

There are no fees, perquisites, profits or salary; it is an honorable trust that is confided to the directory of this institution. Yet we are not able to say that it is not an office, but merely an employment. For this distinction is taken, and it is a sensible one, between an office and mere employment on a contract, express or implied. Large sums of money are placed under the charge of these directors, to be disbursed in the maintenance and education of the deaf and dumb. Although the institution was chartered, and commenced as a private eleemosynary one, it has since become a public corporation, endowed by biennial appropriations from the treasury, from taxes expressly levied for this purpose. It is governed by this board of directors, appointed by the Governor and Senate, and who hold their offices for six years. It is an office of honor, and if not of great distinction, it is yet one of a high, benevolent, and important trust, and which, if administered in the liberal and philanthropic spirit in which it has been endowed by the public, will accomplish a great deal of good by relieving the misfortunes of those who so imperiously demand our aid, and deserve the warmest sympathies of our hearts, although they cannot audibly appeal for the one, nor hear the kindliest expressions of the other.

A decision or two may aid to throw some light upon a subject as yet but little discussed.

In the Commonwealth *v.* Binns, 17 Serg. and Raw. R. 219, the selection of a newspaper, to print the laws of the United States, was held not to confer an office upon the editor, and was

not incompatible with the office of alderman of the city of Philadelphia, which was held by the editor of the paper selected. It was regarded as a contract for service, and agencics and employments are not within the prohibitive meaning of the constitution and law.

The same distinction was made in an advisory opinion by two of the justices of the Supreme Court of Maine, in answer to an application of the Governor, as to the power to appoint a senator or representative of the same legislature which directed it, an agent for the preservation of timber on the public lands of the State, and other purposes.

Such an agency is a mere employment, and not an office within the meaning of the constitution. 3 Maine R., Appendix, 481. So again in The State of Deleware v. The Wilmington City Council, 3 Harring. R. 294: the office of trasurer of a public municipal corporation,(such as the city of Wilmington, is not "a civil office" in that State, in the sense of the constitution, which disqualifies a clergyman from holding civil office. In their arguments, both the justices in Maine, and the court in Delaware, use expressions which are broad enough to exclude the office before us. For in the former, they seem to regard "offices in the constitutinal sense, as confined to those to which a portion of the general sovereign power of one of the three departments of the government, is confided, and in the latter, that when exercised through a corporation, the offices are "corporate," and not "civil," in the sense of the constitution. This all may be true to a great extent, but is not universal,nor invariable. Corporations may be formed for the very purpose of exercising some of the important administrative functions of government, and the offices created in it, may possess all the powers for such object, that could be conferred on an independent civil office, and in its administration of the public authority be liable to all the bias, prejudice, corruption and abuse, intended to be provided against. So again an office may be created and an officer appointed to perform important public duties—important in exercising the administrative functions of government—and yet it may be difficult, strictly, to define and assign his office, powers and duties, to any particular department of the government. And this may be true, although it may be easy to exclude them from the legislature and jubiciary, and to show that authority must proceed from the former, yet they may be such as do not seem to belong to, or readily assimilate with, the executive department.

In The Commonwealth v. Dallas, 3 Yeates R. 303, 314, it was held that the Recorder of the city of Philadelphia was a judge of a court of record, but was not such a judge as was

intended by their constitution, and that office was not incompatible with the office of district attorney of the United States.

After vibrating between two opinions, and with hesitation, the court arrived at the conclusion, that the constitution intended only such judges as were distinguished by the constitution, the existing laws of the State, and the general language of the country. The case can form no precedent out of the State, nor will it throw much light upon the discussion of principle in its general application to offices, as that was not the term in their constitution.

The formal objection in relation to previous leave to file this information, we think insufficient to reverse this judgment. Leave by acquiescence will not be too strictly sanctioned when public redress is sought. The relator, as director of the same board, has shown sufficient interest to entitle him to make this information.

We are not called upon in this case, and shall not discuss the grade of "offices," with a view to fix any limit to the meaning of the constitution. This we think falls within the meaning and the mischief.

Judgment affirmed.

SKINNER, J., DISSENTING. By an act of the legislature, approved February 23rd, 1839, certain persons were created a body corporate, by the style of "the president and directors of the Illinois Asylum for the education of the deaf and dumb," with perpetual succession, power to contract, sue and be sued, have a common seal, purchase, hold and convey real estate, for the purposes of the corporation, and so forth. The legislature expressly reserved the power to alter, modify and change the charter or act of incorporation at pleasure, provided for private donation and public appropriation to establish and sustain the institution, and for the administration of the affairs of the institution, by a board of directors and their successors. Laws of 1839, 162. The legislature, by an act approved February 3rd, 1849, changed the name of the corporation, the term of office of the board of directors, provided for their appointment biennially, by the Governor and Senate, and for the filling of vacancies in the board, by the board of directors. Laws of 1849, 93.

The constitution of this State declares "that no person holding any office of honor or profit under the government of the United States, shall hold any office of honor or profit under the authority of this State."

The record admits that the defendant has been appointed, by

the government of the United States, marshal of the southern district of Illinois, since his appointment as one of the board of trustees of this institution, and has entered upon the discharge of the duties of the office.

The institution is of a public character, for its uses and objects are public, but the corporation, through which the affairs of the institution are administered, is clearly a private corporation, of an eleemosynary character. Public corporations are such as are established for governmental and municipal purposes, and relate generally to communities, as counties, cities, towns, &c., and, perhaps, such as are of a strictly public character, and where the government is the sole founder and has the *whole* interest. Private corporations, although established, wholly or in part, for public purposes, are artificial persons, created by law, endowed with certain powers of maintaining such artificial existence, of performing acts, as persons, and incurring legal liabilities. In such corporations, private interests are in some manner involved, by voluntary donations, by the holding of stock, or the like; although the government may also be interested, or be the principal founder and supporter of the same, by public appropriation. If the corporation is not created for the administration of political power, or for purposes strictly incidental thereto, without the intervention of individual interests, by donations or otherwise, the corporation, although for public purposes, is a private corporation in law. Angel & Ames on Corp. 9; Ibid., Chap. 1, Sec. 1, 2 and 3; Dartmouth College *v.* Woodward, 4 Wheaton 668; Allen *v.* McKeen, 1 Sum. (Cir. Court) R. 276; U. S. Bank *v* Planter's Bank, 9 Wheaton 907; Bank of South Carolina *v.* Gibbs, 3 McCord 377; 2 Kent's Com. 275, 276.

In this case, the act of incorporation contemplates donations by private persons, provides for obtaining the grounds, upon which to erect the buildings of the corporation, by individual bounty, und confers all necessary powers and franchises characteristic of private corporations aggregate. Nor can it be contended that this corporation may not incur legal liabilities, that judgments may not be obtained against it, founded upon such liabilities and satisfaction obtained out of the corporate property.

All private corporations emanate from the sovereign power of the State, but they have a separate legal existence, may act as individuals, to the extent of the powers conferred by the law of their creation, and those lawfully administering the affairs of such corporations are, in no proper sense, municipal officers, or persons holding office under authority of the State. The trustee in this case, however, appointed, is an officer of the corporation,

having no powers appertaining to the political government of the State—an officer of the *corporation*, and *not* of the government.

For the reasons stated, I am unable to concur in the opinion of the majority of the court; and I purposely avoid intimating any opinion as to the extent of the operation of the clause of the constitution, before quoted, beyond the necessities of the case presented by the record.

MOSES THORPE, Plaintiff in Error, *v.* SAMUEL S. STARR, Administrator, &c., Defendant in Error.

ERROR TO MORGAN.

A variance between a writ and declaration can only be taken advantage of by plea in abatement; and after an award upon a reference by the court such a plea is unavailing.

Where a sole plaintiff dies and the cause of action survives, an administrator should be substituted in the cause, and all subsequent proceedings should be had in his name.

Upon a reference to arbitrators, by order of court, of matters in a pending suit, by agreement, judgment should be entered upon the award, as in a case of verdict by a jury.

THIS cause was heard before WOODSON, Judge. The opinion of the court gives a statement of the case.

BROWN and MCCLURE, for Plaintiff in Error.

M. MCCONNEL and J. GRIMSHAW, for Defendant in Error.

SKINNER, J. Aaron Starr sued Moses Thorpe in assumpsit, and declared against him in *debt*. The cause was referred to arbitrators under the statute, and the arbitrators reported to the Circuit Court an award in favor of Starr. The record shows that letters of administration of the estate of Aaron Starr were filed in the Circuit Court; the death of the plaintiff suggested, and Samuel Starr, the administrator, made a party, but does not show that the administrator was made party *plaintiff*.

The letters of administration recites that Aaron Starr died intestate on the 24th day of November, 1853, (after the making and filing in court of the award,) and appoints Samuel Starr administrator of his estate. The court, on motion, ordered, "that the award be approved and entered as a judgment" of the court.

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The award is set out, and then follows a judgment for cost and award of execution therefor. All the orders are entitled in the name of the original parties, and the administrator is no where further noticed in the record. Thorpe assigns for error that the writ is in assumpsit and the declaration in debt: that the judgment is in favor of Aaron Starr, who is shown by the record to have been dead at the time of its rendition, and that the judgment is informal and insufficient.

The variance between the writ and declaration could only have been taken advantage of by plea in abatement, and after the award such plea would have been unavailing. Weild *v.* Hubbard, 11 Ill. 573 ; 1 Chitty's Pl. 581 : Wilson *v.* Nettleton, 12 Ill. 61.

Under the statute, where a sole plaintiff dies and the cause of action survives to personal representatives, the death being suggested and the administrator made known to the court, an order should be made substituting such administrator plaintiff in the cause, and the cause should then proceed to judgment and execution in the name of the administrator. R. S. 44, Sec. 7.

The reference to arbitrators in this case was made of matters of a pending suit, and by order of court, upon agreement of the parties ; and upon the coming in of the award judgment should have been entered thereupon as in case of verdict of a jury. R. S. 56, Sec. 2 ; ibid. 57, Sec. 8.

The judgment is reversed and the cause remanded, with direction to the Circuit Court to make an order substituting the administrator party plaintiff and to render judgment in his favor for the amount of the award in debt, and for costs, unless cause to the contrary be shown.

Judgment reversed and cause remanded.

Judgment reversed.

THE PEOPLE, Plaintiff in ERROR, *v.* WILLIAM PHELPS, Defendant in Error.

ERROR TO FULTON

A suit by scire facias on a forfeited recognizance in a criminal case is for the recovery of a debt of record, and is a distinct proceeding from the criminal matter out of which it arises.

If bail, by means of a capias on the indictment found, can produce the principal, so as to procure their own discharge from scire facias, by a surrender of the principal, the costs under the capias are not properly chargeable as costs under the proceeding by scire facias.

THE defendant in error entered into a recognizance with one Bennet for the appearance of the latter to answer to a criminal charge. The recognizance was forfeited, and a *scire facias* issued against Bennet. Before judgment was entered on the sci. fa., Phelps procured a capias to be issued, upon which Bennet was arrested and brought into court, whereupon Phelps asks to be discharged, to which the State's attorney objected, unless Phelps should first pay the costs made upon the capias, issued at his instance. The Circuit Court, WALKER, Judge, presiding, ordered his discharge, to which the State's attorney excepted, and brings the case here.

W. C. GOUDY, District Attorney, for The People.

W. KELLOGG, for Defendant in Error.

SCATES, C. J. The institution of a suit by *scire facias* on default of appearance on a recognizance in criminal cases, is for the recovery of a debt of record; and it is a distinct proceeding from the criminal proceeding out of which it arises, and in no sense interferes with the process or progress of the criminal charge. It become a civil proceeding: indeed I believe at the common law, it was not in the same court but by estreatment of the recognizance into the king's exchequer, the scire facias issued from that court, for the purpose of awarding execution for the debt due the king, as in other cases, for the collection of his revenue.

When a defendant escapes from custody, or makes default on recognizance, the people are entitled to a *capias* against him, as a matter of course; and it issues in the criminal and not the civil case. The intermeddling of a surety of defendant in a recognizance, by himself or his attorney, without the advice or direction of the State's attorney, either in asking for the *capias* or in procuring its service, will not charge them with liability for the costs taxable for the process or service of it, as principal or surety for costs, as for services rendered to them in the case. Although such surety may be quickened to diligence and activity in procuring defendant's arrest, by the desire to procure his custody, with a view to his surrender in discharge of his own liability, it cannot be allowed to change his relation to the prosecution from that of a citizen of the community into that of party or surety for costs.

Bail have the right to procure a certified copy of the recognizance, and power under it to arrest their principal and surrender him to the sheriff, in discharge of the recognizance, upon payment of cost, at any time before award of execution on *scire*

facias, [Rev. Stat. 187, Sec. 196] ; and we apprehend no reasonable objection can be urged against their using the same diligence and activity in accomplishing the same end by a *capias* on the indictment ; but not in the sense of surrendering to or allowing bail to take the control of the prosecution or the process. (*a*)

Under these veiws of the rights and liabilities of bail, we are all clearly of opinion that the item of forty dollars cost of executing the *capias* issued on the indictment, belongs to the costs taxable in that case, and is improperly put into the bill of cost taxable in the *scire facias*. The defendant having paid all costs properly taxable against him, up to the surrender of his principal, is entitled to be discharged of his liability on the recognizance and scire facias.

Order of discharge is affirmed.

Judgment affirmed.

THOMAS DAVIS, Plaintiff in Error, *v.* ISAAC SCARRITT, Defendant in Error.

ERROR TO MORGAN.

The affidavit of one of several defendants, denying the existence of a partnership, or the execution of the instrument sued on, renders it necessary, as to him, that proof of partnership, or of the hand writing, should be made. Co-defendants are not entitled to any direct benefit from such affidavit.

ACTION of assumpsit, commenced by the defendant in error against Davis, the plaintiff in error, and one Wm. Pankey. The declaration contains two counts, and commences, Isaac Scarritt, plaintiff in this suit, complains of William Pankey and Thomas Davis, *late* partners, trading and doing business under the name, style and firm of Pankey & Davis, defendants.

For that whereas the said defendants heretofore, to wit : on the 24th day of July, 1851, at Alton, to wit : at the county of Greene aforesaid, made their certain promissory note in writing, by the name, style and firm of Pankey & Davis, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, by which said note the said defendants promised to pay to the order of the said plaintiff, four months after the date thereof, three hundred and forty dollars and forty-one cents, for value received, &c.

And whereas, also, the said defendants afterwards, to wit : on the 3rd day of October, 1851, at the county of Greene,

[a] Weese vs. People, 19 Ill. R. 646; Mather vs. People, 12 Id. 9; Gingrich vs. People, 34 Id. 448.

made their certain other note in writing, bearing date the day and year last aforesaid, by which note, the said defendants, by the name, style and firm of Pankey & Davis, promised to pay to the order of the said plaintiff, one day after the date thereof, six hundred and twenty-two dollars and four cents, for value received.

Pleas of non-assumpsit and payment by Pankey ; plea of non-assumpsit by Davis, verified by affidavit.

Venue changed to Morgan county.

At the March term, 1855, of the Morgan Circuit Court, the suit was abated as to William Pankey, and leave was given to Davis to file additional pleas.

And afterwards, at October term, 1855, of the Morgan Circuit Court, the cause was tried by a jury. The plaintiff introduced a witness, who testified that the signatures of the notes were in the hand writing of William Pankey, and then offered to read the notes in evidence, to which the defendant objected. His objection was overruled by the court, and defendant excepted. The notes were then read in evidence, and are signed Pankey & Davis.

Defendant then proved by the same witness, that on the 24th July, 1851, William Pankey was in partnership with one William B. Pankey, and that defendant, Davis, was not in partnership with William Pankey to his knowledge ; that William B. Pankey was his partner until last of September or first of October, 1851 ; that Davis lived in Carrolton, and Pankey in Whitehall, and carried on business there ; to which evidence the plaintiff objected, and his objections were sustained by the court and the defendant excepted. This was all the evidence offered on both sides.

The cause was tried before WOODSON, Judge.

PALMER and PITMAN, for Plaintiff in Error.

D. A. SMITH, for Defendant in Error.

CATON, J. This action was upon a promissory note signed "Pankey & Davis." The defendants pleaded severally : Pankey non-assumpsit and payment, and Davis non-assumpsit, which is verified by his affidavit. On the trial, the Circuit Court held, that this was not sufficient to put in issue the making of the note by him, or the existence of the firm of Pankey & Davis, by which the note purported to have been executed. In this the court erred. The eighth section of chapter forty, Rev. Stat., upon which this decision was made, has been twice construed by this court, on this very point. Stevenson *v.* Farnsworth, 2 Gil.

man 715, and Warren *v.* Chambers, 12 Ill. 124. It was there held that the affidavit of one of the defendants denying the existence of the partnership or the execution of the instrument sued on, was sufficient to entitle the party making the affidavit to make the defence; as to him, the case stands upon proof, the same as it would had the statute not been passed. Full proof, however, is only made necessary by the affidavit as to him. (*a*) The implied admission created by the statute, still exists as to the other defendant, who is not entitled to any benefit from the oath of his co-defendant, except the incidental benefit which would result from the plaintiff failing to maintain the issue as to one of the joint defendants. The statute says, that when two or more are sued as partners or joint obligors, the plaintiff need not prove the joint liability or partnership, "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." Here the defendants were sued both as partners and as joint obligors, in the sense in which these words are used in the statute, and either of the defendants had the option to choose which mode he pleased, to deny the joint liability. Davies adopted the latter mode provided in the statute, and he was entitled to make his defence under the sworn plea.

The judgment is reversed and the cause remanded.

Judgment reversed.

LANSING S. WELLS, Appellant, *v.* WILLIAM E. HEAD, Appellee.

APPEAL FROM JERSEY.

In a action of trespass for injury to personal property, it is not error to refuse to instruct the jury that if they have a reasonable doubt of the guilt of the defendant, they must find for him. Such a case depends upon the preponderance of the evidence offered and its credibility.

THIS was an action of trespass, for shooting a mare, of which shooting she died. The declaration is in the usual form, and a plea of general issue, and change of venue from Madison county to Jersey county for trial.

Upon the trail of the suit before a jury, the plaintiff below introduced evidence tending to prove the defendant guilty of the trespass as alleged.

After the closing of evidence, the defendant asked the court to give the following instruction: "The court is requested to

[a] Hurd vs. Haggerty, 24 Ill. R. 174, Gordon vs. Bankard, 37 Ill. R. 147; Degan vs. Singer, 41 Id. 28.

instruct the jury that if they have a reasonable doubt of the guilt of the defendant, they must find for the defendant," which instruction the court refused to give and defendant below excepted.

The jury returned a verdict for the plaintiff for $180.66, and the defendant asked for a new trial, which was denied.

The defendant prayed an appeal.

The appellant assigns the following errors:

1st. The court refused to give to the jury the instruction as asked for by the appellant.

2nd. That the court refused set aside the verdict of the jury and grant a new trial.

This cause was tried before WOODSON, Judge, at May term, 1855, of the Jersey Circuit Court.

S. T. SAWYER, for Appellant.

H. BILLINGS and J. GILLESPIE, for Appellee.

CATON, J. Unless we are inclined to overrule our decision in the case of Webster *v.* The People, 14 Ill. 365, this judgment must be affirmed. In that case this question and the whole of it is expressly decided, and in a stronger case than this. That was an action of debt on a penal statute brought in the name of the State. This is a mere action of trespass brought by one citizen against another. There is no reason why the proof should be any stronger in this case than as if the action were trover, replevin or detinue, or even a simple action of assumpsit. It is a simple question of right between two men. One asserts a right which the other denies. The question is, in whose favor is the balance of proof? Does the plaintiff convince the judgment that the right which he claims is with him, or that the defendant has done him the injury of what he complains? If it is proved by the same measure of evidence which would be sufficient in any other civil controversy, that is sufficient. The Circuit Court committed no error, and the judgment must be affirmed.

SKINNER, J. The trespass alleged in the plaintiff's declaration does not amount to a charge of crime, or aver facts constituting in law a crime. Crime therefore not being directly imputed to the defendant, no presumption of innocence is involved, and a preponderence of evidence is sufficient to sustain the verdict.

Judgment affirmed.

WILLIAM LOOMIS and THOMAS G. TAYLOR, Plaintiffs in Error, *v.* JOSIAH FRANCIS, for the use of Charles R. Pierce, Defendant in Error.

ERROR TO SANGAMON.

Upon an application to amend the record of judgment, by making a new party, such party when brought into court, should be ruled to plead, before he is adjudged. Nor should the judgment be entered *nunc pro tunc*, so as to give it any retroactive effect.

THIS was an application to the Circuit Court of Sangamon county, to make one Thomas G. Taylor a party to a judgment, in the case of Josiah Francis, sheriff of Sangamon county, for the use of Charles R. Pierce, against William Loomis and the said Thomas G. Taylor, entered at August term, 1851, of the said court, so that the judgment should be against both, &c. This application was founded upon the affidavit of Pierce, stating that his attorney in the suit against Loomis and Taylor, had released Taylor from his consent or knowledge, and that he remained in ignorance that the judgment had been so taken, until a short time prior to the application to correct the judgment, nor until after two executions had been returned," no property found." The affidavit also stated that the attorney who released Taylor was unmarried, was without means, and absent from the State, and that recourse to him would be useless. A counter affidavit was filed by Taylor. Proofs were taken by the court, Davis, Judge, presiding, at March term, 1855 ; when it was ordered, all objections to the form of the remedy sought by Francis for the use of Pierce, having been waived, that the judgment of August term, 1851, be so amended [*nunc pro tunc*,] as that the name of Taylor should be inserted therein. To correct this order, Taylor sued out his writ of error and brings the case here.

LINCOLN and HERNDON, for Plaintiffs in Error.

STUART and EDWARDS, for Defendant in Error.

CATON, J. The court undoubtedly erred in rendering the summary judgment which it did, and also in entering the judgment *nunc pro tunc*. When Taylor was brought into court, he should have been ruled to plead, and thus given an opportunity of making his defence to the merits, and upon his failing to comply with such rule, he might have been defaulted, as in other cases.

Nor should the judgment in any event have had a retro-active operation. By doing so, subsequent purchasers from Taylor might be affected. The only object which we can perceive in entering the judgment, *munc pro tunc*, was to make it a lien on Taylor's estate, from the date of the judgment against Loomis, for the purpose of cutting out intermediate purchasers and incumbrancers. That purpose was illegal and unjust as to them, for they are entitled to be protected from any embarrassemt which this judgment might create, although they are not parties to this proceeding. Indeed, for that very reason, no judgment should be entered which might prejudice their rights.

The judgment is reversed and the cause remanded.

Judgment reversed.

JOHN REYNOLDS, Plaintiff in Error, *v.* AMOS B. THOMAS *et al.*, Defendants in Error.

ERROR TO FULTON.

An act of forcible entry and detainer cannot be maintained against two or more, who hold in severalty.

Courts of law will not take cognizance of separate causes of action against different parties in the same suit.

THIS was an action of forcible entry and detainer, commenced by the plaintiff in error before a justice of the peace, in Fulton county, against the defendants in error, where there was a trial by jury, who found a verdict of not guilty. On this verdict there was a judgment for costs against the plaintiff, from which he appealed to the Circuit Court.

At the October term, 1855, before THOMPSON, Judge, presiding, a motion was for first time entered to dismiss the suit, because of the insufficiency of the complaint, which motion was sustained, and the suit dismissed, to which the plaintiff excepted. Judgment was rendered in Circuit Court against the plaintiff, and he now brings the case to this court by writ of error.

The only error assigned is that the Circuit Court erred in dismissing the suit.

The complaint charges that the plaintiff was, on the first day of April 1855, and had been for several months prior thereto, in the actual, peaceable and exclusive possession of a town lot described in the complaint, and of a two story brick building thereon; that the plaintiff was the owner, and entitled to quiet

and undisturbed possession; that while the plaintiff was in such possession, Joshua R. Breed, alone or in concert with Caleb S. Hall, forcibly, violently and without right, entered upon the possession of the plaintiff, and forcibly, violently and wrongfully ousted the plaintiff from the possession of the lot and building; that the said Breed, John Kelly and Lorenzo Bolton, conspiring together to keep the plaintiff out of possession, leased the lower story of the building to Amos B. Thomas and Harvey Gaylord, (two of the defendants,) and the upper story to Benjamin Wells, for Harriet Wells, (the other defendant;) that the defendants thereby entered into the actual possession, were in possession when the complaint was made, and refused to surrender it on demand.

The complaint then avers that the defendants, before and at the time they leased and took possession of the premises from Breed, Kelly and Bolton, each knew that the plaintiff was in possession at the time of the forcible entry, and had been prior thereto; that one of them had been a tenant, and surrendered, on the evening before, to the plaintiff; and that they hold as tenants, and maintain the possession of Breed, Kelly and Bolton so obtained by force.

J. K. COOPER and GOUDY and JUDD, for plaintiff in Error.

W. KELLOGG, for Defendants in Error.

SKINNER, J. This was an action of *focible entry* and detainer. On motion of defendants below, the court dismissed the suit for want of a sufficient complaint, and this decision is assigned for error.

The complaint alleges that on the first day of April, 1855, the plaintiff was the owner and in the actual possession of a certain town lot [decribing it], and a two-story building thereon; that while so in possession, one Breed forcibly entered and turned the plaintiff out of the possession thereof; that said Breed and others (named), conspiring together to keep the plaintiff out of possession, leased the lower story of the building to Amos and Harvey Gaylord, and the upper story to one Wells, and that they entered and hold possession against the plaintiff after demand, &c.; that defendants, at the time of taking their leases and taking possession, knew of the forcible entry of Breed, and hold under and maintain the possession of Breed.

The complaint shows that the defendants entered into and hold separate portions of the building in severalty, and not in common; that they entered and hold under separate leases and distinct portions of the premises. An injury to or disturbance

of the possession of one tenant would not give an action therefor to the other, nor to all of them jointly.

Their interests and possessions are distinct, and the portion occupied by each tenant is as much his *castle* in law as if in a separate building and on different ground. This being an action in *tort* the plaintiff could have entered a *nolle prosequi* and so have avoided the misjoinder, but not chosing to do so, and the misjoinder appearing from the complaint, the court properly dismissed the court.

In this case the complaint shows two distinct causes of actions, each against different persons, and all are sued jointly.

This is not like a case where the parties go to trial without objection, and there is a special finding as to each defendant; but the objection is taken in nature of a demurrer, and the error appears upon the plaintiff's own showing.

The following cases hold—under a statute similar to ours—that an action of forcible detainer cannot be maintained against two or more who hold in severalty: Kerr *v.* Phillips, 2 Southard's R. 818; Snedeker *v.* Quick, 7 Halstead 129.

Courts of law will not take cognizance of separate causes of action against different parties in the same suit. 1 Chitty's Pl. 73; ibid. p. 1.

Judgment affirmed.

TRUSTEES OF SCHOOLS of Township Sixteen north, of range nine west, Appellants, *v* STEPHEN A. DOUGLAS *et al.*, Appellees.

APPEAL FROM MORGAN.

The several acts of the General Assembly since 1839 have kept alive the succession in the several officers appointed as agents for the inhabitants; and the present trustees may sue and recover upon a judgment in favor of a school commissioner which was rendered at that time.

ON the 30th August, 1836, the appellee, A. Brockenborough, and J. McKinney, made their note at one year's date to John T. Jones, then school commissioner and agent for the inhabitants of said county for the use of the inhabitants of T. 16 N., R. 9 W., for $50, and a judgment was rendered by the Circuit Court of said county against the makers of said note, at the suit of said Jones, as school commissioner, on the 28th June, 1839, for debt, damages and costs. At the October term, 1854, of said

court, appellants sued the applee and McKinney in debt on said judgment to revive the same, copying the note on which judgment had been rendered, in the declaration, averring the death of Brockenborough. and the non-payment of the judgment. Summons returned not found as to McKinney, and service acknowledged by the appellee. At March term, 1855, he filed a demmrrer to the declaretion, which was sustained by the court, WOODSON, Judge, presiding.

D. A. SMITH, for Appellants.

M. MCCONNEL and W. A. TURNEY, for Appellees.

CATON, J. The original judgment was obtained in 1839, by Jones, as school commissioner, and agent for the inhabitants of the county, for the use of the inhabitants of this particular township, in pursuance of the laws as they then existed. The legal title to this judgment continued in the school commissioner till the passage of the act of the 26th February, 1841, which transferred the legal title in the judgment to trustees of schools who were authorized to be elected by that act. Here the legal title rested till the passage of the law of 1845, which, in the forty-third section, transferred it to other trustees authorized by that act to be elected. Thus it remained till the passage of the school law of 1847, when it was again transferred to other township trustees, authorized to be elected by that act. The law was again altered in 1849, when other township trustees were authorized to be elected, who are declared to be successors to the several trustees authoized to be elected by the before mentioned laws, and vesting in them , all rights of property, and rights and causes of action, existing or vested in the trustees of school lands, or trutees of schools as successors, in as full and complete a manner as was vested in the school commissioners, the trustees of school lands, or the trustees of schools appointed or elected as aforesaid." During all these several transfers of this judgment it remained upon the record of the court, without, so far as appears, any steps being taken to collect it. It still stood in the name of the school commissioner, in whose favor it was rendered, till, by the last act, it was transferred to the present plaintiffs, by whom this action was brought in their corporate capacity, upon that orignal judgment ; and the only question presented is, their right to bring or maintain the action. I cannot discover the least objection to their legal right to do so. If the legislature had power to pass the several acts transferring the legal title to the judgment, in the manner above stated, there is no room left to doubt their right to bring

the action; and their power to do this was not even denied upon the argument. These were all municipal corporations created for school purposes; and this judgment, and other property, vested in them, was public property for the use of schools. And this, as well as the corporations in which it was vested, was necessarily subject to legislative control and disposition. The complete authority of the legislature over such subjects has never been doubted, and probably never will be, seriously.

If, as was contended, the corporation by which the action was commenced, was, pending the action, by a subsequent law, repealed out of existance, and was succeeded by another created by that act, I find no such law; but if it was as contended, the new corporation was of the same name, and possessed the same powers, rights and jurisdiction as the old and it became its duty to prosecute the action to a determination in the same form and mode, and in the same name, so that no change in the name of the plaintiff was required to be made on the record. Besides, even if there had been a change in the name of the corporation, the objection should have been made by a plea in abatement *puis darrein continuance*, and not by general demurrer.

We think the demurrer was improperly sustained; and the judgment must be reversed, and the cause remanded, with leave to the defendants to plead to the merits.

Judgment reversed.

DISSENTING OPINION BY SKINNER, J. The judgment sued on in this case was rendered in favor of Jones, school commissioner, &c. He was the plaintiff in the action, and in whose name the recovery was had. The legal title and interest in the judgment was in him alone, although he might have no equitable or beneficial interest therein. The legal title in and right of action at law upon this judgment was vested in Jones, and upon his death would pass to his personal representatives. in exclusion of those having the equitable or beneficial claim; and so they would remain until some law should give to another the right of action, and those having the beneficial interest could sue upon it alone in the name of the plaintiff in the record—Jones—or his personal representatives. The successor of Jones, as school commissioner, could not have maintained an action at law upon this judgment, either in his own name, or as school commissioner. The addition to the name of the plaintiff in the record, of "school commissioner," &c., does not affect the *parties* to the action, or have any other effect than to indicate who are entitled to the proceeds of the judgment, and have the equitable interest in

such judgment. The recovery is still in favor of Jones, the plaintiff in the record.

Though a judgment be recovered by A. for the use of B.. B. cannot sue at law upon the judgment, but to maintain the action must sue in the name of A., in whom the legal title is. Triplett *v.* Scott, 12 Ill. 137; 1 Chitty's Pl. 2 and 3. In none of the laws giving trustees of schools the right to sue upon causes of action existing in the school commissioner, or in any of the school corporations to which they are successor, do I find that the right is given, *except so far as such right existed in the school commissioner, or in the school corporations to which they succeeded*; and the right of action upon this judgment never existed in either, and hence, by operation of these laws, could not vest in the present trustees of schools. Laws of 1841, 275, Sec. 62; Laws of 1845, 61, Sec. 43; Laws of 1847, 127, Sec. 39; Laws of 1849, 162, Sec. 39.

For these reasons I think the judgment of the Circuit Court should be affirmed.

LEWIS RUFFNER, Plaintiff in Error, *v.* MURRY MCCONNEL *et al.*, Defendants in Error; and MCCONNEL *v.* RUFFNER *et al.*, on Cross Bill.

ERROR TO MORGAN.

A mistake in fact may be a ground for equitable jurisdiction, if the mistake is made to appear satisfactorily. But this does not extend to mistakes in the law of the contract, or in the intention of one of the parties, or the mistakes of legal terms agreed upon between the parties, without fraud.

One partner has not the power to convey the realty of the firm by deed or assignment, nor make contracts about it specifically enforcible against the others.

Lands belonging to a partnership are liable for payment of its debts, and go into joint account on settlement of profit and loss; but they must be conveyed in the mode recognized for the transfer of real estate.

RUFFNER states, in his bill, that, for value received of Fielder, as general agent of Kanawa Salt Company, on 29th Aug., 1842, for consideration of $400, a deed was executed and acknowledged, on same day, at Naples, by Vansyckel and wife, and McConnel and wife, two days afterwards at Jacksonville, to Feilder, for a tract of land in Scott county; Vansyckel and McConnel and wives " covenanting that their heirs, executors and administrators will warrant and defend title to said premises, and to every part thereof, to him, the said party of the second part

his heirs and assigns forever, against the lawful claim or claims of all and every person or persons whatsoever, claiming or to claim the same or any part thereof;" that it was the intention to execute a general warranty deed, and that the word "they," by inadvertence or mistake, was omitted; that the contract was for a general warranty deed, and there was no stipulation for just such a deed as was executed; that Fielder and wife, on 9th October, 1853, by quit-claim deed conveyed the land to Ruffner, and that deed was not recorded until 1853; that a chancery suit was instituted in Circuit Court of Scott county, in 1847, by William Richardson and others *vs.* McConnel, Vansyckel and Fielder and others, which was responded to by them, he relying upon the aforesaid deed, and that he was purchaser for a valuable consideration without notice; that a decree was had in the case, under which the land was sold and conveyed to William Thomas, as trustee for complainants, in 1850 and 1851, and that sale and conveyance had been reported, and approved by the court, and that McConnel and Vansyckel as parties to the proceedings, had notice. Ruffner says that title, conveyed to him by Fielder, and by McConnel and Vansyckel to Fielder, was not warranted and defended, but was evicted by title paramount under the foregoing proceedings, and that title to the property never was in McConnel and Vansyckel. Ruffner says that his title as grantee or assignee of Fielder has been wholly evicted, and that McConnel and Vansyckel ought to pay him the consideration of the deed of 29th Aug., 1842, and six per cent. interest from that date, and prays for that relief, or such relief as he may be entitled to in the premises.

McConnel answers that Ruffner has no right to sue in this case; that Fielder had only an equity to correct mistake, which was not transferable; that Fielder had no right to recover the purchase money—could only have the mistake corrected—which was a personal right, and not assignable; that Fielder conveyed land to Ruffner, by quit-claim deed, for consideration of only $1, and that Ruffner had no right in law or equity to assert any claim under the covenants of the deed of Aug., 1842; that admitting the allegations of the bill to be true, the remedy, if any, is at law; that the bill is not for discovery and relief, but for relief only, and is cognizable only in a court of law for violation of contract, and a prayer for discovery only could give the court jurisdiction—and insists that the suit be dismissed; that the land was sold at sheriff's sale, and bid off by Vansyckel, (who paid for the same,) in name of McConnel and Vansyckel, without knowledge, consent or authority from McConnel, and that his name was put in certificate of purchase by mistake.

When the facts were ascertained, Vansyckel urged sheriff to make deed to McConnel and Vansyckel, and that when he(Vansyckel) sold it, only quit-claim deed would be required of McConnel; and so he agreed upon no other conditions to the use of his name. Some time after the sheriff's deed was made, Vansyckel sold the land to Fielder, but of the terms McConnel says he knows nothing; that the deed in question was drawn by an agent of Fielder, and executed by Vansyckel and wife at Naples, and sent to McConnel to Jacksonville to execute, and he took it to Naples to get explanation of Vansyckel, and learned from him that he had negotiated sale of land to Fielder through agent in St. Louis, and he (Vansyckel) told the agent that title to land was good, and was in McConnel and Vansyckel; that McConnel had no interest in it and never had any, and he would not make a warranty deed; that agent examined title, and found it good; that agent informed Vansyckel that the deed in question was mere quit-claim deed; that McConnel then examined the said deed,and finding there were no covenants against him, and being strongly urged by Vansyckel, reluctantly signed and acknowledged the deed when he returned from Naples. McConnel denies the sale of the land, for any consideration, to Fielder, as wholly untrue; and denies that he contracted for warranty deed, or any deed with covenants, or that any such deed was intended, or that anything was left out of the deed by mistake, or that there was any mistake, and demands proof.

Vansyckel answers as McConnel does, so far as the jurisdiction of the court is concerned; and, furthermore, says that Fielder, in 1852, unsuccessfully impleaded McConnel and Vansyckel, in an action of covenant in the Circuit Court of Scott, on the covenants of the deed sought to be corrected in this case, and that judgment in the covenant case is in full force, &c., and is a bar ‹any proceeding in this case, and answers in other particulars substantially as McConnel's answer has been set forth.

Replication was filed to these answers.

McConnel exhibits cross bill against Fielder, Ruffner and Vansickel, amplifying statements of his ansnwer—quotes the covenants in the deed sought to be corrected this case, and charges that the covenants should have been mere quit-claim covenants, and that the covenants in the deed were inserted by fraud or mistake; that the deed be corrected, and theat eh and his heirs, &c., may be protected from further annoyance by injunction.

Ruffner and Fielder answer the cross bill, quoting from certain records and procee dings that McConnel, by stipulation at the end of the answer, admits to be true, denyingall the allegations of the cross bill inconsistent with the or nal bill; and

they jointly and severally pray that Ruffner may have the relief he asks in his original bill.

Replication filed to the answer.

Stipulation made at October term, 1853, admitting verity of allegations as to matters of record in the Circuit Court of Scott, and waiving the production of trascripts.

Fielder testifies that he is well acquainted with Ruffner and Vansyckel, and slightly acquainted with Mc Connel; that the consideration of the deed was $400, paid, at the date of the deed; by a credit on certain protested acceptances of McConnel and Vansyckel, which the witness held as agent of a salt company, on account of sales of salt by McConnel and Vansyckel. The deed was drawn by L. Spencer, a lawyer of St. Louis, (since deceased,) whom witness employed to go to Illinois to investigate title and have transfer legally made. No stipulation or arrangement with McConnel and Vansyckel other than general warranty deed, and directed agent to take no other. McConnel and Vansyckel never proposed any other, and when the deeds came into the hands of witness, he looked them over as to quantity of land, considerations, &c., and had not been apprized, until recently, of the absence of personal covenant in the deed in question in this case. Witness wrote but seldom to McConnel and Vansyckel; generally called in person to settle accounts. They were trading at Naples for several years, and sold a large quantity of salt for Hewitt, Ruffner & Co.

Decree dissmises original and cross bills.

Errors assiged:

1st. That the original bill was dismissed.

2nd. That the court below did not grant appellant the specific relief prayed for in his bill,

3rd. That the court below did not decree correction of mistake, in deed of appellees to Fielder, by adding the word "they" to covenant of warranty.

The decree in this case was rendered at October term, 1854, of the Morgan Circuit Court, WOODSON, Judge, presiding.

D. A. SMITH, for Plaintiff in Error.

M. MC.CONNEL and J. GRIMSHAW, for Defendant in Error.

SCATES, C. J. The bill seeks to correct a mistake of fact, alleged to have been made by omitting to insert the word " they " in the covenant of warranty in a deed of conveyance, so as to make it a personal covenant of the vendors; and thereupon, for relief by decree for the purchase money, with interest, on breach of the covenant so reformed, by recovery from vendors and ven-

dee, by paramount title, in a case in equity, to which all were parties defendants.

We do not think the record shows a case for the interposition of a court of equity. We recognize a mistake in fact as a ground for equitable jurisdiction ; but relief will only be granted upon clear and satisfactory proof of the mistake in fact Harris *et al. v.* Reece *et al.*, 5 Gil. R. 212 ; Selby *v.* Geines, 12 Ill. R. 69 ; 1 Story Eq. Jursip., Secs. 110, 151, 152, 153.

But this does not extend to mistakes in the law of the contract, case, or legal meaning of the terms agreed on between the parties, without fraud. 1 Story Eq. Jursip., Secs. 111, 115 ; Beebe *v.* Swartwout, 3 Gil. R. 162. Nor to mistakes in the intention of one only of the parties, and without fraud in the other. Coffing *et al v.* Taylor, 16 Ill. R. 457.

We may admit, without discussion of the evidence, that a mistake has been shown as to the kind of covenant Vansyckel intented and agreed to enter into, and that the deed of both should contain ; yet the evidence shows that McConnel did not agree personally, but, on the contrary, expressly refused to enter into a covenant of warranty. Defendants were partners, and liable as such for the debt which was paid with the land, notwithstanding the private agreement between them that Vansyckel should pay all the debts, and be liable therefor. Although this land was transferred to, and the title held by, the partners, and liable to partnership debts, yet the plaintiff's abstract equity against McConnel is weakened by the fact that it was the private transaction, if not the private property, of Vansyckel, and take in the names of both at his instance, and without McConnel's knowledge, and who only afterwards consented to transfer or convey, that the property might pass out of him again for what it might be worth.

The solution of the facts in this case, however, depends upon the legal power of one partner, generally, to convey or make such contracts, verbal or written, as will pass the title of real estate belonging to the firm or which may be specifically enforced in equity, by compelling the other partner to execute a conveyance, with or without particular covenants, or by decree for such a conveyance by a commissioner of the court. This would be the result, if the power exists in each partner to bind the other in relation to the reality. I do not speak of such contracts in relation to the liability of partners for damages for their breach, but in relation to specific execution of them, and conveyance by one, for all the partners.

In this point of view, under the law governing partnerships, one partner has not the power to convey the real estate of the firm, either by deed or assignment ; nor make contracts, written

or verbal, specifically enforcible against the others. Collyer on Part., Secs. 135 and notes, 394; Story on Part., Sec. 101 and notes; Story on Agency, Cap. 6, Sec. 125; Piatt *v.* Oliver et al., 3 McLean R. 28. See Tapley *v*, Butterfield, 1 Metcalf R. 515; Deckard *v.* Case, 5 Watts R. 22; Sloo *v.* President, &c., State Bank of Illinois, 1 Scam. R. 428.

Lands belonging to the partnership are nevertheless equally, with the personalty, liable to the payment of the debts of the firm, and will go into the balance of account between the partners on settlement of profit and loss. See same authorities. But in the transfer of lands, the rules applicable to the conveyance and descent of realty are to be observed, as they are not modified by the nature of the ownership; nor have partners, under the law of partnerships, an implied power, individually, for the firm to do what may be done by a court of equity in paying creditors, or adjusting balances between the partners. They must observe all the solemnities, and convey in the modes recognized by law for the transfer or conveyance of real estate. By these, a co-partner, joint-tenant, or tenant in common has no power to bargain, sell or convey the real estate, or interest in it, of his co-tenant. The agreement of Vansyckel, as partner, was not, therefore, obligatory upon McConnel to make any kind of conveyance of this land, either in law or equity. The plaintiff should have protected himself by refusing to take any other than such a conveyance as suited, or would protect his title. Upon defendant's declining to give a warranty, he should have refused to receive the one tendered; and if he had any personal remedy against the firm, for damages for breach of such an agreement by one partner—upon which we express no opinion—he should have brought his action upon the contract for breach and not a bill for specific execution.

The right to a decree is very questionable, upon another ground, even against Vansyckel alone, upon any covenant in, or that should have been in, this deed as to him; for he alone might have made his covenant of warranty in it, had it been asked and required.

The plaintiff has brought his action of covenant on this very covernant, for a breach, against both defendants, and suffered a recovery against him for costs, and which has been affirmed in this court. Ruffner *v.* McConnel et al., 14 Ill. R. 168.

We are not able to distinguish the case in principle, if it be at all in the facts in this respect, from the case of Sibert *v.* McAvoy, 15 Ill. R. 106, where the plaintiff first sued upon the contract at law, and after judgment; then filed his bill to reform the contract by correction of an alleged mistake. The court held that the contract was merged in the judgment, and there was no contract left to be reformed or corrected.

Under this view of the case, we need not examine into the question whether the recovery in equity against warrantors and warrantee, by paramount title, is sufficient showing of a breach, without further actual eviction.

Decree affirmed.

SKINNER, J. I agree that Vansyckle could not bind McConnel, his co-partner, to execute a deed with covenants of general warranty, and that upon this record the decree should be affirmed.

BREWER WOODS, Appellant, *v.* JAMES W. GILSON, Appellee.

APPEAL FROM MACOUPIN.

To disqualify a deputy sheriff from serving an execution, either he or his principal must have been plaintiff in action, entitled to the money to be made by a sale under it, or have a direct interest in the process.

Where a third person, after execution issued, pays off a mortgage given by the judgment debtor, and takes possession of the goods and sells them, they will still be subject to the execution. The satisfaction of the mortgage by the third party did not invest him with any interst in the mortgage debt or the mortgaged property.

THE facts of this case will be found in the opinion of the court.

J. M. PALMER, for Appellant.

D. A. SMITH, for Appellee.

SKINNER, J. Wood sued Gilson inr eplevin. The defendant pleaded in bar that Dorothy Jones recovered in the Circuit Court of Macoupin county a judgment against Watts and Arbuckle, on which an execution issued to the sheriff of Macoupin county; that the same came to the hands of the defendant as deputy sheriff to execute; and that the property replevined being subject to said execution as the property of Watts, he took and seized the same by virtue of the execution.

To this plea the plaintiff replied, first: That the property replevined was not subject to the lien of the execution; and second: That the defendant was not deputy sheriff.

Upon these replications issues were joined. The plaintiff also replied, that Dorothy Jones had, before a justice of the peace of Macoupin county, recovered a judgment against Watts

and Arbuckle, from which judgment Watts appealed, and that the defendant became his security in the appeal bond; that said judgment was affirmed by the Circuit Court of Macoupin county, and is the same judgment in the defendant's plea alleged; that thereby the appeal bond became forfeited and the defendant became liable to pay the said Dorothy Jones the judgment in the plea alleged; and that the defendant was appointed at his own instance deputy sheriff for the sole purpose of executing the writ.

To this replication the defendant demurred, and the court sustained the demurrer. The object of this replication was to avoid the levy, on the ground, that the defendant, as deputy sheriff, could not execute the writ on account of interest, he being security for Watts in the appeal bond. This is not such direct legal interest in the process as would render him incompetent to execute it.

He was not plaintiff in the execution, nor was he entitled to the proceeds of the sale to be made thereon.

To have disqualified him to execute the writ he or his principal must have been plaintiff in the action of which the execution was a consequence, or must have had a direct interest in the process, or a right to the moneys to be made by sale under it. None of the cases cited go farther than this. J. McCord 470; C. Monroe 173; 3 A. K. Marshall 536.

The demurrer was therefore properly sustained.

The cause was tried by the court and judgment rendered for defendant below. Motion for a new trial made and overruled. The court properly refused a new trial. It was clearly proved that the defendant at the time of the levy was deputy sheriff. The proof shows that Watts was the owner of the property and mortgaged the same to Bently; that Bently took possession of the property under the mortgage before the execution lien could attach; that Campbell, while the execution against Watts was in the hands of the defendant, tried to purchase the mortgage of Bently; that Bently refused to sell and assign the same; that Campbell then paid the mortgage debt and Bently indorsed the mortgage *satisfied*, and delivered the same and the property mortgaged to Campbell: that Campbell sold the property to Loveland & Co., who sold the same to Wood, the plaintiff below.

By the payment of the mortgage debt the property became discharged from the mortgage, and was liable to be levied upon as the property of Watts, the mortgage and execution debtor. By such payment Campbell could acquire no property in the mortgage debt nor in the thing mortgaged, whether done with or without the consent of Watts. The property became subject

to the lien of the execution when discharged from the mortgage, and was rightfully levied upon in the hands of Wood, who had obtained no better right to it than Campbell had acquired.

Judgment affirmed.

LORENZO CADWELL, Appellant, *v.* DANIEL MEEK *et al.*, Appellees.

APPEAL FROM FULTON.

An agent is a competent witness to establish his relation to his principal, and a contract made for him, unless the agent has a direct interest in the result of the suit. If an agent is equally liable to either of the parties, he is a competent witness, and his supposed preferences will affect his credibility only.

To bind the principal by the acts of his agent, he must be fully and fairly informed of all the material facts and circumstances of the transaction.

The usual course of dealing by a party, cannot vary or control a contract.

THIS suit was commenced in the Fulton Circuit Court, by attachment, to recover $1,758.23, the price of sixty-two head of beef cattle. Declaration in assumpsit, containing the common counts. On the return of the attachment, the defendant below, (appellant in this court) appeared and plead the general issue.

The cause was tried at the May term, 1855, Hon. O. C. SKINNER, presiding, by a jury; verdict was found for the amount claimed by the plaintiffs below, (appellees in this court.) Motion made for a new trial, and overruled, and judgment rendered on the verdict. The defendant below brings the cause here by appeal.

On the trial in the Circuit Court, the plaintiffs claimed: that one Ezra Cadwallader was the agent of the defendant; that they sold to him, as such agent, the beef cattle, for the price of which they sued; that the price was agreed on by the plaintiffs and the agent; that the money was to be paid on the delivery of the cattle to the defendant; and that the cattle had been weighed, delivered to, and accepted by, the defendant, he knowing that Cadwallader had acted as his agent in the purchase.

The defendant admitted that he had received the cattle, and that they were worth the amount claimed by the plaintiffs, and that Cadwallader purchased the cattle, yet he denied that Cadwallader *was his agent*, or had any authority to contract for him with the plaintiffs, so as to make him liable to them, or that he received the cattle, knowing that Cadwallader had assumed to act as his agent; but on the contrary, the defendant claimed that Cadwallader purchased cattle of whom he pleased, on his

own terms, and at his own risk, and re-sold them to the defendant at an agreed price; or in other words, that Cadwallader was liable to the plaintiffs, while he, Cadwell, was liable to Cadwallader. The defendant futher claimed, that he had an offset against Cadwallader for an amount more than sufficient to pay the price of the cattle, and hence, that he was not indebted for them to any one at the time suit was brought.

The defendant further claimed, that there was a *custom under which Cadwallader had acted for him*, and under which he, the defendant, *received the cattle*, and insisted that all his statements and acts were *explained by, and consistent* with, that custom. This custom was, that large dealers in the products and trade of the country had dealings mainly with certain persons, called *runners* or *buyers*, who were not agents, but who examined and bought from the farmers and country merchants the articles wanted, on their own terms, and at their own risks, and then furnished them to the larger dealers, under a contract entered into before, to receive a certain amount at some agreed price; and that it was also a part of this custom, that the large dealers should furnish money to the *runner*, in advance, wholly or partly, on delivery of the property, or otherwise, from time to time, depending on the understanding of the parties, in order to enable him to secure the best bargains: but that there was no binding obligation to furnish the money in advance. The l egal effect of the transaction between the wholesale dealer and his retail buyer, being that the property was to be paid for on delivery, and that the wholesale dealer never became liable to the various persons about the country, from whom the *runner* might choose to purchase.

On trial of the cause in the Circuit Court, Moses F. Hand was sworn, as a witness for the plaintiffs, who testified that he resided in Warren county: that Ezra Cadwallader lived in Ellisville, Fulton county, on the way from Liverpool, in the same county, to the residence of the witness; that the defendant had been engaged for the three preceding seasons (years), in packing beef at Liverpool, on the Illinois river; that the witness had furnished the defendant with beef cattle during that time, which the witness raised and bought for that purpose; that he had not acted as defendant's agent, but that he first made a contract with the defendant to furnish the cattle on certain terms, and deliver them at the packing house in Liverpool; then he bought them of whom he could, on the best terms he could, running all risks till delivered, taking any profits over the price he paid for himself, and was entitled to the agreed price from the defendant; that the defendant let him have money, as suited the conve-

nience of both parties, and was not responsible to the person of whom the witness bought.

The witness also stated, the defendant had repeatedly told him, that whatsover Underhill Boynton said, with reference to buying cattle, was right, and that Boynton had *acted* as the *agent* of the defendant in *buying* cattle for the defendant, during the time he had done business at Liverpool; but that the defendant had never informed him that Boynton had authority to *appoint other agents* for the defendant, and that he had no knowledge of his ever doing so; that he knew no *other agent* of the defendant than Boynton.

The witness testified to a contract made by himself with the defendant, through Boynton, in the fall of 1854, and its contents, during which it was disclosed that the contract was in writing.

Anson Smith was sworn for the plaintiffs, and testified that Underhill Boynton, a short time prior to buying of the cattle in controversy, called at his office in Ellisville, to see *Ezra Cadwallader*, who was absent at Chicago; that Boynton left word with the witness, to deliver to Cadwallader, on his return, as follows: to tell him that they wanted some beef in a hurry, and for him to buy; that he would give them a certain price, (not recollected by the witness,) per 100 lbs. for cattle delivered at Liverpool; or if he did not want to buy on those terms, to buy anyhow; that he, (Cadwallader) could make one or two hundred dollars as easy as not; that they would pay him for his service, but nothing said as to how, or what price, and nothing said as to pay by the day; that the witness couled also tell Cadwallader, that he could have money from time to time, as he needed it or he would send him some immediately.

The witness further stated that he delivered the message to Cadwallader on his return; that Cadwallader saie he would not buy by the hundred—would not lay himself liable—but would spend a few days in getting some cattle.

The witness also stated, on cross-examination, that he never informed either Boynton or defendant of Cadwallader's answer, and he did not know whether they knew how he acted in the purchases made.

Ezra Cadwallader was called as a witness by the plaintiffs and sworn on his *voir dire*. The plaintiffs admitted that the witness was called for the purpose of proving that he was an agent of the defendant, and as such, purchased the cattle from the plaintiffs, for the price of which this suit was brought. The witness stated that he had no more interest than any person would have, who acted as an agent; that he received the message from Boynton left with Anson Smith; that he had no other

authority from the defendant; that he bought the cattle as an agent, and informed the plaintiffs so at the time. He further stated that there was no agreement between himself and the plaintiffs that he would pay them for the cattle, if they failed to recover in this suit, *but that the witness expected to pay them*, as they should not lose by him.

Objection was made to the introduction of the witness, but the court overruled the objection, to which the defendant expected.

The witness was then sworn in chief, and testified to the receipt of the message through Anson Smith from Boynton, substantially as stated by Smith; that he acted on the authority given by that message, and bought as the agent of the defendant, expecting to charge by the day for his services; that he did not see Boynton or defendant till after all the cattle he bought were delivered, and when he did see the defendant nothing was said as to Boynton's agency.

Objection was made to the introduction of the statements of the witness to plaintiffs, as to his authority, and overruled, to which there was exception taken.

The witness then stated that he told the plaintiff, that he wanted to buy for the defendant, as agent; that he bought sixty-two head of cattle, to be weighed at Ellisville, and that they amounted to $1,858.23; that he sent them to Liverpool by one Sackett, with an order for the money; that he had received, at a previous time, $250, of which he paid $100 to the plaintiffs, but received none when he sent plaintiffs' cattle.

On cross-examination, the witness stated, that Smith told him, that the defendant proposed to give $5 per 100 lbs. net, the weight to be ascertained at Liverpool' where the cattle were to be slaughtered; that nothing was said to him as to *buying by the gross, on a credit*, or as to ascertaining the weight *elsewhere than at Liverpool* in the manner stated. He further stated, that he *never informed either Boynton or the defendant that he would not buy* and furnish beef by the 100 lbs. as proposed.

The witness further stated, that he bought three lots of cattle for the defendant that season, of which the plaintiffs were the last, all of which he sent to Liverpool by Sackett. With each lot he sent some written statement, signed by Cadwallader & Smith (they being partners), of the cattle, with a verbal or written order for money; that the order was not to pay the money to the plaintiffs, but to send it to the witness. When the plaintiffs' cattle were sent, no money was returned, but a message was sent by Sackett from the defendant to the witness, that he had been disappointed in getting money by express, for the witness to come down to Liverpool the next Saturday, and stay

over Sunday; that he had a settlement to make with him, and he should have the money to take back; that the witness did go down as requested, and when there presented an account of $25 for five days' services in buying cattle, to which the defendant replied, "rather short": that the next time he bought cattle he would have them weiged at Liverpool; at the same time he gave a bill of the cattle from his private memorandum book, and the account might have been made out as between Cadwallader & Smith, with the defendant; that at the same time the defendant and witness looked over a "corn transaction" between the defendant and Cadwallader & Smith of two years before. The defendant made out an account current, and gave to the witness to examine, and claimed over $4,000, due to the defendant, which the witness stated was to much, as he did not owe as much as $3,000. The witness also stated that, the defendant did not ask him to offset the price of the cattle he had bought, against the amount due for corn directly, but "intimated it pretty strong," stating that he was in a tight place and needed the money, to which the witness replied that he had bought the cattle with the promise of the money, and he would not use the money of the sellers to pay his debts, to which defendant made no reply. The witness also stated, that the cattle referred to in this conversation, was all of the three lots, on which he had received $250.

The witness then stated further, that he had furnished cattle to the defendant for two prior seasons, but not as agent; that he bought, sometimes having the money advanced, and then furnished to the defendant at an agreed price, and so far as he knew, all others dealing with the defendant, had done the same thing; that as a country merchant, it was convenient and profitable for him in selling goods, and collecting debts, to take cattle and sell them to the defendant.

S. D. Sackett was then sworn for the plaintiffs, who testified that he drove the three lots of cattle to Liverpool, for Cadwallader, with the instruction to deliver to Boynton; that the witness met the defendant at one time, when he drove down the cattle got of John Danley, and inquired of him at *whose expense* an *extra hand was to be kept*; to which the defendant replied, "at mine—I foot all the bills—Cadwallader is at work for me." At another time he asked the defendant if he was to have the plaintiffs' cattle, to which he replied "that he had written to Cadwallader to buy them for him if they were nice." In a few days after, the witness drove down the plaintiffs' cattle. The defendant was in a fret, and refused to receive them, and it was arranged that they should be put in a field over night at the risk of the witness, and in the morning the defendant received them.

The witness stated that he took a written statemeut of the weight, signed, Cadwallader & Smith. The witness also requested defendant to send some money, to which he replied that he had none to send—to tell Cadwallader to come down the next Saturday and spend Sunday with him—that he had a settlement to make with him, and he should have the money to take back.

The witness testified, on cross-examination, that the only bills or expense spoken of by the defendant, was the expense of the extra hand, for driving, and that he did not say how or on what terms Cadwallader was at work for him.

The plaintiffs thereupon rested.

Henry Walker was then called, as a witness for the defendant, and testified that he had been engaged in Fulton county, in the cattle business; that he had, for three years past, bought cattle of the farmers, and re-sold to the defendant; that many others had also been dealing with the defendant; that the defendant had, for three years, been engaged at Liverpool, a town on the Illinois river, in Fulton county, in buying pork and beef and in packing the same, and that the business at that place, in the defendant's line, was done entirely by himself and those connected with him.

Thereupon, the defendant offered to prove what the *general custom of dealers* was during that time, in the place where the defendant transacted his buisness, with regard to the *manner of buying and procuring beef cattle*, and also what the *general custom* was in the *county and country at large* in *the same business;* also what the *universal custom* of the *defendant* was in *the business*, together with the fact that the witness was well acquainted with such customs. To this the plaintiff objected, and the court sustained the objection, to which the defendant excepted.

It was also proposed to show the same facts by several other witnesses, but the court refused to allow the evidence to go to the jury, to which exception was taken.

The defendant then called Underhill Boynton as a witness, who testified that he was, and had been for some time, an agent of the defendant, authorized to select beef cattle; that the defendant himself was not a competent judge of the quality and price, but left that matter to the witness, who was skillful in that line; that the witness *had no authority whatever to appoint other persons agents for the defendant*, and that the only agent defendant had last season, was the witness; he also stated that he did *not give* any *authority* to Ezra Cadwallader to *buy* for the defendant, but that, in passing through Ellisville, he left word with Anson Smith to tell Cadwallader he wanted 1,000 head of cattle, and for him to buy on the same terms as he had

the years before; that he was very anxious to have him buy, as they were in a hurry to make up the lot; that on the next day as he returned from Moses T. Hand's, (with whom he had made a contract, meanwhile,) he stopped and told Smith to tell Cadwallader that he could buy, if he wished, on the same figures that Hand had agreed to buy, and if he was short of money, that they would send him some up, or he should have it when he wanted it.

The witness also stated that the cattle for which this suit was brought, were bought by the defendant of Cadwallader & Smith, through the word he left with Anson Smith, and that they were not *authorized to act in any other* way than that in which *Hand did*—to buy of whom they pleased, and the defendant was to take them at an *agreed price* per 100 lbs., and to *pay the expense of driving.*

The witness also stated that he was present, and heard the conversation between Cadwallader and defendant, at Liverpool, mentioned by Cadwallader in his testimony. The defendant made the sum due from Cadwallader & Smith on the "corn transaction," $4,300. Cadwallader said it footed up more than he expected, and it would ruin him to turn the *whole* of the cattle on the amount due defendant; to this the defendant replied that it was tight times, but if his money came, as he expected, he would let him have money, as he had done before.

This witness further states that Cadwallader did not dispute the amout due defendant, or claim that he had bought plaintiff's cattle as an agent, but was willing to turn a part of the money on the corn matter.

The witness stated, further, that when the plaintiffs' cattle were sent down, a bill was sent, directed to the witness, signed Cadwallader & Smith, giving the weight of the cattle, but not stating of whom they were procured.

1st. The curcuit court erred in permitting improper evidence to go before the jury.

2nd. The circuit court erred in admitting Ezra Cadwallader as a witness.

3rd. The circuit court erred in refusing to admit the evidence offered by the defendant, &c.

4th. The cirucit court erred in refusing to grant a new trial.

GOUDY and JUDD, for Plaintiff in Error.

W. KELLOGG, for Defendants in Error.

SCATES, C. J. Ezra Cadwallader was a competent witness to prove his own agency for plaintiff, and the contract he made for

him with defendants. This is the general and uniform rule, and well supported by authority. 1 Stark. Ev, 133 ; Lowber *v.* Shaw. 5 Mason R. 242 ; McGunnagle *v.* Thornton, 10 Serg. and Raw. R. 252 ; Harvey and Claxton *v.* Sweasy, 4 Humph.R. 450 ; Christy *v.* Smith, 23 Verm't R. 670.

This general rule is subject to qualification. An exception to it will exclude agents, as other witnesses, for an immediate and direct interest in the result of the suit. 1 Stark. Ev. 103 to 120, where the various interests are presented ; and 23 Verm't R. 670 ; 4 Humph. R. 450 ; Shiras *v.* Morris et al., 8 Cow. R. 60. Sage *v.* Sherman, &c., 25 Wend. R. 430,and Emerton *v.* Andrews, 4 Mass. R. 653, are further examples of that primary liability which renders a witness or an agent incompetent.

But this exception to the general rule is also subject to a modification ; for, where a witness is equally liable to the one or the other party who may be condemned by the judgment, his supposed bias from interest is removed ; he stands indifferent, and becomes, under such circumstances, competent, and existing preferences, if any are apparent, will go to his credit. Birt et al., Assignees *of* Glover, *v.* Kershaw, 2 East. R. 458 ; Ilderston *v.* Atkinson, 7 Term R. 480, and note ofEvans *v.* Williams et *al.* An honorary obligation will only go to the credit. Frink *v.* McClung, 4 Gil. R. 576.

The testimony of the agent was submitted to the jury, with full and proper instructions upon the whole case, including the agent's credit, and explanatory and rebutting proofs. We can not disturb the verdict, under such circumstances, believing, as we do, that the evidence fully sustains the verdict, whether viewed in the light of a previous authority or a subsequent ratification of the acts of the agent. We recognize, and fully sanction, the rule applicable to ratifications of the acts of agents, that, to make them binding, the principal must be fully and fairly informed of all the material facts and circumstances. Owings *v.* Hull, 9 Pet. R. 628 ; Hastings *v.* Bangor House Proprietors, 18 Maine R. 436 ; Sage *v.* Sherman,&c., 25 Wend. R. 430.[a]

There is no suppression of a material fact shown in this record. If Cadwallader is to be believed—and we have no reason to doubt, supported as he is by other witneses and circumstances—notwithstanding Boynton did not hear nor swear to all that the other says transpired—plaintiff was fully advised of the fact that Cadwallader had purchased the cattle as agent; that the money was due and belonged to defendants, and not to him ; and he was not willing, and had no right, to take their money to pay his own debts. Boynton would be understood as conveying a different impression of what transpired between the plain-

[a] Mathews, etc,. *vs.* Hamilton et. al., 23 Ill. P 471.

tiff and witness; but I think he is fully corroborated by the witness who drove down the cattle, who give plaintiff's own statments, that Cadwallader was at work for him, and that he had written to him to buy defendants' cattle if they were nice. He must, therefore, be responsible for his own reception and retention of these cattle, with a full knowledge that they did not belong to Cadwallader, and which he knew, for any thing in the record, in due time to have refused them, if not content to purchase of defendants.

The answer he would make to this state of facts, is his own usual course of dealing in that neighborhood for three years, as a legal custom of trade.

No such usage or custom, although it may be a general one, can be allowed to alter, vary or control the express terms of a contract. Dixon *v.* Dedham, 14 Ill. R. 324. It may explain what is not agreed expressly, and how an implied contract may be understood and fulfilled. We do not think this particular individual usage, even if admissible, would explain or contradict the facts in this record. Such may have been plaintiff's usual course of dealing, while supplies of beef or cattle could be procured through *runners*, as intermediate purchasers; and yet, when one who had so acted refused to engage any further in that mode of trade, but assumed to act and purchase as an agent, and plaintiff receives cattle so purchased with a knowledge of that fact, he shall not be permitted to set up his previous course of dealing, by which he seeks, and would succeed, if allowed, in taking defendants' cattle to pay the debts of a former customer, who now assumes his own agency, as the means of procuring possession of their cattle. This custom might have been greater weight had it greater age and an universality. I know that particular individual customs of companies and houses have been received to fix the rights and liabilities of customers and the powers of agents. Such was the case of Jones *v.* Warner, 11 Conn. R. 40, which allowed the regular course of the trade of the house, to show that its clerk had no authority, to make a contract out of that usage.

So in Loring et al. *v.* Gurney, 5 Pick. R. 15, a like individual usage was allowed on its being proven that the customer was aware of it.

Thompson *v.* Hamiltonet al., 12 Pick. R. 425, and Halsey *v.* Brown et al., 3 Day R. 349, are instances of a general custom in particular localities which were allowed to explain rights and liabilities arising on implied contracts, as that masters of coasters sailed the vessels on shares with the owners, as a mode of fixing the owners' compensation for the use of the vessel;

and against, that freights for gold, silver, &c., were a perquisite of the master, and did not belong to the charter or owner of the vessel.

In Reuner *v.* The Bank of Columbia, 9 Wheat. R. 581, (5 Cond. R. 691,) a constant and uniform usage of the banks of Wasbington city, and Alexandria, in the District, to allow four, instead of three days of grace, on bills and notes was recognized and upheld. The court in sustaining this usage, advert to the fact that it had been the uniform usage from the establishment of the bank in 1793, and it was well known and understood by the defendant, when he indorsed the note upon which he was sued.

Upon a like principle, a general usage or course of trade in particular articles of commerce have been sustained under like circumstances. Thus in Sewall *v.* Gibbs et al., 1 Hall R. 602, on sale of indigo in ceroons, it was usual to deduct ten per cent. for tare,— but in case of fraudulent packing, the actual tare ; and so a deduction of seventeen per cent. was allowed upon proof of the custom and fraudulent packing. But in no case have I found a special, local or individual custom received to contradict a contract. There is no dispute but that these cattle were expressly and avowedly brought for plaintiff, and by one professing to act as agent only. To allow the plaintiff to set up his individual usage or course of dealing through one agent alone, would be to allow him to take advantage of defendants. Had plaintiff refused to receive the cattle under Cadwallader's purchase for him as agent, and this suit had been brought on that contract to enforce it against him, he might and would occupy a different ground ; and upon showing that he had pursued such a unifom course of trade through one agent only and alone with intermediate purchasers, and defendant's knowledge of such course of dealing, might present grounds for rebutting an agency and raising a suspicion of fraud or want of good faith and fairness on their part, in contracting so far out of that usage. Such a supposed state of facts might implicate the defendants for bad faith. But in the absence of such facts, such usage as is offered would apparently enable plaintiff to perpetrate a fraud upon defendants.

Judgment affirmed.

Samuel Murray *et al.*, Plaintiffs in Error, *v.* Francis Whittaker *et al.*, Defendants in Error.

ERROR TO MORGAN.

Where a case is brought from the Circuit to the Supreme Court and remanded, the defendant in the Circuit Court is presumed to know that the case is returned and docketed without notice of the fact.

Either party may procure the record from the Supreme Court, and have the case placed on the docket of the Circuit Court for further proceedings; and the opposite party will after that be governed by the action of the Circuit Court.

While it might be a better practice for the Circuit Courts to cause notice of the filing of the record in such cases to be given, yet it is not in the power of the Supreme Court to make a rule in that regard.

The opinion of the court embodies a statement of the case. The proceedings complained of were had before Woodson, Judge.

M. McConnel, for Plaintiffs in Error.

D. A. Smith, for Defendants in Error.

Skinner, J. The record of this case shows that the cause had been remanded on reversal of a former judgment, by this court to the Circuit Court of Morgan county, for trial *de novo*, and that at a term of said court prior to the October term, 1854, the cause was docketed and continued to the next term. At the next term, judgment by default for want of a plea, was rendered against defendants below, and the plaintiffs recovered judgment for their debt and damages.

At the same term the defendants appeared, and on their motion this judgment was set aside. The defendants then pleaded to the action, and moved for a continuance upon affidavit, setting forth defence to the action, and inability to make such defence on account of the absence of a material witness; and alleging as excuse for not having obtained the attendance of such witness, that neither the defendants nor their attorney had had any notice or knowledge that the cause had been docketed for trial in the Circuit Court until that term.

The court overruled the motion. The cause was tried and judgement rendered against the defendants below; and they here assign the refusal to continue the cause for error.

The defendants below had notice of the pendency of the cause in this court, and were bound to know that the same was remanded for further proceedings in the Circuit Court. Either party could have procured the record of this court, and, upon motion in the circuit court, have had the same filed, and the

cause docketed in that court for further proceedings; and, in such case, the opposite party would be bound by the action of the Circuit Court in the cause without further notice.

There is no statutory regulation requiring notice to the opposite party, upon the filing of the record of this conrt in the Circuit Court for further proceedings, and this court has no power to make rules of practice for the Circuit Courts.

The better rule of practice for the Circuit Courts would seem, from analogy, to be to require the record, upon motion in open court, to be filed, and the cause to be docketed, and to stand continued for trial at the next term, unless the party filing the record shall prove notice in writing to the opposite party, served ten days before the term at which the record is so filed, of his intention to file such record and demand a trial, or further proceedings at such term. (*a*)

Judgment affirmed.

ALBON H. HITCHCOCK, on motion to quash execution in the case of THE PEOPLE *v.* BENJAMIN E. RONEY.

ERROR TO PIKE.

The lein, created by the criminal code, upon the real and personal property o convicts, takes effect from and during the entire day on which the arrest is made or the indictment found.

A change of venue will not effect any change in the operation of this lein; which is not limited to the county in which the judgment is rendered.

A stranger to the record and proceedings in such a case cannot interfere, by motion to quash a levy, sale and execution, had at the instance of the people.

AT the September term of Pike Circuit Court, 1855, Hitchcock, the owner of certain real estate in Beardstown, Cass county, Illinois, levied upon and sold under an execution issued from the Pike Circuit Court, in the case of People *vs.* Roney, entered a motion and filed his reasons to set aside the levy and sale in said real estate, and quash the execution therein.

The motion was continued for the purpose of notice to Lewis F. Saunders, the purchaser under said execution.

At November special term of said court, 1855, Saunders, the purchaser, having been notified of said motion appeared by his attorney, and the People appeared by the State's attorney. The motion was heard, overruled, and judgment entered against said Hitchcock for costs.

Bill of exceptions taken. Execution, dated 2nd May, 1 85, was issued from Circuit Court to sheriff of Cass, in suit of Peo-

[a] Ogden *vs.* Bowen, 4 Scam. R. 301; Shaw *vs.* Dennis, 5 Gil. R. 421; Dodge *vs.* Deal, 28 Ill. 304; Chickering *vs.* Faile, 29 Id. 294.

ple *vs.* Benj. E. Roney, for the sum of $290.75, costs rendered against said Roney at March term, 1855, of Pike Circuit Court.

This execution was received by the sheriff of Cass county, 9th May, 1855, at 11 o'clock P. M., and on 25th day of May, 1855, was levied on lot 3, in block 32, in Beardstown, Cass county, and on 23rd of June, 1855, said real estate was sold to Lewis F. Saunders, for $319.45.

Also, a deed, with covenant of warranty and seizin, consideration $1,500 for said premises and two other lots, executed by Benjamin J. Roney to Murray McConnel, dated 13th day of May, 1853, and recorded in Cass county, on 14th May, 1853.

Also, a deed, with covenant of warranty, executed by Murray McConnel to A. H. Hitchcock, consideration $850, for above premises, dated 21st May, 1855, and recorded in Cass county, on 22nd May, 1853.

It was also admitted by said Hitchcock, on hearing of said motion, that Benj. E. Roney was indicted in Cass Circuit Court, on 13th May, 1855, and that the venue therein was changed to Pike county, where, at March term of Circuit Court of said county, 1855, said Roney was convicted and sentenced.

Error assigned is overruling of said motion.

Hitchcock, who represented himself as purchaser, by mesne conveyances from said Roney, of said lot three, offered the following reasons by his motion, for quashing the fee bill issued at the instance of the People against Roney: 1. Because the fee bill and execution were illegal and void, as containing sundry illegal costs. 2. Because Pike court had no power to issue them to Cass county. 3. Because the levy, by sheriff of Cass county, was illegal and void. 4. Because said judgment and levy, and sale were not liens. 5. Because no certificate of levy was filed of record or recorded. The motion to quash was denied by WALKER, Judge of the Pike Circuit Court, at November term, 1855.

M. McCONNEL and J. GRIMSHAW, for Hitchcock.

M. HAY, *Contra.*

SCATES, C. J. "The property, real and personal, of every person who shall be convicted of any of the offences punished by this chapter, shall be bound, and lien is hereby created on the property, both real and personal, of every such offender, from the time of his or her arrest, if he or she be arrested before indictment; if not, then from the time of finding the indictment, at least so far as will be sufficient to pay the fine and costs of prosecution." At the end of each term, the clerk shall issue

executions for all fines and costs so adjudged, and note the day of the arrest or indictment, and the sheriff shall levy on all such real and personal property of defendant, which he "possessed as his or her own real or personal estate, on the day mentioned in such execution" and advertise and sell as in civil cases. Rev. Stat. 186, Sec. 192.

De minimis non curat lex, would, upon general principles, include the whole day. And here the lien is expressly made to operate upon all the estate owned on that day. We must allow the arrest, or the finding of an indictment, to create and operate as a lien, on that day and the whole of it, or else we cannot give it any operation, without violating its plain language and obvious intent. I shall not discuss the power of the legislature to create liens for liabilities, nor the power or policy of giving preferences to public interest.

This is another instance of a semi-secret lien, as mentioned in McClure *v.* Engelhardt (ante, p. 47,) which has not been required to be recorded for purposes of notice.

I conceive the change of venue cannot effect any change in the operation of this lien. It can make no difference whether the judgment of fine, or for costs, is rendered in the county where the land lies, or a foreign county, as to this lien; for it is not the judgment which is declared to be a lien, but the *arrest* or *indictment* so operates, for the satisfaction of the judgment of fine or costs which may follow the conviction. This lien therefore, does not arise under the general statute, making judgments liens from the last day of the term.

Hitchcock is a stranger to the record and proceedings, and has no right to interpose a motion to quash the levy, sale and execution. As a purchaser of the same land, he has his remedies to investigate the question of title, and they are not impaired by this proceeding, to which he is not a party.

In Price *v.* The Shelby Circuit Court, Hardin R. 254, the court held that they were not bound to hear a motion in a summary way, at the instance of a stranger, although his interest might be affected by the execution sale.

So in Glassell's Administrator *v.* Wilson's Administrator, 4 Wash. C. C. R. 59, the court refused to interpose at the instance of third persons, who claimed the land levied on and sold; and this rule was again applied in Wallop's Administrator *v.* Scarburg et al., 5 Gratt. R. 1.

More especially will this summary remedy be denied, when it is inappropriate, and incapable of affording as complete relief as suit or bill.

This reason constituted in part the ground of refusing a motion, in Day et al. *v.* Graham, 1 Gil. R. 435, as the rights and equi-

ties of third persons, purchasers, could not be inquired into and protected by terms on setting aside the sale. No objection was taken to judgment creditors of the same debtor, as strangers, in that case, whose judgments were entitled to satisfaction out of the same property. Indeed such creditors were expressly relieved, and on motion, from a fraudulent sale, in Goff *v.* Jones, 6 Wend. R. 522.

The court refused this summary remedy to the purchasers themselves, in Hewson *v.* Deygert, 8 John. R. 333. But the court did interpose in Davis *v.* Tiffany, 1 Hill R. 642, at the instance of a purchaser of the land, without notice of the judgment. There is no other fact noted to point us to, or explain the ground of this ruling. We have no doubt it was proper in the case, but is an unsafe precedent, without facts for our guidance.

Judgment of the court, denying the motion, is approved.

Judgment affirmed.

SAMUEL WARNER *et al.*, Plaintiffs in Error, *v.* GUSTAVUS MANSKI, Defendant in Error.

ERROR TO MORGAN.

Where a bill of exceptions does not show what the question propounded to a witness was, it is difficult for this court to say that the Circuit Court erred in refusing to permit the witness to answer it.

THE decision of the Circuit Court to which the plaintiff in error took exception, was made by WOODSON, Judge.

D. A. SMITH, for Plaintiffs in Error.

M. McCONNEL, for Defendant in Error.

SKINNER, J. The bill of exceptions in this case shows that the plaintiff below had examined a witness in chief; and the defendant, with the avowed purpose of discrediting the witness on cross-examination, asked him a leading question in reference to a matter as to which the plaintiff had not examined him and that the court would not permit the question to be answered.

The refusal of the court to allow the question to be answered is assigned for error. What the question was does not appear. It may have been impertinent, and the matter inquired about wholly irrelevant to the issue and in no manner important touching the credibility of the witness.

We cannot say the court erred, without knowing what the question propounded was. Miller *v.* Houcke. et al., 1 Scam. 501 ; Russell *v.* Martin, 2 Scam. 492 ; Hays *v.* Smith, 3 Scam. 427.

Judgment affirmed.

Matthew H Mitchell, Admr., &c., Plaintiff in Error, *v.* Reuben Jacobs *et al.*, Defendants in Error.

ERROR TO FULTON.

Taking an appeal, executing a bond,&c., are in the nature of process to remove a case from an inferior to a superior court ; and if these should be irregular, and objection is not made in the first instance after appearance, the irregularity is waived.

An appearance in this case, except to object to the process or service, is a waiver of all irregularity in them.

Where counsel for defendant found a lease among the papers in the cause not marked filed, which was an important piece of evidence for plaintiff, and annexed it to a dedimus and sent it out of the State, it was held that secondary evidence of its contents should be admitted.

The defendants in error presented a claim for allowance against the estate of Matthew Mitchell, deceased, in the county Court of Fulton county, which was objected to by the plaintiff in error, and upon a trial the County Court found against the claimants, and rendered judgment for costs. From this judgment the defendants in error attempted to take an appeal to the Circuit Court The bond purports to be executed by both of the defendants in error, but was only signed by Henry Emery, one of them, together with John P. Boice, as security. The bond was *approved by the clerk of the County Court* on the 28th day of November, 1853. The transcript of the County Court record shows that the judgment was rendered on the 7th day of November, 1853.

The appeal bond and transcript were filed in the Circuit Court on the 28th day of November, 1853, and on the same day an appeal summons was issued against the plaintiff in error, returnable at the February term, 1854, which was returned not served. At that term the cause was continued. On the 14th day of April, 1854, an alias appeal summons was issued, which was returned served on the plaintiff in error. No summons was issued *against* Reuben Jacobs, the party who *had not joined* in the execution of the appeal bond.

At the May term, 1854, the appearance of Reuben Jacobs was entered by his attorney, and thereupon the cause was continued

At the next term, (in September, 1854,) on the first day, the plaintiff in error entered his motion to dismiss the appeal, and assigned as reasons—

1st. That there was no appeal pending in that court.

2nd. The appeal bond was not given, taken and approved in the time and manner required by law.

3rd. The appeal bond was insufficient.

The other facts of the case are stated in the opinion of the court. The decisions complained of were made by WEAD, Judge, at February term, 1855, of the Fulton Circuit Court.

GOUDY and JUDD, for Plaintiff in Error.

WILLIAM KELLOG, for Defendants in Error.

CATON, J. This was an appeal taken from the county to the Circuit Court. At the first term after the appeal was taken, the parties appeared and the cause was continued by consent. At the next term, the appellee in the Circuit Court made a motion to dismiss the appeal, because the appeal bond was not filed within the time prescribed by the statute; and also, because it was not approved by the proper officer. This motion was overruled, which is assigned for error. This identical question was decided by this court, in the case of Pearce *v.* Swan, 1 Scam. 266. In that case, the court said: " taking the appeal, executing the bond, and delivering the papers to the Circuit Court, are the means provided by law for transferring the cause from the justice and constable to the Circuit Court. These measures are in the nature of process to remove the cause from the inferior to the superior court. When process by which a court obtains jurisdiction of a cause is irregular, and no objection is made, the irregularity is waived. The irregularity is not like the case of a defective jurisdiction over the subject matter; for the statute gives jurisdiction to the justice and constable in the first instance, and to the Circuit Court by appeal." That was an appeal in a case of the trial of the right of property, levied upon by a constable on an execution issued by a justice where, as the statute then stood, the party must take an appeal and file his bond immediately upon the rendition of the judgment by the justice; and in that case, this was not done till a subsequent day, and the party appeared to the appeal in the Circuit Court without objection, and this court held that the objecion was waived. The appeal proceedings being likened to process, odjections to their regularity must be taken in the same time that objections to defective or void process or service are required to be taken. Now, the rule is well settled, that if a part

appears to a cause for any purpose whatever, except to object to the process or service, he waives all objection thereto, although the process may be void, or there may have been no service. Easton *v.* Altum, 1 Scam. 250. Here the appellee did appear at the appearance term, in the circuit court, and consented to a continuance of the cause. When he did that, he submitted himself and his cause to the jurisdiction of the court; and it was too late afterwards for him to object, that himself or the cause was not properly brought there. Suppose it had been an original case in circuit court, and the original process had not been signed or sealed, or had not been served; or suppose, even, no attempt had been made to issue such process, his appearance and consenting to a continuance would have been a waiver of process or service, and he could never afterwards be allowed to object that he was not properly brought before the court. He came voluntarily and submitted himself to its jurisdiction, and that put an end to all such objections. The circuit court decided properly in overruling the motion to dismiss; for what reasons, it is immaterial to this court.

The only remaining question is, as to the admissibility of the secondary evidence of the contents of the lease. The facts upon which that was admitted, were these: The original lease had been used upon the trial in the county court. Subsequently, the counsel for Mitchell, the party against whom it was produced and used, found the lease, with some other papers not marked, filed in the court-room where the trial had taken place. He took the lease, and, instead of returning it to the opposite party, to whom it belonged, he attached it to a *dedimus* and sent it to California, the residence of the witness whose testimony he wished to take, to be read in this cause in the circuit court. Of this he subsequently informed the counsel of Jacobs, stating, at the same time, that he had no doubt it would be back in time for the trial. In this he was dissappointed; for the commission was not returned at time of the trial, and consequently the lease was not produced. Under these circumstances, we think the circuit court properly admitted secondary evidence of its contents. The party could not produce it. It was absent without his consent or fault. It was beyond the jurisdiction of the court, so that it could not be reached by legal process. But above all, it was placed thus beyond the power of the party or the court by the opposite party. He had taken the lease, knowing that it belonged to Jacobs, to whom, he also knew, it was indispensable on the trial, and without the consent of Jacobs, had sent it to California. To allow him, therefore, to say that Jacobs should apply for a continuance of the cause, or forego indispensable evidence on the trial, would be allowing Mitchell to take advantage of his own wrong. After placing

Jacobs in this position, the least he could do, to repair the wrong which he had done him by putting his primary evidence beyond his reach, was to consent that he should give secondary evidence of its contents ; and, under the circumstances, even very strict proof of that should not have been required.

The court committed no error in admitting the evidence, and the judgment must be affirmed.

Judgment affirmed.

Lewis B. Parsons, Plaintiff in Error, *v.* Gilbert Evans, Defendant in Error.

ERROR TO MADISON.

Exceptions may be taken to the decision of a Circuit Court, trying a case without the intervention of a jury, but they must be taken at the time ; and then the error can be assigned, not otherwise.

This cause was tried by the circuit court of Madison county, Underwood, Judge, presiding, without the intervention of a jury and judgment was rendered for the defendant in error.

Stuart and Edwards, for Plaintiff in Error.

J. and D. Gillespie, for Defendant in Error.

Skinner, J. This cause was tried by the circuit court by consent of parties, without the intervention of a jury, and judgment rendered against the defendant below. He appeals to this court, and assigns for error the rendition of this judgment. The bill of exceptions embodies the evidence, but fails to show that any exception was taken to the decision of the court, or that a motion was made for a new trial, overruled, and the decision of the court excepted to.

Under the statute, exceptions may be taken to decisions of the circuit court, where the cause is tried without the intervention of a jury; and the decisions of the court so *excepted* to, may be assigned for error in this court. R. S. 416, Sec. 22.

In this case, it is the finding of the court, upon the evidence, that is complained of; and to enable the party to assign error, the bill of exceptions should show that exception to such finding was taken at the time. Dickhut *v.* Durrell, 11 Ill. 72.

The statute gives the right, in such case, to assign error, only where the decision assigned for error was *excepted* to, and we have no right to dispense with this requisition.(*a*)

Judgment affirmed.

[*a*] But see Metcalf *vs*. Fouts, 27 Ill. R. 114.

DAVID J. WAGGONER, Plaintiff in Error, *v.* FRANCIS B. COOLEY *et al.*, Defendant in Error.

ERROR TO FULTON.

The admissions of a person in possession, claiming property, are proper testimony as against his own title. An exception to this rule arises, under the statute, in the trial of right of property, which excludes the testimony of the defendant in execution.

As between vendor and vendee, a fraudulent sale may be good, but void as between each of them and creditors.

A creditor, in failing circumstances, has not the right to transfer his assets to an agent, with power to sell, and prefer creditors.

Creditors who, to secure a debt take title by purchase, from a fraudulent vendee with knowledge of his title, only such title as their vendor had, and other creditors may assail the whole transaction for fraud. (*a*)

THIS was an action of trover, commenced by the defendants in error, against the plaintiff in error, in the Fulton Circuit Court, to recover damages for the conversion of certain lots of corn, oats, wheat, &c.

The defendants filed four pleas, to-wit:

1st. That he was a deputy sheriff of Fulton county, and as such, he received six several writs of attachment, set out in the plea, against one Abraham Stevenson, issued from Fulton county, by virtue of which he levied upon and took the property described in the declaration ; and avers that the property belonged to the said Abraham Stevenson, the defendant in the attachments.

2nd. The same allegations as the first plea, except that instead of setting forth six writs, it only alleges that one writ in favor of Samuel C. Davis was received by him, which writ is one of the six described in the first plea.

3rd. That the property mentioned in the declaration was the property of Abraham Stevenson, and not the plaintiff's.

4th. That the property was not the plaintiff's, but was the property of one Horatio J. Benton.

The plaintiffs in error replied to the 1st, 2nd and 3rd pleas, denying that the property was Stevenson's and averred that it was the property of the plaintiffs, with conclusion to the country, to which *similiter* was added ; and to the 4th plea, that the property was not Benton's but was the plaintiff's, on which issue was joined.

A jury was impanneled, which found the issues for the plaintiffs below. Motion was made for a new trial, and overruled by the court, and judgment was rendered against the plaintiff in error, upon the verdict of the jury.

On the trial of the cause it was proven that the property in controversy, together with a stock of merchandize, was prio

(*a*) Butler *vs.* Haughwont, 42 Ill. R. 18.

to the 9th day of May, 1854, the property of Abraham Stevenson, who was conducting a business in the town of Ipava, Fulton county, and that becoming embarrassed, he, on that day, transferred and sold the whole of his property fraudulently to his clerk, Horatio J. Benton, for the purpose of avoiding the payment of his debts, and at the same time he transferred, for the same purpose, all the indebtedness due him to his brother, John Stevenson. It was also proven that Benton was a party in the fraudulent object. It was proven that Abraham Stevenson then absconded with all his ready money, and was pursued by a creditor who arrested him in Ohio, and thereupon he settled with the pursuing creditor by paying his money on hand, and returned to Fulton county. It was further proven that Stevenson conferred no authority on Benton to pay his debt, or dispose of the property for his (Stevenson's) benefit, but that Benton was instructed not to pay the creditors; and that no agency was created as to the property in controversy.

It was then proven that one S. H. Gilbert, as the agent of the plaintiffs who resided in Chicago, came to Fulton county after the fraudulent transfer to Benton, while Stevenson was absent from the store, and Benton was in possession of the stock of goods and the property in controversy, having charge of a debt due the plaintiffs of about $840, and a writ of attachment issued from the court of Common Pleas for Cook county, in favor of the plaintiffs against the effects of Abraham Stevenson, to make their debt; that the agent, Gilbert, placed the writ from Cook county in the hands of the sheriff of Fulton county, who, at the direction of the plaintiffs' agent, levied on the stock of goods as the property of Stevenson, and was about proceeding to levy on the property in controversy, when Gilbert and Benton made an arrangement. This arrangment was that the stock of goods should be released from the levy, and the property in controversy was to be sold and transferred by Benton to the plaintiffs, for which the debt of the plaintiffs against Abraham Stevenson was to be transferred to Benton. It was further proven that this arrangement was consummated in the presence of the sheriff of Fulton county, the levy released and the writ returned, the property in controversy sold, and in part delivered, and the indebtedness on Stevenson transferred to Benton.

It was further proven that directly after the arrangement between Benton and plaintiff's agent, that the writs of attachment mentioned in the first and second pleas, came to the hands of the defendant, as deputy sheriff, and by virtue of the writs he levied on and took the property in controversy as the property of Abraham Stevenson. At that time a part of the produce had been removed from where Stevenson left it, and stored in

the plaintiff's name, and the rest remained in the original places of deposit.

The defendant then produced Joseph Dyckes as a witness and proved by him that he was sheriff of Fulton county ,and as such had charge of the plaintiff's writ of attachment from Chicago, and was present and heard the negotiation by which Benton sold the property in question to the plaintiffs, and while Benton was in possession thereof, by which they claimed the title to the property. After making such proof, the defendant proposed the following question: What did Benton say with regard to the title to the property in controversy, while he was in possession of the same? To which the plaintiffs objected and the court sustained the objection, to which the defendant excepted.

The defendant then proved by Dyckes that Gilbert claimed that the transfer by Stevenson to Benton was a fraud and void; that the property still belonged to Stevenson; that Gilbert directed the witness to make the levy, then compromised with Benton and released the levy, when the court on motion of the plaintiffs, excluded the evidence from the jury, to which the defendant excepted.

The several writs of attachment, with the returns thereon were offered in evidence, which was all the evidence.

The plaintiffs asked the court to give the following instructions to the jnry, to wit:

The court is asked to instruct the jury—

1st. That if they beleive, from the evidence, that Stevenson was indebted to the plaintiffs, and that their agents purchased the property in the declaration mentioned, of Benton, and that Benton was in possession thereof at the time of such purchase by purchase from Stevenson, and that said agent paid for said property in inbebtedness on Stevenson, and received said property in payment thereof, and received the possession of said property, and that defendant afterward took said property, they should find for plaintiffs.

2nd. That if the jury believe, from the evidence, that Stevenson was indedted to the plainiffs, and the goods and property in plaintiffs' declarations were received in payment of such indedtebness from Benton, he being in possession of said goods and received into their possession by their agent before said property was taken by defendant, the sale to the plaintiffs, was a legal sale, and that it is immaterial whether the sale by Stevenson to Benton was fraudulent or not, or whether the plaintiffs had ntoice of such fraudnlent sale between said Benton and Stevenson.

3rd That if they believe, from the evidence, that the sale

of the property specified in plaintiffs' declaration was sold to Benton by Stevenson, and that Benton gave his notes therefor, and that such sale was not a fraudulent one then the property passed to Benton, and a sale by him to plaintiffs would vest the property in said plaintiffs; and that to constitute a fraudulent sale to Benton, they must believe that both Benton and Stevenson intended it to be a frauduleut sale.

4th. That if Benton bo ught the property and gave his notes therefor in good faith, without any intention to defraud any one, then the sale is a good one, even if Stevensen did intend it to be fraudulent.

5th. That if the jury believe, from the evidence, that Stevenson sold the property to Benton in good faith and took his notes therefor, the sale is not fraudulent; even if Benton intended to defraud Stevenson or others, and that both vendor and vendee must participate in a fraudulent intent in order to make the sale fraudulent.

6th. That in this case the plaintiffs are not to be affected by a fraudulent sale between Benton and Stevenson, even if there was one, unless they had some participation in said fraudulent sale.

7th. That where two creditors have demands against one debtor, it is competent for such debtor to prefer either creditor and pay him, even if the other creditor should lose his debt thereby; and in such case the creditor who first obtained payment of his debt, in property or otherwise, is entitled to retain the same if possession is delivered.

8th. That if the jury believe from the evidence, that Stevenson fraudulently sold and conveyed the property described and delivered possession thereof to Benton, and gave him the entire control of the property, still a sale by said Benton to a creditor, of Stevenson in payment of Stevenson's indebtedness to such creditor, will vest the right of the property in such creditor, and that his title thereto cannot be divested by a ubsequent attaching creditor by reason of such fraudulent sale

9th. That where one person gives the entire control of goods and chattels to another and authorizes him to dispose of them as he pleases, or fraudulently sells them to such person and delivers the possession to such fraudulent vendee, any sale made by such person to whom such goods are delivered, will be valid, and he will be treated as the agent of the first person, and such first person will be bound by his acts, and all persons claiming under him.

And the defendant asked the court to give the following instructions to the jury:

1st. If the jury believe, from the evidence, that the sale of

the property, the title to which is in controversy, in this suit made by Abraham Stevenson to H. J. Benton, was made for the purpose of hindering, delaying or defrauding the creditors of said Stevenson in the collection of their demands against Stevenson, and that Benton participated in the said fraudulent intent of Stevenson in making his, said Benton's, purchase of the said property; and if the plaintiffs only have shown a title to said property acquired through Benton—and if the jury believe from the evidence, that said plaintiffs purchased from, Benton with a full knowledge of the said fraudulent contract between Stevenson and Benton, then the plaintiffs have shown no better title to said property as against the rights of Stevenson's other creditors than Benton had thereto at the time when he sold the same to the plaintiffs.

2nd. If the jury believe, from the evidence, that the contract between Stevenson and Benton was of the fraudulent character mentioned in the above instruction, then the pretended sale between Stevenson and Benton would be void as against Stevenson's creditors, and such creditors could attach and hold said property in the hands of Benton for the satisfaction of their demands ; and in like manner said creditors could attach and hold said property in the hands of the plaintiffs if the plaintiffs only purchased said property of Benton, and before and at the time of their purchase had full knowledge of the void character of said Benton's title on account of such fraud.

3rd. If property is conveyed for the purpose of hindering, delaying or defrauding the creditors of the seller, and such property is attached by such creditors, such property is considered as still the property of the seller in favor of his creditors' rights.

4th. If the jury believe, from the evidence, that all the title to the wheat and barrels claimed by plaintiffs which they have shown was derived from Benton, and that Benton had no title to the wheat except what he obtained from Stevenson ; and if thay further believe that Stevenson never sold this wheat to Benton, then the jury must not assess any damages against the defendant for said wheat.

And the court gave the 4th in number and refused to give the 1st, 2nd and 3rd,—to which decision of the court in refusing said instructions the defendant then and there excepted.

This cause was heard before WEAD, Judge, and a jury, at February term, 1855. Verdict and judgment for the plaintiff in the court below.

GOUDY and JUDD, for Plaintiff in Error.

WM. KELLOGG, for Defendants in Error.

Scates, C. J. With an exception exlcuding by statute, a defendant in execution from testifying on the trial of the right of property levied on, by the general principles of law the admissions of a person in possession claming property, are admissible in evidence against his own title, and we are not able to discover any ground of objection upon which Benton's statements on this point should have been excluded, as the whole tenor of the evidence tended to show that defendants deduced title through him. Jackson ex dem. Titus et al. *v.* Myers, 11 Wend. R. 533 ; Crary *v.* Sprague et al. 12 Wend. R. 41.

The acts and declarations of Gilbert, his agency for defendants being proved, were admissible at least to show notice of the alleged fraudulent sale under which defendants were alleged to claim.

The first, second, sixth, eight and ninth instructions given for defendants here are erronouos ; and the first, second and third instructions asked by plaintiff here, were improperly refused.

The error seems to have arisen out of a mistaken view of the rights and powers of a fraudulent vendee. The sale may be and is good as between vendor and vendee, but void as between each of them and creditors. As to them, it is still the property of vendor, and so creditors may attach or levy upon it.

This is the general rule, and under it the law will recognize, favor and secure the vigilant, as in cases of insolvency, where diligence may give priority by suit.

But the case is not placed upon these familiar principles. We, on the contrary, understand the instructions, as assuming the ground, that although the sale is void for the purpose of transferring the title to the vendee, it is nevertheless a valid appointment of an agent with power to sell to and prefer the creditors of the vendor. No authority to sustain this position has been shown. The power of a failing, or insolvent debtor, to prefer and secure a creditor, has not been transferred to, or sanctioned in a fraudulent vendee, by any principle or decision known to us, when drawn in question or litigated between the creditors themselves.

The case of Thomas *v.* Goodwin, trustee, 13 Mass. R. 140, referred to for this position, does not sustain it. The proceeding was a trustee process against the fraudulent vendee, with a view to charge him with the value of the property. To discharge himself from liability, he proved that he had paid, on the orders of the debtor, the full value over to creditors. An executor of his own wrong may discharge himself from further liability by payment of intestate's debts in good faith, nor is it apparent why a fraudulent vendee may not discharge himself from further

liability, after having paid away the proceeds or value of property, when the proceeding seeks to charge him with the value again. But when the proceeding is against the property itself, or the proceeds in the hands of the fraudulent vendee, I consider the aspect of the question as wholly changed. He has no right to dictate who shall, and who shall not be paid, or preferred. His position and possession of the property is one of self protection merely, and not one of agency or preference.

It may be here, that Benton has, by a delivery of the property over to a creditor of Stevenson, discharged himself from any further liability for it, or its value, and yet the receiver of it from him, and under his contracts and sales, has acquired no title to it, or preference over Stevenson's other creditors. Had defendants bought the property of Stevenson, they then might have raised the question of title by purchase and preference.

Burnell et al. *v.* Robertson, 5 Gil. R. 282, is no authority for defendants, for there both sales were made by competent authority, the one by the owner, without delivery, the other by levy of attachment on the property, which created a valid lien, overreaching the former sale without delivery.

Had the defendants proceeded with their attachments, they had a lien, and may have perfected title by sale, and it may be a preference to the full value of the goods attached. But when they abandon that diligence, and consent to take title by purchase of the fraudulent vendee, with a full knowledge of his fraudulent title ; the fact that they are creditors of the fraudulent vendor cannot purge and purify the transaction of its fraudulent character towards other creditors, and make that valid which was before void. They waive their vantage ground, and take what title their vendor may have, as against other creditors, equally with themselves entitled to assail the transaction for fraud. See Jennings *v.* Gage et al., 13 Ill. R. 610 ; Saltus *v.* Everett, 20 Wend. R. 275 ; Swett et al. *v.* Brown, trustee, 5 Pick. R. 178 ; Caldwell *v.* Williams et al., 1 Carter R. 405 ; 2 Kent Com. 324.

Had the fraud been perpetrated upon the vendor, a *bona fide* purchaser or bailee, who receives the goods on a pre-existing debt, may hold them against the defrauded vendor, as is held in Root *v.* French, 13 Wend. R. 570, and ante, 11 Wend. R. 533. Powell et al. *v.* Jeffries et al., 4 Scam. R. 387.(*a*) Every advantage that a suitor may obtain by his diligence, is sustainadle, even to the levy of an attachment between the execution anb filing a deed for record. Cushing *v.* Hurd, Jr., 4 Pick. R. 253. But a creditor has no right to take the goods without suit. Osborne *v.* Moss. 7 John. R. 164. Nor is his title improved by a purchase from one who had no right to sell, for the fact of

(*a*) Butler vs. Haughwont, 42 Ill. R. 18.

his being a creditor will not confer the right or power. And however free his own purchase may be from fraud, he must answer for the fraud which taints and avoids his vendor's purchase, when that fraud is known to him, although he was no party to that fraud.

The instructions given and those refused seemed to proceed upon the ground that the fraudulent vendee had power to sell to a creditor of the vendor, and that he would acquire a valid title against the claims of other creditors, notwithstanding the first sale was void as to them all, for fraud, and that fraud known to the second purchaser. The principle is unsustained by authority and we are not able to give it our sanction.

Judgment reversed and cause remanded for a new trial.

Judgment reversed.

GEORGE CRULL and WIFE, Plaintiffs in Error, *v.* CHARLES F. KEENER, Executor, &c., Defendant in Error; and CHARLES DICKERSON *v.* CHARLES SPRAGUE.

AGREED CASE FROM SCOTT.

The Supreme Court, except in certain specified cases, has only appellate jurisdiction.

The Supreme Court will not take jurisdiction of a case certified, or an agreed case, unless there has been a final judgment entered in the court below.(*a*)

THIS was an agreed case, certified by the clerk of the Circuit Court of Scott county, submitting certain questions, under the statute of limitations, to this court for its consideration and decision.

The case was designed to come within the provisions of the seventeenth section of the twenty-ninth chapter of the Revised Statutes of 1845, entitled "Courts."

The case of Dickerson *v.* Sprague was certified from the Cass Circuit Court, under the same circumstances.

N. M. KNAPP and D. A. SMITH, for Plaintiffs in Error.

M. MCCONNEL, for Defendant in Error.

CATON, J. This court has only appellate jurisdiction, except in certain specified cases, of which this is not one. Sec. 5, Art. 5, Const. In this case no decision was ever made in the Circuit Court; but the counsel have stipulated or certified that certain

(*a*) Moody vs. Peak, 13 Ill. R. 343.

questions of law arise in the case, which are still pending and undetermined in that court; and on that stipulation the questions are brought here, and we are asked to decide them in the first instance, and for the circuit court. This is neither contemplated by the statute nor allowed by the constitution. The word *appellate* in the constitution is used in contradistinction to *original.* It was intended to invest this court with supervisory power only, except where original jurisdiction is *expresly given.* It contemplated some action, decision or determination of some officer or inferior tribunal, by which the rights of some party could be affected; to re-examine and reverse which, he might be allowed to appeal to this court. The appellate power conferred is to correct errors committed by some inferior jurisdiction, and no error can be committed till a decision is made. There must be something to appeal from, before an appellate power can be exercised. Were we to undertake to decide questions thus presented in the first instance, to this court, we should clearly assume to exercise original jurisdiction, which is exclusively vested in the inferior courts. This very question is still pending and undetermined in the circuit court; and it is within its jurisdiction, and perfectly competent, for that court to act upon and decide it, at the very moment it is being considered in this court. Neither the case nor the question is removed from that court by this attempt to bring it before this court. It is the policy of the fundamental law, that all questions of law should be subject to at leaat two solemn considerations and decisions, before they should be considered as finally settled and determined; and that in their final determination, this court should have the advice and assistance resulting from the consideration and decision of the inferior tribunal. We cannot doubt as to the true meaning of the constitution conferring upon this court its jurisdiction.

Nor do we think the legislatrue misunderstood it, when they passed the sixteenth and seventeenth sections of the twenty-ninth chapter R. S., or that they ever contemplated that, under that statute, this court would ever assume to exercise any thing but appellate jurisdiction. The sixteenth section is this: "The parties in any suit or proceeding at law or in chancery, in any circuit court, may make an agreed case containing the points of law at issue between them, and file the same in the said court and the said agreed case may be certified to the Supreme court by the clerk of such circuit court, without certifying any further record in the case; and upon such agreed case being so certified and filed in the Supreme court, the appellant or plaintiff in error may assign errors, and the case shall then be proceeded in in the same manner as it might have been, had a full record been certified to the said Supreme court." Nothing can

be more manifest than this was never designed, to allow a case to be taken to the supreme court till a final decision had been made in the circuit court, so that it could be taken up in the ordinary way by filing a complete record. It provides merely another and less expensive mode of accomplishing the same purpose. There must be an appellant or plaintiff in error in the case, who can assign errors, and to do that, there must be something to assign errors upon—some error to complain of. The circuit court could commit no error, till it made a decision which could be erroneous. It would be no great compliment to legislative wisdom or learning, to impute to them the intention of requiring or authorizing a party to assign errors upon nothing. That would indeed be a new invention in legal proceedings. The proposition will not admit of grave discussion.

The seventeenth section, upon which more special reliance was placed at the bar, by the counsel of both parties, in suport of this jurisdiction, is this: "Any judge of a circuit court may, if the parties litigant assent thereto, certify any question or questions of law arising in any case tried before him, to the Supreme court, together with his decision thereon; or, the parties in the suit may agree as to the questions or points of law arising in the case, and the same may be certified by the counsel or attorneys of the respective parties, who shall sign their names thereto; and upon such certificate being made, the same shall be filed in the Supreme Court; and a copy of said certificate, certified by the clerk of said circuit court to the Supreme Court, and filed therein, and, upon filing the same, the like proceedings may be had in the Supreme court as if a full and complete record had been transcribed and certified to said court." Now let me ask, in the first place, what proceedings would be had in this court, should a party bring a case here in the usual mode, by a complete transcript of the record, from which it appeared that no decision had been made in the circuit court? All who are acquainted with the practice of this court, know that it would at once be dismissed for want of jurisdiction; and such the statute declares shall be the proceeding, when such a case is brought up by a certificate under this section. Under the first clause of the section when the certificate is made by the judge, it is expressly provided that his decision thereon shall be certified, together with the questions of law presented in the case. Then, in that case at least, a decision must first be made before the case can come here for review. Now, it is plain, from the language of the law, that the subsequent provision of the same section was merely intended to provide another mode for bringing up the *same* case. It was not intended to authorize the bringing up a case in one mode, which could not be brought up

in the other mode. After providing for bringing up the case by the certificate of the judge of the questions, and his decision thereon, the statute says : " *Or*, the parties in the suit may agree as to the questions or points of law arising in *the* case," evidently intending to authorize an alternative mode of proceeding in the same case, and not in another case, in which the first mode could not be adopted. It is true that the legislature did not, in every case, expressly declare that no such certificate should be made until the case was finally disposed of in the Circuit Court; but the reason undoubtedly was, that it did not occur to them that any body would think of bringing a case to this court for review till something was done in the Circuit Court which required reviewing; that it was not supposed that any person would desire to come to this conrt to get justice done him, till he had failed to get it in the court, to which by law he was required first to resort. If no decision was to be made in the Circuit Court, why require him to go there at all? It would seem to be a very useless formality to require the parties first to go into the Circuit Court, not for the purposes of justice or adjudication there, but merely as a means of getting into this court for the real purpose of the litigation, but with no power here to enter the requisite judgment; but for that purpose, the case would again have to be sent back to the Circuit Court; for the case would not be here, but only the question certified, and the judgment could only be entered in the court where the cause would be pending. It would be better at once to allow the parties to come here with their case, as well as their question, and avoid all this expensive circumlocution. But the truth is, the constitution never authorized it, and the legislature never intended it, nor have they done it unintentionally.

This question, submitted to the court for its opinion, must be dismissed for want of jurisdiction to determine it.

Case dismissed.

JOHN GREEN *et al.*, Appellants, *v.* HENRY OAKES, Appellee.

APPEAL FROM SCOTT.

The remedy by injunction to prevent the obstructing of a public highway, is effective, and where the facts are easy of ascertainment and the rights resulting there from free from difficulty, equity will grant relief, at the suit of the public, or of the citizen having an immediate interest therein.

Where a public road has been used for twenty years, the owner of the land over which it passes acquiescing therein, the law presumes a dedication.

(*a*) Cunningham vs. Loomis, post 555.

On the 23rd day of November, 1853, Thomas Green and Ellery M. Merris, filed their bill in chancery with reference to a plat prefixed, alleging their ownership and occupancy of certain lands and that they were deeply interested in the uninterrupted and undisputed use of a public highway, indicated by said plat running east and west, "that had been used by the public for upwards of twenty years," and that Oakes had vowed his purpose to obstruct the same, by fences and gates, at two different points.

Injunction was granted on the bill.

Oakes filed his answer, allwoing that the court had no jurisdiction; that complainants had adequate relief at law; that bill is subject to demurrer and ought to be dismissed, because it did not allege that the highway had been legally laid out and established; and that Oakes as owner of the land had been paid for the right of way. Denies that the road had been established 20 years, or that there was any prescriptive right to it, &c., &c.

Replication filed to answer, when Oakes entered a motion to dissolve the injunction, which was continued on affidavits, that the road had been established, worked upon and used by the public for more than 20 years, before commencement of suit.

Three witnesses for complainants testify, that for more than 20 years they resided within a mile of the road in controversy; that the road was opened about 1829, with the assent of the owners of the land over which it passed; that for more than 20 years before the institution of the suit, the road had been worked upon, and used by the public; that it was essential to the public convenience, and that the obstruction of it would be injurious to the interests represented by appellants, and that they had understood that Oakes threatened to obstruct it.

Bill dismissed October term, 1855, and appellants decreed to pay costs.

Errors assigned:

1st. That bill was dismissed.

2nd. That the relief asked for in the bill ought to have been accorded by the court below.

D. A. Smith and N. M. Knapp, for Appellants.

M. McConnel and Grimshaw, for Appellee.

Skinner, J. This was a bill in chancery to enjoin against obstructing a public road.

The bill alleges that the road has been used as a public highway, with the knowledge and consent of the owners of the land over which it runs, without interruption, for more than twenty years, and has been worked and kept in repair for many years

as one of the common highways of the county of Morgan; that complainants are owners of and occupy lands adjoining the road and that its free use is necessary to the enjoyment and use of their land, and that the respondent is about to fence up the road and deprive them of the use thereof.

The answer denies that the road is a public highway, or has been used as such for twenty years.

We are satisfied that the evidence establishes that the road has been used as a common public highway of the county, with the knowledge and acquiescense of the owners of the land over which it runs, for more than twenty years, and that it has been treated, by the authorities having jurisdiction of roads, as one of the public roads of the county. If equity will grant relief by injunction in favor of an individual interested against one about to shut up the road, and it is one of the public highways of the county, then the circuit court should have made the injunction perpetual, instead of dismissing the bill.

Although courts of equity will not interpose by injunction to prevent an obstruction of an alleged easement or way, or the creation of a nuisance or purpresture, when the right is doubtful and there is remedy at law; yet where the right is clear and appertains to the public, and an individual is directly and injuriously affected by the obstruction of the easement, or the creation of the nuisance, they will interfere on the application of such individual to prevent the threatened wrong or invasion of the common right.

In such case, equity can give complete remedy—prevent irreparable mischief, and that continuous and vexatious litigation, that would arise out of resort to the remedies afforded at law.

Obstructions to public highways are public nuisances, and private persons accustomed to use them, as well as the public, are interested in the prevention and removal of such obstructions.

The remedy by injunction is perfect, and while it protects one from the injury, all are alike benefitted without the expense, delay and multiplicity of actions incident to redress at common law; and where the facts are easy of ascertainment, and the rights resulting therefrom free from difficulty, equity will grant relief, either at the suit of the public or of the citizen, having an immediate interest therein. 2 Story's Eq. Com., Secs. 923, 924, 925, and cases there cited; Corning *v.* Lowerre, 6 John. Ch. 439; Hills *v.* Miller, 3 Paige's Ch. 254; ibid. 213; 4 ibid. 510; 6 ibid. 83; 6 ibid. 554. (*a*)

Where a public road runs across private property, and is used by the public as a common road without interruption for twenty

(*a*) Chamblin vs. Morgan, 18 Ill. R. 294, & notes.

years, the owner acquiescing in such uses, the law presumes a dedication of the ground upon which the road runs, to the use of the public for such purpose, (*a*)

Whether this presumption is liable to be rebutted, or is conclusive as a prescriptive right, is not necessary for the purposes of this case to decide. 3 Kent's Com. 442, 443, 444, 450, 451 ; Willoughby *v.* Jenks, 20 Wendell 96 ; Conner *v.* New Albany, 1 Blackf, 43 ; Brown *v.* Manning, 6 Ohio 129 ; Gowen *v.* The Philadelphia Exchange Company, 5 Watts and Serg. 141 ; Hobbs *v.* Inhabitants of Lowell, 19 Pick 405.

The decree is reversed and the cause remanded with direction to the circuit court to enter a decree making the injunction perpetual. (*b*)

Reversed and remanded.

Decree reversed.

MAHLON SHADLEY *et al.*, Plaintiffs in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO CLARK.

A *scire facias*, upon recognizance, should show, by proper recitals, that the recognizance had legally become matter of record.

THE *scire facias*, issued herein, simply recites the order of the circuit court, stating that Shadley did not answer, ordering that his recognizance before the justice be declared forfeited, and that a scire facias issue, and then calls upon the defendants named to answer. The defendants were served, but made default, and judgment went against them for the amount of the recognizance. Judgment rendered at October term, 1854, of the Clark circuit court.

STUART and EDWARDS, for Plaintiffs in Error.

J. MCWILLIAMS, District Attorney, for The People.

SCATES, C. J. The *scire facias* serves the double office of process and declaration, in cases like this, and should be good and sufficient for each purpose. This is not sufficient for either, on default.

The constitution requires all process to run in the name of the people of the State ; and this is not issued by such authority.

In its office as a pleading, the scire facias should show, by a

(*a*) Godfrey vs. Alton, 12 Ill. R. 30; Daniels vs. People, 21 Ill. R. 443; Marcy vs; Taylor. 19 Id. 636; Proctor vs. Lewiston, Id. 153; Gentleman vs. Soule, 32 Id. 272 Rees vs. Chicago, 38 Id. 323, post 363.

( ) Ferris vs. Crow, 5 Gil. R. 101; Mc' Faden vs. Fortier, 20 Ill. R. 515; Leighton vs. Hall, 31 Id. 108.

proper recital of the recognizance, when it so appears upon its face, or by proper averments, that the recognizance was matter of record, and had legally become so; for *scire facias* only lies upon matter of record.(*a*)This recognizance recited was entered into before a justice of the peece, but has never been returned, filed and made a matter of record. It is not to be implied from the order of forfeiture and award of the *scire facias;* it must be shown or averred in it. Both are substantative defects.

Judgment reversed.

MURRAY McCONNEL, Plaintiff in Error, *v.* GEORGE STREET *et al.*, Defendant in Error.

ERROR TO MORGAN.

A party, who holds land under paper title, purporting to convey the same, and pays taxes for seven successive years, will be protected.

That the title of a party originated in good faith, and that he holds under it will be presumed until the contrary is shown.

Good faith, (under the act of 1839, to quiet possession,) is understood to be the opposite of fraud, and of bad faith; and its non-existence must be established by proof.

THIS cause was heard by WOODSON, Judge, by consent, without the intervention of a jury, who decided that Street and the others had, and that McConnel had not, a good title to the lot of land in question, and rendered judgment accordingly. The opinion of the court sets out the facts in the case.

M. McCONNEL, *pro se.*

D. A. SMITH, for Defendants in Error.

SKINNER, J. Street, Harlin and Street, in 1853, brought ejectment against McConnel to recover fractional lot six in Jacksonville.

Plea not *guilty;* trial by the court, and judgment for plaintiffs.

The plaintiffs proved that the land, upon which the lot was laid out, was patented to one Arnett; a deed for the lot from Arnett to the county of Morgan, executed in 1825, and duly acknowledged and recorded on the day of its date; and the plaintiffs proved title in them, derived from the county of Morgan, by several *mesne* conveyances, and that McConnel was in possession at the time of the commencement of the suit.

McConnel proved a deed of quit-claim of land covering het

(*a*) Noble vs. People, 4 Gil. R. 434 and notes.

lot in controversy, from Arnett to him, executed in 1835, duly acknowledge and recorded on the day of its date, and conveying all "the right, title, claim and interest" of Arnett in the land described therein; that he took possession of the lot in 1836, and had occupied the same (without actual residence thereon) from that time until the commencement of the suit; that the lot had not been sold for taxes since he took possession of the same; that after the execution of the deed from Arnett to McConnel, Governor Duncan laid out an addition to the town of Jacksonville, which extended over a portion of the original plat of Jacksonville, and that lot one of this addition covered all of the lot in controversy except a few feet which were left out to widen an alley on the south side of the lot; that he had paid all taxes assessed on the lot, either by the discription of "fractional lot six in Jacksonville," or of "lot one in Duncan's addition to Jacksonville," for the years 1845, 1846, 1847, 1848, 1849, 1850, and 1851, the lot having been assessed sometimes by one and sometimes by the other of said descriptions.

The only question for determination, is whether the plaintiffs' action is barred by the possession of McConnel under his paper title, and payment of taxes for seven successive years, by operation of the first section of the act of 1839, entitled "An act to quiet possession, and confirm titles to land."

McConnel had actual possession of, and paid all taxes assessed on, the land for seven successive years, and, under paper title, purporting to convey to him the lot.

The description used in assessing, and according to which he was compelled to pay the taxes, could not prejudice his rights, so that he paid all taxes legally assessed thereon for the seven years; nor could the addition to the alley of a strip off the side of the lot, thereby dedicating its use to the public, affect his rights to the extent of his possession in fact.

His possession was adverse, and the deed under which he held, in connection with the patent to Arnett, purported to vest in him the title to the lot, and in the absence of the prior deed from Arnett to the county of Morgan, his title was paramount. That his title originated in *good faith*, and that he held under his paper title, will be presumed until the contrary is proved. Fraud is not to be presumed, but must be proved.

"*Good faith*," within the meaning of this statute, I understand to be the opposite of *fraud* and of *bad faith*; and its non-existence, as in all other cases where fraud is imputed, must be established by proof. (*a*)

That the paper title of McConnel is "color of title," within the meaning of this statute, there can be no question.

We hold that the possession under the paper title, and payment

(*a*) Woodward vs. Blanchard, 16 Ill. R. 433; Bowman vs. Wittig, 39 Id. 448; Mc'Cagg vs. Heacock, 42 Id. 156, 34 and Id. 478 and post 502.

of taxes for seven successive years, is a bar to the plaintiffs' action. Woodward *v.* Blanchard, 16 Ill. 424; Laflin *v.* Herrington, ibid. 301. (*a*)

THE PRESIDENT AND TRUSTEES OF THE TOWN OF MOUNT STERLING, Plaintiffs in Error, *v.* JAMES GIVENS, Defendant in Error.

ERROR TO BROWN.

Where, upon a proceeding by town authorities to condemn lands for opening streets, they describe said land in all their proceedings, as being the land of A., they cannot afterwards deny his right to be heard on the question of damages, upon the ground of his want of title.

THIS is an appeal from the verdict of a jury impanneled to assess the damage for the extension of certain streets in the town of Mt. Sterling, over lands *claimed* by the defendant in error. Judge Walker having been of counsel for the defendant in error, the cause was sent to Hancock county, and was there tried at the October term, 1855, before SIBLEY, Judge, and a jury.

The jury found for the plaintiff, James Givens, and assessed the damage he will sustain by reason of running the streets over his land, over land above the additional value said lands will derive from the construction of said streets, at $290.

Of this verdict the authorities of Mt. Sterling complain, and bring the cause to this court.

J. W. SINGLETON, for Plaintiffs in Error.

BROWNING and BUSHNELL, for Defendant in Error.

SCATES, C. J. At the common law, possession was sufficient to sustain an action of ejectment for the recovery of title in fee; Day et al. *v.* Alderson, 9 Wend. R. 223; and a bare parol acknowledgment of a tenant will be received as evidence to recover possession from him; Jackson ex dem. Dale et al. *v.* Denison, 4 Wend. R. 558. And this has been extended to parol declarations against one in possession, and those claiming under him, where no legal title is shown in him, and higher testimony appeared as to the matter of his title. Jackson ex dem. Swartwout et al. *v.* Cole, Cow. R. 587. It was further held in this case that the defendant, having given evidence to show the lands

(*a*) Dickinson vs. Breeden, 30 Ill. R. 325 dna post 501

were forfeited to the State as the lands of a certain person, and with the view of defeating plaintiff's title by showing title out of the lessors of the plaintiff, and in another, derived through such forfeiture of that person's estate, the plaintiff might proceed to deduce title from that person, without further proof of title in him.

And this court has sustained parol proof of ownership of land, under the statute against trespassing by cutting timber, which had been received as evidence of such ownership, without objection of defendant. Clay et al. *v.* Boyer, 5 Gil. R. 506. And yet strict proof of title may be required to show, and is contemplated by this statute, as in ejectment at the common law. Wright *v.* Bennett, 3 Scam. R. 258 ; Mason *v.* Park, id. 532 ; Whiteside et al. *v.* Divers, 4 Scam. R. 336 ; Jarrot *v.* Vaughn, 2 Gil. R. 132.

In County of Sangamon *v.* Brown et al., 13 Ill. R. 212, the court say the claimant holds the affirmative, and must prove title and damage. There is nothing in the case to show the claimant made this proof. That is the chief question here.

The act of 1849 to incorporate towns and cities, (Acts 1849, p. 224,) authorizes incorporated towns to exercise the powers conferred by the act of 1839, (Acts 1839, p. 12. art. 7) to incorporate the city of Springfield, amongst which is one to take private property for opening, widening or altering public streets. lanes, avenues and alleys.

In exercising this power in the extension of North and Washington streets, through the lands of Givens, the plaintiffs, in all their corporate orders, jury process, trial, or inquest of damages, have proceeded to locate these streets, and condemn land for a public easement, upon the land of defendant, James Givens, and not a particular locality.

The order locating the extension of these streets, has no certain, reliable or definite other description than north and west, over the lands of James Givens. If he has no lands, then that order is void for uncertianty, as no man can locate the extension. If James Givens has no land in these directions, or if, as is not shown, there is no land in these directions known by that name or description, how far will you take these streets under such an order? Can the street commissioner in opening, or the jury in assessing damage, determine how far to go and where to stop? Does the order purpose to reach the outer boundaries of the town plat as recorded, or the outer boundaries of the corporation if beyond the plat, or a mile, or ten miles? May not others, owning lands which would be crossed by these lines extended north and west, well resist any attempt to con-

demn their lands under this order, until it be shown that such land as is described as the point or boundary of extension, lies beyond, and therefore, the extension is across them also? I make this criticism upon the order and the whole of the proceedings of the trustees in the condemnation, in answer to the view presented on the argument, that the order was no admission of title in James Givens, but was a mere discription of the land or line of extension, and James Givens must therefore prove title of ownership by deed or possession. This is a general rule true. But it may have its exceptions, as I have shown by decisions, where persons sustain relations that forbid them to call for proofs against their acts or admissions, or by waiver of such proof, and acquiescence in an inferior, secondary character of evidence.

The circumstances and acts of the plaintiffs present such a case here. They have ordered an extension over the land of James Givens, and called a jury and assessed damages to him by that comdemnation, and they have submitted proofs to show no damage, on the trial of an appeal by him, without objection or denial of his ownership, except by a general instruction asked to be given to the jury to find for the trustees. So careful to conceal the true ground, being for want of written evidence of title, it is not mentioned in the instruction. Had it been openly made and avowed, it may be, that on application, the court would have allowed the proofs to have been opened, and this objection removed by technical proof of title. It is too late here to raise that objection as technically included under the instruction asked. But beyond this we are of opinion that there is an intentional admission of ownership in Givens, doubtless known to be his from the private individual knowledge of the trustees, for the whole proceeding carries upon its face the manifest intention of extending these streets over his land, and his land alone, and for which purpose they call a jury and assess damages to him, and condemn his land.

Had the order and proceedings described the land by numbers, or any other designation of name or boundary, then indeed a very different question might arise as to ownership, and the legal proofs of it in James Givens, when he should come to ask damages for that extension over lands claimed by him. It is true the public may acquire no title, unless they properly condemn private property, and it may be, pay the true owner, or deposit it subject to his right. But it is equally true that the public authority may have the question of title investigated, if they please, and proceed against an individual as the owner, and condemn it as his, and his right. When they do so, it is inadmis-

sible to deny his right to be heard on the question of damages, or to withhold them when assessed upon the ground of his want of title. This seems to us to be a clear case of this character.

Judgment affirmed.

A. J. WHITESIDE *et al.*, Plaintiffs in Error, *v.* JOSEPH N. TUNSTALL, Defendant in Error.

AGREED CASE FROM GREENE.

Where persons are regularly summoned as garnishees, and make default, they admit an indebtedness to the defendant equal to the amount recovered against him.

WHITESIDE and Eaton employed Tunstall to set up a steam engine, which if he did not successfully accomplish, he was not to have any other consideration than his board and horse keeping. During the progress of his work, one Parkey, who had a judgment against him, caused an execution to be issued, which was returned, two days afterwards, " No property found." Parkey caused garnishee process to issue against Whiteside and Eaton; they failing to answer to the garnishee process, were adjudged to pay, and did pay, the amount of the judgment against Tunstall. The circuit court decided that Whiteside and Eaton had no recourse against Tunstall for the money paid for him, because the *fi. fa.* against him did not run the seventy days before its return. Tunstall did not succeed in his undertaking to set up the steam engine, and Whiteside and Eaton were not his debtors. The judgment complained of was pronounced at November term, 1855, of the Greene Circuit Court.

D. A. SMITH and J. M. PALMER, for Plaintiffs in Error.

C. D. HODGES, for Defendant in Error.

CATON, J. I am of opinion that the appellants were concluded by the judgment against them in the garnishee proceeding. They were regularly summoned to answer whether they did not owe the defendant twenty-one dollars. They failed to appear and answer at all and were defaulted, and judgment was entered against them for the amount. They thereby admitted an indebtedness to the defendant of at least that amount; and that admission was as conclusive upon them as if they had

appeared and denied the indebtebness ; and upon a trial a jury had found the existence of the indebtedness. Had there been such a trial, and the indebtedness had been proved to the satisfaction of a jury, and a verdict and judgment had been accordingly rendered, would it be compatible with the intention of the statute, after paying that judgment, to allow them again to litigate the matter with the defendant? If they paid his debt at his request, it was not as an advance and accommodation for him, but as a duty and an obligation to him. The law can imply no other request on his part for them to pay his debt. They can only recover against him for money paid to his use and at his request,— where the request either express or implied is, that they shall pay it as advance to him and for his accommodation. The law can imply no such request here, but only that they should pay and satisfy the judgment against him out of money which they owed him. If we cannot imply that request we can certainly imply no other, and then we must hold that the money was paid without his request, in which event he is not liable to reimburse it, for they cannot become his debtors against or without his consent, express or implied.

The judgment must be affirmed.

Judgment affirmed.

JOHN E. WEINER, Appellant, *v.* NICOHLAS HEINTZ and VALENTINE MILLER, Appellees.

APPEAL FROM MADISON.

If a court has jurisdiction of the subject matter, however erroneous a decree or judgment may be, it can only be avoided by a direct proceeding for that purpose. and cannot be attacked for error in another and independent proceeding.
Although equity may grant relief by a strict foreclosure, the practice should not be encouraged.
The right of redemption continues until barred by lapse of time, by strict foreclosure, or by judicial sale. But such right of redemption ceases after a sale under a decree to pay the debt.
A suit at law to coerce payment of a balance remaining due, after applying the proceeds of the sale, does not open the sale and entitle the mortgagor to redeem, except within the time limited by the statute.
If a decree directs the sale of land subject to an incumbrance for notes not then due, the purchaser takes the land subject to the incumbrance, and cannot sue to recover the amount of the notes; they are paid by operation of law. (a)
If the mortgage acquires the fee in the land, the debt is merged in the land; and unless some contrary intention is manifest, the debt is extinct.

THE demurrer in this case was sustained and the bill dismissed at September term, 1855, of the Madison Circuit Court.

(a) Where mortgagee is such purchaser. Edgerton vs. Young, 43 Ill. R. 465.

The facts of the case are stated in the opinion of the court. By consent the cause was brought for hearing to the second grand division.

H. BILLINGS and J. GILLESPIE, for Appellant.

G. KOENRER, for Appellees.

SKINNER, J. This was a suit in equity to redeem mortgaged lands.

The court sustained a demurrer to the bill, and this decision is assigned for error. The bill alleges that Weiner, in 1840, executed a mortgage of the lands unto Nicholas Miller, to secure the payment of two promissory notes made by Weiner to Miller, each for $620—one payable in ten months after date, and the other in five years and ten months after date; that Miller in 1841, assigned the notes and mortgage to Heintz; that Heintz, in 1843, on a bill to foreclose as to the note first due, obtained a decree of the Madison circuit court, for the amount of this note, and for sale of the mortgage lands to satisfy the same, but by which decree it was specially decreed that the sale should be made subject to the lien of the mortgage for the payment of the note not the due, and that the land should stand as security for the payment of this note; that sale of the lands was made in pursuance of the decree, and that Heintz became the purchaser at $1043; that a deed was executed under the sale to Heintz specially reciting, that the lands were conveyed subject to the incumbrance of the morgage for the payment of this note last due, and according to the provisions, therefore, of the decree; that, in 1846, Heintz conveyed the lands to Miller, and that Miller was fully aware of the rights of Weiner; that Miller, in 1852, died, having devised these lands to Valentine Miller, who still holds the same; that the lands, at the time of the decree and sale, were worth greatly more than the amount of the mortgage debt; that Weiner had tendered, to Valentine Miller and to Heintz, the full amount of the mortgage debt and interest, and demanded a re-conveyance of the lands, and that they refused so to do: that Heintz, in 1854, sued Weiner in the Madison circuit court, upon the note last due, mentioned in the mortgage and decree, and the suit is still pending.

The bill charges that the decree of sale is void; that Weiner is entitled to redeem: prays that Weiner be let in to redeem, and that Hentz be enjoined from proceeding at law to collect the note. Nothing is alleged, in the bill, against the jurisdiction of the circuit court of Madison County, of the persons and subject matter in the proceeding in which the decree of sale of

the mortgaged lands was made; and, if the court had jurisdiction, however erroneous the decree may be, it can only be avoided by a direct proceeding for that purpose, and cannot be attacked for error, when brought in question in another and independent proceeding.

This doctrine is too well settled to require the citation of authorities.

The next question is, has Weiner, upon the case made by the bill, a right to redeem? The cases cited in argument, go to the rights of the mortgagor, in case of *strict* foreclosure; and they show great diversity of opinion, and clear absence of uniformity of decision. Some hold that, in case of such foreclosure, the land is taken for the mortgage debt, and that the debt is thereby satisfied; others, that the land is thereby taken in satisfaction of the debt, to the extent only of the actual value of the land and that the mortgagee may proceed to collect the balance of his debt, without affecting the foreclosure; and others, that the land is taken *prima facie* in satisfaction of the debt, and that the mortgagee, if he preceeds to collect a balance of the debt, upon the ground that the land is not of sufficient value to pay the debt, thereby opens the foreclosure, and lets the mortgagor in to redeem. 4 Kent's Com. 181 to 185 and notes; 2 Hilliard on Mort. 138 to 150; Lansing *v.* Goelet, 9 Cowen 346, and cases there cited; Hatch *v.* White, Gallison, 152.

This conflict of decision illustrates the propriety and utility of decrees for sale of the mortgaged property to satisfy the debt; and such practice is not unknown in England, and is common and perhaps general in most of the United States; and it is no longer questioned, whatever may have been the ancient practice of the chancery courts, that the power to decree a sale, instead of a strict foreclosure, is inherent in courts of equity.

It is not denied that equity may still grant relief by strict foreclosure, but the practice should not be encouraged. By a sale of the mortgaged property, that is accomplished which the mortgagor and mortgagee, at the time of the execution of the mortgage, intended; that the property should stand as security for the debt, and, if necessary, be resorted to as a fixed security out of which to obtain payment. At this day the mortagag is but an incident to the debt, an hypothecation of the property as security for the debt, with the right in the mortgagor to redeem by paying the debt, and in the mortgagee to resort to the security to obtain satisfaction of the debt, in case of default of payment.

Such is the common understanding among the people and the right of redemption must continue until barred by lapse of time, by strict foreclosure, or by judicial sale. But such right to redeem has no application where there has been a sale under

decree to pay the debt; nor, in such case, does a suit at law, to coerce payment of a balance of the debt remaining after applying the proceeds of the sale, open the sale and entitle the mortgagor to redeem, thereby defeating the title of the purchaser. Lansing *v.* Goelet, 9 Cowan 359; Dunkley *v.* Van Buren, 3 John. Ch. R. 330; Andrews *v.* Scotton, 2 Bland's Ch. R. 666.

By such sale the land is converted into money, and applied to the mortgage debt, and the purchaser takes the title.

If the proceeds amount to more than the debt, the surplus goes to the mortgagor, and if they are insufficient to pay the debt, the balance unpaid remains, and the mortgagee may recover such balance from the mortgagor. And this is consistent with the nature of the contract, the rights and interests of the parties, and free from hardship, complication and difficulty in practice.

Our statute, in case of sale of mortgaged lands under decree of a court of equity, gives to the mortgagor, his heirs, administrators and grantees, a right to redeem for twelve months after sale and to judgment creditors the same right for three months thereafter. Rev. Stat. 305, Sec. 24.

But, although Weiner is not entitled to redeem, he has a right in equity to relief against the collection of the note not due at the time of the rendition of the decree.

The land was sold to pay the note then due, and subject to the incumbrance of the mortgage, to the extent of the amount of the note, not then due. Such are the provisions of the decree under which the sale was made, and of deed to the purchaser.

The purchaser took the land subject to the incumbrance, became mortgagor to the extent of that note, and the land continued sudject to the payment of the note, whoever should be the holder of the note or the owner of the fee, and equity would enforce payment out of the land. The purchaser is presumed to have bought the land at its value, less the amount of this note and equity will not permit him to hold the land and collect the note from Weiner. Besides, the note is paid by operation of law.(*a*)

Heintz owned the mortgage debt, and got the fee of the land by his deed, under the decree, thereby becoming substantially mortgagor and mortgagee.

The mortgage, and, with it the debt, therefore, merged in the fee, and could no longer exist. Where two titles or interests in land become united in the same person, in the same right, and at the same time as that of mortgagor and mortgagee, the lesser will merge in the greater estate and become extinct; unless there be some interest or intention to the contrary, or the merger would work an injury to some one. Hilliard on Mort. 330; 4 Kent's Com. 99 to 101; Campbell *v.* Carter, 14 Ill. 286.

(*a*) Merritt *vs.* Niles, 25 Ill. R. 383; Smith *vs.* Smith, 32 Id. 198; Mines vs. Moore 41 Id. 273.

Here no motion could exist to keep the debt alive; for in equity the land would be made to pay the debt, and the owner of the debt was, at the same time, the owner of the land.

The decree is reversed and the cause remanded, that the complainant may have relief by injunction and surrender of the note.

Decree reversed and cause remanded.

Decree reversed.

CALEB JONES, Plaintiff in Error, *v.* MARSHAL SMITH *et al.*, Defendants in Error.

ERROR TO SCOTT.

Where a judgment debtor agrees to give notes and mortgages to secure his creditors, representing his title to the property to be mortgaged, as being clear and indisputable, and they receive the mortgages, relying upon his statement, but ascertaining subsequently that they have been deceived, they may refuse to acquiesce in such arrangement, and issue execution on their judgments, and he cannot restrain them.

THIS is a suit in chancery, and the facts, as proven, are as follows:

Complainant, Jones, became indebted to James Gillham, and gave his note, and Marshal Smith signed his note, as security. He also became indebted to Abijah Felton, and gave his note, and said Smith signed with him as security.

Jones and Smith were sued upon these notes, and two judgments were rendered, and executions were issued, and levied upon three tracts of land belonging to Jones.

Jones paid those judgments, while the levy was in force and the executions were in the hands of the sheriff, in the following manner:

Gillham and Felton took Jones' individual notes for the judgments, payable in one year, at legal interest; and to secure the payment of those notes, Gillham and Felton took two mortgages (one to each of them), upon the three tracts of land belonging to Jones, and he paid the cost of both suits; and the sheriff was ordered by Gillham and Felton to return said executions without further proceedings, which was done.

A few weeks after Gillham and Felton sued out alias executions upon those same judgments, and caused them to be levied upon those three tracts of land belonging to Jones, and other lands belonging to Smith.

The sheriff, by the order of Gillham and Felton, advertised

and sold the property, under those second executions, in about twenty days from the time they were issued. And defendant, Smith, attended the sale, a d purchased the three tracts of land belonging to Jones, for the full amount of said judgments and costs, and after the day of redemption expired, procured sheriff's deeds therefor. Gillham and Felton thus received their money, by sale of the property within two months after the judgments were paid, and still retained Jones' note and mortgage given therefor.

Smith, who purchased this land belonging to Jones, is the defendant in these executions, and was fully informed at the time he made the purchases that said judgments and cost had been paid as above stated.

After Smith obtained deeds for this land, he filed this bill in chancery, alleging a mistake in issuing those second executions as to date, and prayed that this mistake be corrected. The bill also alleges that Jones and wife had, before the date of the judgments aforesaid, fraudulently conveyed this land to a daughter; and that the daughter married, and then joined with her husband in a reconveyance of the land to her father. But a mistake had occurred in the acknowledgment, as to the wife which rendered the deed, as to her, void and the bill prays that the title to this land be perfected in Smith, by setting aside the deed from Jones and wife to the daughter.

The bill also charges that before said land was sold by the sheriff to Smith the same land had been sold for tax, to one Rucker, and by him to Armitage. And the bill alleges that said tax sale was void and conveyed to Armitage no title.

Jones defended this suit in chancery, and filed an answer setting forth all these facts, admitting the tax sale to Armitage was void, and was not an incumbrance upon the land. He also filed a cross bill, making Smith, Gillham and Felton parties, and prayed that he might be permitted to redeem the land from the mortgages given to Gillham and Felton, and to pay to them the notes and interest, and that the contract of which said notes and mortgages were the evidence, might be affirmed as against those parties.

The bill also prays that the second executions issued on these judgments, and the sale and sheriff's deeds for said land to Smith, be set aside. That an account of the rents and profits of said land occupied by Smith, be taken, and the amount set off against the amount due upon said notes and mortgages, and that he, Jones, be permitted to pay the balance due, if any, and the land be restored to him.

The circuit court, upon motion of Smith, dismissed the cross-bill without hearing, upon the ground that Jones had no right

to file the same in this case, and proceeded to make a decree as prayed for by Smith in his orignal bill.

Jones took the case to this court, and this decree was reversed and it was directed that the cross bill was properly filed, and that if Jones proved the facts therein alleged, he was entitled to the relief therein prayed. [See Jones v, Smith and others, 14 Illinois 279.]

The circuit court, upon the second hearing, again dismissed said cross bill, and affirmed its former decree.

McConnel, for Plaintiff in Error.

McClure, for Defendants in Error.

Caton, J. The pleadings in this suit, so far as they had then progressed, sufficiently appear in the report of the case when it was before us on a former occasion. Jones v. Smith, 14 Ill. 229. After the suit was remanded, an answer was filed to the cross bill denying that the notes and mortgages were received in satisfaction of the judgments, and this is the point principally controverted in the case. The circuit court found that they were not, and dismissed the cross bill and granted the relief prayed for in the original bill. After a careful examination of this evidence, we are very clearly of opinion that the circuit court has decided the case correctly. That the verbal arrangement between the parties to the judgment was, that the notes and mortgage should be taken in satisfaction of the judgments, may not be disputed, but this was upon the undoubted under standing that the title to the mortgaged premises was clear and undisputed, affording a good security to the judgment debtors, for the amount due them. Such was the substance of the arrangement between the parties. The notes and mortgages were executed in pursuance of this arrangement, and sent to the judgment creditors. Gillham received the one to him, and went and examined the title and found it defective. The fee was in fact in Mrs. Armitage, a daughter of Mr. Jones, and there was a tax title outstanding against the property mortgaged. The agent of Tilton, who had made the arrangement for him with Jones, was not at home when the mortgage was left at his house. Upon his return he took the mortgage to get it recorded, but before that was done he also discovered the defect in the title. Both judgment debtors notified Jones that they would not accept the notes and mortgages in satisfaction of their judgments. They immediately sued out executions on their judgments, which they caused to be levied on the premises in controversy, and the sheriff advertized the same for sale. At the time appointed for

the sale, Jones appeared and asked a postponement, to give him an opportunity of clearing up the title, and said if he did not get up the tax title he would make no further opposition to the sale. The time was given. He either could not or would not remove the incumbrance, and at the time then appointed, the premises were sold without objection by Jones. Indeed, it seems very clear to my mind, from the evidence in this record, that Jones did not act with frankness and sincerity towards Gillham and Felton in that transaction. While he assured them that he had a clear title, he knew that his son-in-law Armitage, had a tax title, and the facts also established by Armitage's own testimony, that he had procured that tax title for the benefit of Jones himself. Indeed, Jones cannot be exonerated from the direct charge of fraud in the transaction. While he sought to get these judgments satisfied by the execution of the mortgages, he was contriving to defeat the title under the mortgages by means of the tax title which his son-in-law held for his benefit. Such a transaction can be sustained in no court of justice, to say nothing of the fraudulent conveyance which he had previously made to his daughter, Mrs. Armitage. With no sort of propriety could we hold, under such circumstances, that the execution of the mortgage operated as a satisfaction of the judgments. They were agreed to be accepted as a satisfaction, only upon the condition that the title was good. The condition failed, and hence there was no satisfaction. The arrangement. was made upon the faith of the representations of Jones, and without examination by the judgment creditors. So soon as they discovered the fraud, or the defect of title, they repudiated the arrangement, as they had a right to do, when they were immediately remitted to their original rights upon the judgments. Notwithstanding the unfairness of his conduct, they certainly acted with indulgence towards Jones, and evinced no disposition to get out of the agreement they had made with him. They postponed the sale at his request, to give him an opportunity to clear up the title, in which event they were still willing to receive the notes and mortgages in satisfaction of the judgments, although they were under no obligations to do so. After all this, he refused or neglected to remove the incumbrance, and thus comply with his agreement. He then stood in no position to claim that the judgments were satisfied, either in law or in sound morality. He cannot be allowed thus to take advantage of his own wrong. The allegations of the cross bill, that the judgments were satisfied by the execution of the notes and mortgages, were in no sense sustained, and it was properly dismissed.

The mistake in the execution, which is sought by the original bill to be corrected, is clearly made out, as also that the deed to

Mrs. Armitage, was not *bona fide*. Indeed, no controversy has been seriously made on these points, but the defence has rested upon the case made by the cross bill, which, as we have seen, is not sustained by the proof. The court properly granted the relief sought for by the original bill.

The decree must be affirmed.

Decree affirmed.

CHARLES MANNING *et al.*, Appellants, *v.* HENRY A. WARREN *et al.*, Appellees.

APPEAL FROM JERSEY.

Where courts of equity have concurrent jurisdiction with courts of law, and the party proceeds in equity, if barred at law he will also be barred in equity.

Although the statute of limitations may not in terms apply to courts of equity, yet by analogy equity will act upon the statute and will refuse relief where the bar is complete at law.

A mortgage became forfeited in 1837; an undivided portion of the mortgaged lands, conveyed prior but recorded subsequent to the mortgage, which were soon after partitioned between the mortgagor and his vendee; the parties who subsequent to the partition acquired from the vendee of the mortgagor and held the land in actual possession over seven years and paid taxes, were held to be protected under the statute of limitations against the application by bill of the mortgagee to foreclose his mortgage. The possession under paper title and payment of taxes for seven years being a bar to equity relief against the lands so held under the mortgagor.

THE facts of this case are stated in the opinion of the court.

LEVI DAVIS, for Appellants.

J. M. PALMER, for Appellees.

SKINNER, J. This was a bill in equity by Manning and Glover against Warren and others for foreclosure of a mortgage and sale of the mortgaged lands. The bill was filed in 1831, and alleges that in May, 1837, Caleb Stone, being the owner of the mortgaged lands, to secure Manning, as indorser, for the sole benefit and accommodation of Stone against loss on account of such indorsements, executed to Manning the mortgage deed; that Manning, in 1837, for the sole benefit of Stone, indorsed a certain bill of exchange drawn by A. L. and C. Johnson in Missouri on A. L. Johnson of New York, in favor of Stone and Glover for $2108, payable four months after the 10th day of March, 1837; that the bill was protested for non-payment, and

that Manning, as such accommodation indorser, at the maturity of the bill paid the same, whereby the mortgage became forfeited; that in 1842 Manning assigned the mortgage to complainants, and that the amount so paid and the interest thereon remain due to complainants.

The mortgage was duly acknowledged and recorded on the 29th of May, 1837. Warren, Bridges and Snell, three of the defendants, answered separately, setting up in defence, among other things, that Stone, on the 2nd day of March, 1837, conveyed to one Kirkland the undivided half of the following of the mortgaged lands: W. half N. W., E. half S. W., W. half S. E. 25, and E. half N. E. 26, T. 8 N., R. 13 West, of third principal meridian; that the conveyance was duly acknowledged and recorded on the 23rd day of July, 1838; that a partition of said lands was made between Stone and Kirkland, by which Kirkland took the E. half N. E. 26 and west half N. W. 25 of the four tracts so jointly owned, and Stone the other two tracts; that these defendants derive title to the lands so partitioned to Kirkland by deeds through Kirkland; that they and those under whom they hold have been in the actual possession of these lands under deeds of conveyance running back to Kirkland, for more than seven successive years, and have paid all taxes assessed thereon for the period of their possession.

The possession of these defendants under deeds connecting them with Kirkland for seven successive years before commencment of this suit, and payment of taxes by them for the same time, are admitted.

The circuit court dismissed the bill as to these defendants, and the only question necessary for determination is, did the possession and payment of taxes bar the complainants' suit as to them?

When courts of equity have concurrent jurisdiction with courts of law and the party proceeds in equity, if barred at law he will also be barred in equity. (*a*)

And although the statute of limitations may not in terms apply to courts of equity, yet by analogy equity will act upon the statute and refuse relief where the bar is complete at law. 1 Story's Eq. Com., Secs. 55, 529; Deloraine *v.* Brown, 3 Brown's Ch. R. 633; Smith *v.* Clay, ibid. 633; Dearman *v.* Wyche, 9 Simons 571; Kane *v.* Bloodgood, 7 John. Ch. R. 90; Stafford *v.* Bryan, 1 Paige's Ch. R. 239; Humbert *v.* Trinity Church, 7 ibid. 195; Watkins *v.* Harwood, 2 Gill. and John. 307; Miller's Heirs *v.* McIntyre, 6 Peters 61; Elmendorf *v.* Taylor, 10 Wheaton 152.

It is therefore unnecessary to determine whether this case is

(*a*) Harris vs. Mills, 28 Ill. R. 44; Pollock vs. Mason.41 Id. 517.

within the express terms of limitation law of 1839, for it is clearly within the equity of its provisions. Real Estate Statutes, 426.

The object of the bill is to subject the lands adversely held by these defendants to sale for the satisfaction of complainant's debt against Stone, and a surrender of possession to the purchaser is a part of the relief legitimately appertaining to such proceeding, and the court would cause the purchaser to be put in possession of the lands.

The remedy is as complete by this suit, to oust, by process of law, these defendants, as ejectment at law, upon the mortgage, could be. By either ejectment or this bill, the remedy, as against these defendants, is complete and effectual to turn them out of their possession.

When, then, did the right of action, to obtain such possession, accrue under the mortgage?

The mortgagee, or his assignees, after forfeiture of the mortgage, could have maintained ejectment to obtain possession of these lands, and the action accrued when the adverse possession commenced. Adams on Ejectment 60; Smartle *v.* Williams, Salkeld 246.(*a*)

The proof shows that actual possession was taken by these defendants, and those under whom they claim, as early as 1840, and has been continued up to the commencement of this suit. Upon the payment of the bill of exchange by Manning, in 1837, the mortgage became forfeited, and from that time ejectment could have been brought upon the mortgage, against any one in possession of the land, until the bar of the statute was complete.

The right of action, then, accrued some eleven years before the commencement of this suit. That these defendants held adversely to the mortgage can admit of no doubt. They entered under a conveyance executed by the mortgagor prior to the execution of the mortgage, though the mortgage was first recorded, and are presumed to have entered and held in pursuance of, and according to the purport of, their paper title, and not in subservience to the subsequent conveyance of their grantor.

We hold that the possession and payment of taxes for seven successive years, by Warren, Snell and Bridges under their paper title, is a bar to equity relief against the lands so held by them.

Decree affirmed.

(*a*) Carroll vs. Ballance, 26 Ill. R. 9.

MAHALA BRADY, Adminstratrix, &c., Appellant, *v.* JOHN B. THOMPSON, impleaded, &c., Appellee.

APPEAL FROM CASS.

In determining the weight of testimony between two witnesses, the preponderance should be given to the one whose advantages for being correctly informed as to the matters in controversy, are the best.

ON the 29th of August, 1853, intestate filed his bill stating that he, Thompson, and Dutch, were partners in a California enterprise, for some five months in 1850; that Thompson and Dutch had adjusted their accounts, but that he had not adjusted his accounts with them; that on a proper and fair adjustment of the partnership account, Thompson was justly indebted to intestate about one-third of $1050, which he refused to adjust, that as between intestate and Dutch, nothing was due either way. Bill waived answer on oath and prayed for interlocutory decree, that parties account—that Dutch be examined as a witness—and intestate offered to submit to decree if he were found indebted to either of the parties, and for general relief.

Thompson filed answer admitting the allegations of the bill as to partnership, and stating that he, intestate and Dutch, in November, 1850, had a full and final settlement of accounts in all matters relating to the partnership business, excepting, &c., as stated in the answer—states that "there was a full payment and delivery over to each of said partners of his share of the partnership, both as it respects capital and profits." The answer objects to the examination of Dutch as a witness.

At November term, 1853, cause was referred to the master to take testimony in relation to settlement between partners, and report whether there has or has not been a dissolution of partnership, and a settlenent of partnership transactions. Replication filed to answer the same term.

Dutch filed his answer 12th May, 1854, disclaiming any interest in the controversy, and denying any indebtment to either of the other parties.

At November term, 1854, Mahala Brady filed bill of revivor, suggesting death of intestate, 19th October, 1854, and that she was appointed his administratrix, and praying that cause be revived in her name, and for relief, as in original bill. At that term the cause was so revived, and the court decreed that Dutch (whose deposition had been taken,) was a competent witness, and that Thompson had not fully accounted to intestate as alleged in his answer, and that he (Thompson) account to the administratrix, and that account be stated by master.

The master disallowed the account exibited, and claimed in behalf of appellant, and she by her solicitor excepted.

This case was heard before WALKER, Judge, at May term, 1855, of the Cass Circuit Court.

D. A. SMITH, for Appellant.

H. E. DUMMER and J. GRIMSHAW, for Appellee.

CATON, J. The question in this case is purely one of fact. There is no dispute that Brady, Thompson and Dutch were in partnership for some time in California, and at the close of their business an accounting was had, when a dispute arose in reference to Thompson having received about one thousand dollars of the partnership funds unaccounted for. As between Thompson and Dutch, the settlement was final, and the controversy now is whether it was final also as between Brady and Thompson, and if not, whether Thompson did receive the thousand dollars of partnership funds for which he did not account. We think both these propositions are clearly sustained by the proof. Dutch, one of the partners, testifies that at the close of the concern, it appeared that Thompson had received about one thousand dollars more than he could account for, whether by vouchers or entries in his own memorandum book, all of which were allowed him. That in consequence of the peculiar relations existing between the witness and Thompson, he agreed to a division of the effects on hand, and waived all claim on Thompson by reason of the thousand dollars unaccounted for, but that it was expressly agreed as between Brady and Thompson, that Brady's claim against Thompson for his portion of the thousand dollars, should remain open, and should be settled after Thompson should return to the States, Thompson all the time insisting that he had expended the money for the benefit of the concern, and that with time he could make it so appear. All other matters relating to the partnership, were finally settled up between the parties at the time. The defendant now does not attempt to account for the thousand dollars, but insists in his defence, that the settlement in Stockton was final between all the parties, as well of the thosuand dollars as of all other matters. In support of this, Marston testifies that he heard Brady state immediately after the settlement between the parties in California, that "If he had not been going home he would not have settled with Thompson in the way in which he did." Connover testifies that he was in and out of the roomo ccasionally during the settlement, but states nothing pertinent to the question. Jackson was also present during a part of the time, "when this subject of the

thousand dollars came up, when Thompson told them that he could not see how he could spend that amount of money except for the concern. Dutch told him he would settle the whole matter, but Brady objected, but finally consented to do it, and take equal part with the balance. This was my understanding of the matter. When Brady refused at first to settle, Mr. Dutch insisted on his doing so." This is the substance of all the evidence bearing on the point. There is nothing in the statement made by Brady to Marston inconsistent with the arrangement as testified to by Dutch. The fact that he was about to start home, may well have induced him to postpone his claim on Thompson for his share of the thousand dollars, till a future time, especially as he could not then coerce it without postponing his return home. Nor, admitting Jackson's means of information to be as as good as those of Dutch, is there any thing in this testimony absolutely contradictory of the statement of Dutch. But if there were, Dutch's position and means of information as to the true character of the settlement, entitle his statements to vastly more weight than those of Jackson. Dutch understood the whole transaction in all its detail, and his account of the matter is rational and consistent, and carries to our minds a conviction of its truth. He certainly must have known what the understanding of the parties was, and if he has stated it untruly, he has done so willfully and corruptly. Not so with Jackson. He could have had but a partial knowledge of the transaction, and from hearing incidental remarks or partial statements of the parties, was very liable to receive a false impression of the actual agreement between the parties. We think the complainant was entitled to a decree for one-third of the thousand dollars.

The decree of the circuit court must be reversed, and the suit remanded, with instructions to the circuit court to enter a decree accordingly.

Decree reversed.

GEORGE P. DOAN, *et al.*, Appellants, *v.* SIDNEY S. DUNCAN, Appellee.

APPEAL FROM MORGAN.

Power to act generally in a particular business, or a particular course of trade, will constitute a general agency; if this is so indicated, no matter what the private instructions of an agent may be.

The extent of the authority of an agent should not be confounded with the nature of the agency; but his action will bind his principal, in either case within the general scope of the authority which the world has been permitted to suppose he possesses.

The authority of an agent may be shown by his acts about the business of his principal, while under direction, or by acquiescence in them when made known to the principal.

The previous course of dealing, by or through an agent, is proper evidence for the jury, as tending to show the existence of an agency and its extent.

THIS was an action of assumpsit brought by appellants against appellee, for goods sold, &c. Plea, general isue, trial by jury, verdict for appellee, and judgment for cost against appellants. WOODSON, Judge, presided, at the trial in Morgan Circuit Court, at October term, 1855.

The following are the instructions, as given in the court below:

The plaintiffs asked the court for the following instruction:

"If the jury believe, from the evidence, that the defendant held Charles Clarkson out to the world, as his clerk and agent in buying and selling goods for the defendant, and was known as such agent by plaintiffs, and that the bill of goods sued for in this case was purchased by Clarkson, as such agent, on account of the defendant, then he is legally liable to pay the plaintiffs for the same, notwithstanding any private instructions of the defendant to Clarkson, or his appropriation of the goods to his own use." Which was modified by the court by inserting the words "and was known as such agent by the plaintiffs," to which modification, at the time, the plaintiffs, by their counsel excepted; and the instruction as modified was given to the jury, to which the plaintiffs, by their counsel, at the time excepted.

At the instance of the defendant, the court gave the jury the three following instructions:

1st. "That, although Clarkson may have been employed by Duncan, in the business house of Duncan in Waverly, and they should be satisfied, from the evidence, that he was Duncan's general agent in the management of that business, yet if they believe, from the evidence, that Clarkson went to the business house of the plaintiffs in St. Louis, and offered to buy, and did buy goods, on the credit and in the name of the defendant, under circumstances which would have put a prudent business man upon his inquiry as to Clarkson's authority, and no direct authority was produced to them from Duncan, and no such inquiry was made by plaintiffs, the defendant is not responsible for the goods so brought, unless it is proven by the plaintiffs that the goods were received and used by the defendent, or the transaction was approved and sanctioned by him; and they must find for the defendant."

2nd. "That they cannot find a verdict against the defendant, unless they believe from the evidence, that the defendant gave power and authority to Charles Clarkson, to take up the goods named in the account herein filed; and to have the same charged

to him, said defendant, and to pledge the name and credit of the said defendant for goods, and that these goods were, in pursuance of that authority brought by said Clarkson for the said defendant, and that the name and credit of said defendant was thus in pursuance of said authority, pledged for the same; or unless they shall further believe, from the evidence, that Duncan held out Clarkson to the world as his general agent to buy goods for him, and as such agent had been in the habit of buying goods for Duncan from plaintiffs."

3rd. "That although they may believe, from the evidence, that Duncan had employed Clarkson as his clerk, at his store in Waverly, and had sometimes employed him as his agent to purchase for him, said Duncan, goods at St. Louis or elsewhere, yet if they also believe from the evidence, that Duncan never had authorized said Clarkson to purchase goods of said plaintiffs, or held out or represented that said Clarkson was his agent to purchase goods for him, Duncan, and the jury also believe from the evidence, that Clarkson brought said goods, in the name of Duncan, without Duncan's authority or knowledge, and that Duncan never did receive any part of said goods, then Duncan is not bound to pay for said goods, and the jury must find for the defandant, Duncan."

The jury returned a verdict for the defendant, and the plaintiff, by their counsel, entered a motion to set aside the same and grant a new trial, because of wrong instructions given by the court to the jury, and because the verdict was against the law and evidence of the case; which motion the court overruled.

D. A. SMITH, for Appellants.

M. McCONNEL, for Appellee.

SCATES, C. J. The only question is whether the law of agency has been correctly stated in the instructions. We think it has not. Agencies are classed into general and special. But the powers and the instructions under which the agent acts may be more or less restricted in the one case or the other. Power to act generally in a particular business, or a particular course of trade, in a business however limited, would constitute a general agency,—if the agent is so held out to the world, however so restricted his private instuctions may be. Story on Agency, Secs. 126, 127, 131, 132, 133.

We should not confound the extent of the agent's authority, whether limited or unlimited, with the nature of the agency, whether general or special. (Sec. 133, notes 1 to p. 154.) Either acting within the general scope of the authority held out

to the world by the principal will bind him. And this may be shown by the usual acts of such agent in his principal's business, or by his, permitting and acquiescing in such acts when known to him as well as by express authority and directions. The policy and reason of the rule, is for the protection of the innocent, who deal upon the faith of such authority as the principal holds out or permits as being authorized and sanctioned by him. If any innocent party is to suffer it shall fall upon him who enables the supposed agent under his authoriy, to impose on others. And it is upon this principle that the principal may frequently be bound to third persons for acts of the agent in violation of his express private instructions although the agent himself would be liable to his principal for the breach.

Too much stress is laid upon the personal knowledge of plaintiffs as to the character and fact of agency, in the modification of plantiffs' instruction and in the first instruction for defendant. They proceed upon the ground that defendant would not be liable for the acts of his general agent, unless the fact of the agency was personally known to plaintiffs, or they had demanded and the agent had produced satisfactory proof of his agency.

This does not accord with my understanding of the law of agency. The principal may, when discovered, be held responsible, although concealed by the agent, and he alone trusted. I presume the instructions were prepared and modified, with a view to deny the sufficiency of the acts in proof; to establish a general agency. But I presume the agency and defendant's liability must depend upon the facts, rather than plaintiffs' knowledge of these facts.

The second and third instructions for defendant are clearly wrong. The second would be understood as requiring an express authority to make this particular purchase, or that plaintiffs must show that the agent had been in the *habit* of buying of them for defendant. Much less proof than this instruction contemplates may fix a liability on one for the acts of another, as his agent. Few agencies could be established under the rule laid down in that instruction.

The employment of persons in acts of this kind, buying and selling, frequently constitutes the proof of the agency itself. The third instruction would destroy the force of such acts as evidence, and withdraw them from the jury. For although the agent was "sometime employed," as such, to buy "at St. Louis or elsewhere," yet if not held out to the world—and this is what is regarded and is evidence of a holding out to the world—or authorized to buy of plaintiffs, the jury are told not to regard the several purchases the agent was sometimes employed ot make. Thus the acts, instances, facts that are legitimate

evidence of a holding the party out to the world as a general agent are withdrawn as such, and no inference can be made from them. Stripped of these, and the remainder of the instruction requires direct authority to make this purchase. The previous course of dealing by or through the alleged agent, in St. Louis or elsewhere, was legitimate evidence tending to show an agency or not, and if one, its extent; and all such facts should have been left to the jury to draw their own inferences.

Judgment reversed and remanded for a new trial

Judgment reversed.

SAMUEL COST *et al.*, Plaintiffs in Error, *v.* WILLIAM ROSE *et al.*, Defendants in Error.

ERROR TO FULTON.

In serving process by copy, the return of the officer must show a strict compliance with the statute, or the court will not obtain jurisdiction of the person.

No default should be taken against infants, in a petition for partition; a guardian *ad litem* should be appointed for them before any steps are taken, wherein they are entitled to be heard.

A default should not be taken upon publication, without a return of summons "not found."

A decree of partition should not be rendered against infants without proof of the case made by the bill; which proof should be perserved in the record.

Where land descends to the wife, it should, on partition, be set off to the husband and wife in right of the wife, or to her alone, not to them jointly and in fee.

THE opinion of the court sets out a sufficient statement of the case.

GOUDY and JUDD, for Plaintiffs in Error.

C. J. DILWORTH, for Defendants in Error.

SKINNER, J. This was a bill in chancery for partition. The bill alleges that Solomon Serin in his lifetime, was seized in fee of the N. E. 1-4 Sec. 3, T. 3 N., R. 1 E., of the fourth principal meridian; that in 1851 he died intestate, and that the land subject to the widow's dower therein, descended to his children and their decendants in seven equal portions, as tenants in com mon; that five of these children and the decendants of such of them as are deceased, have convey ed their interest in the estate, being five-sevenths thereof, unto Samuel Cost; that the land is held and owned in common, as follows: five-sevenths by Samuel Cost; one-seventh by complainants, William Rose, and Eliza

Ann, his wife, in right of the said Eliza, who is a child of said Solomon; and one seventh by Sarah, Betsy, John, Hugh and Phebe Serin, children of John Serin, who was a child of said Solomon, and that the children of said John are infants.

The bill prays for partition according to the respective interests set forth. Samuel Cost, the children of John Serin, and Elizabeth Serin, widow of Solomon Serin, are made parties defendant.

Summons issued and was returned. The return was doubtless intended as a return of service as to Cost and Elizabeth Serin, by leaving copies at their residences, but is wholly insufficient, under the statute, to show service.

It does not show that the copies were left with a "white person," a member "of the family," or that such person was informed "of the contents thereof."

To obtain jurisdiction of the person, where this mode of service is adopted, the statute must be complied with. Rev. Stat. 94, Sec 7.

No return was made as to the other defendants, the heirs of John Serin.

Proof of publication was made as to them, as non-residents, a default was taken as to all of the defendants, and an order of reference to the master to take testimony was made. Afterwards, the answer of the infant defendants by guardian *ad litem* was filed, but the record does not show that the person appearing as such guardian was appointed by the court.

The court rendered a decree for partition, directing that five-sevenths of the land be set off to Cost, one-seventh to the heirs of John Serin, and one-seventh to complainants. The commissioners reported that they had made partition of the N. W. 1-4 Sec 3, T. 3 N., R. 1 East, of the fourth principal meridian, and set off and assigned to William Rose, and Eliza Ann Rose, his wife (the complainants), a certain portion thereof, to the heirs of John Serin (naming them) and Elizabeth Serin (the widow), a certain portion, and to Samuel Cost the balance of the tract of land.

This report was approved, and a final decree of investiture was made. Cost prosecutes this writ of error. The decree is erroneous for want of a sufficient return of service of summons. The defects have already been pointed out.

By the report of the commissioners it appears that they made partition of a different tract of land from that described in the bill, the report is approved, and a decree of investiture is made based upon the report. For these reasons the decree must be reversed. As this cause is to be remanded, it is proper to remark that we have treated the case as a chancery proceeding for partition, although the bill seems to have been framed under

the statute, because the bill is addressed to the judge of the circuit court, "in chancery sitting."

The complainants had their election to proceed in chancery, or under the statute, and that they elected to proceed in chancery seems clear from the face of the bill. Louvalle et al. *v.* Menard et al., 1 Gil. 39. (*a*)

Treating this proceeding as a bill in equity, it is apparent that much irregularity has intervened.

The default should not have been entered against the heirs of John Serin upon publication, even were they adults, without a return of summons "not found" as to them. Jacobus *v.* Smith, 14 Ill. 359. (*b*) They being infants no default should have been taken against them, Clay *v.* Norris, 4 Gil. 70. A guardian *ad litem* to the infant defendants should have been appointed and notified, before any steps were taken wherein they were entitled to be heard.

A portion of the land was set off to the infants, heirs of John Serin, jointly and *in fee* with the widow of Solomon Serin, who was only entitled to dower. The interest of Eliza Ann Rose was set off and assigned to her and husband, jointly and *in fee.*

The assignment should have been to the husband and wife *in right* of the wife, or to her alone.

As no default or *proconfesso* decree could be taken against the infants, a decree of partition should not have been rendered against them without proof of the case made by the bill, and this proof, in some manner, should appear in the record; White *v.* Morrison, 11 Ill. 361; Wood *v.* Owens, 12 Ill. 238.

Decree reversed and cause remanded.

Decree reversed.

AMOS GREEN *et al.*, Appellants, *v.* JOHN W. WARDWELL *et al.*, Appellees.

APPEAL FROM ADAMS.

An official bond of a justice of the peace is obligatory from the time is is left with the clerk for approval, if is not rejected by him, although he omits to approve.
The sureties upon an official bond of a justice of the peace will be held liable so long as he performs the duties of station, without reference to the regularity of his election, commission or eligibility.
The board of supervisors, where township organization is adopted, legally succeeds to the County Commissioners' Court, and may bring suit on the bond of a justice of the peace.
The official bond of a justice of the peace *de facto*, is an obligatory instrument.

(*a*) See act of 1857, p. 51, Hechins vs. Lyon, 35 Ill. R. 150.
(*b*) Goudy vs. Hall, 36 Ill. R. 316.

This cause was submitted to Skinner, Judge, of the Adams Circuit Court, without the intervention of jury, at April term, 1854, of said court. The court found that the bond mentioned in the declaration was the act and deed of the defendants, and that the breaches in the declaration were well assigned, and gave judgment for plaintiffs. Defendants below appealed.

Wheat and Grover, for Appellants.

Williams and Lawrence, for Appellees.

Caton, J. This was an action of debt on an official bond against a justice of the peace and his sureties, assigning as a breach, his failure to pay over the money which the justice had collected in his official capacity. The suit is brought in the names of the supervisors, as the board of supervisors of Adams county, as successors in office of the county commissioners of Adams county, to whom and their successors, as the statute required, the bond was made payable. The questions presented arise upon demurrers to the pleas, of which it is only necessary to notice those relied upon in the argument; which are, first, that Hobbs was not duly elected a justice of the peace; second, that the bond sued on was not duly approved; third, that he was not sworn as a justice of the peace; fourth, that he was not duly commissioned; fifth that the notes and account on which the money sued for was collected, were not left with him as a justice of the peace; sixth, that, at the time the money was received, he was not a justice of the peace in manner and form as alleged in the declaration. To these several pleas a demurrer was sustained, which is now assigned for error.

Upon these pleas two questions arise. First, whether any liability can arise upon the official bond of a justice of the peace before it is actually approved by the county clerk, as required by the statute; and, second, whether the sureties of a justice of the peace *de facto*, are liable upon their bond; or, in other words, whether the official bond of a justice of the peace *de facto*, is an obligatory instrument. We have no hesitation in answering both questions in the affirmative, and that the demurrer was properly sustained. When the bond was executed by the parties and delivered to the clerk for his approval, it became obligatory, unless it was actually disapproved by him. His mere non-action on the subject did not deprive the justice of his power to act, nor did it absolve his sureties from their undertaking that he should act with fidelity. Both he and they had done all they could to comply with the law, so that he might legally discharge his official duties. The mere omission of the clerk to discharge

his duty, in formally approving the bond, should not be held to prejudice the public, or those who resorted to, or were brought before him, to submit to his adjudications. If the clerk was not satisfied with the sureties it was his duty to disapprove of the bond, so that the justice might find other and satisfactory sureties. If this was not done, upon principle, the bond became obligatory to secure the rights of the public and third persons. The clerk, indeed, might be prosecuted for a misdemeanor, for having neglected to perform an official duty, to formally pass upon the sufficiency of the bond. But the bond itself we have no doubt was binding upon the parties from the moment it was delivered to the clerk.

The other question is, if possible, attended with less difficulty. The public is not bound to inquire into all the technical questions which may affect the right of the officer to the office which he holds. Although he may have been elected by illegal votes, or may have been ineligible to the office; although the great seal of State may not have been impressed upon his commission, or although even no commission at all may have been issued to him, or although he may never have taken an official oath, or although he may have been elected to the legislature, which is an office incompatible with that of justice of the peace, still, so long as he continued to discharge the duties of a justice of the peace, and held himself out to the world as such, his official acts were binding, not only upon suitors, but also upon his sureties, and they continued bound upon their obligation. By signing his bond they acknowledged his right to the office, and to discharge its duties, and as such, recommended him to the public.(*a*)They at least, shall not be heard to say, that although they signed his bond, and thereby induced others to put money in his hands, relying on their bond for its safety, still he was not elected, was not commissioned, was not sworn; that he was not, in fact, a justice. If he had ceased to be a justice, the plea should have shown how he had ceased, so that the court, seeing the facts, could determine, as a matter of law, whether or not he was still a justice. While he acted as such, and as such collected this money, he must be regarded as an officer *de facto*, although, as the plea states, he had been elected to another office, which, in point of law, rendered him ineligible to the office of justice of the peace. (*b*)

I may notice separately one of these pleas, which attempts to present a different question; and that is the one in which it is said that the notes and accounts were not left with him as justice of the peace. It is of no moment in what capacity he received the evidence of the debts. The question is, in what capacity

(*a*) Eddy vs. Co. Com. &c.15 Ill. R. 375.

(*b*) Shaw vs. Havekuft, 21 Ill. R. 128; Otto vs. Jackson, 35 Ill. R. 359; Allbee vs. People, 22 Id 534.

did he receive the money? The declaration charges him with receiving the money as a justice of the peace and this is not denied by the plea.

But admitting the legal liability of the defendants upon the bond, they propose to carry the demurrer back to the declaration, and insist that the suit is not properly brought in the name of the board of supervisors as successors to the County Commissioner's Court. We think this objection fully answered by this court in the case of The People *v.* Thurber, 13 Ill. 554. I do not now feel called upon again to examine the legislation and legislative intent relating to the adoption of the township organization, and the changing of the county goverments from one form to the other. The board of supervisors were the legal successors to the County Commissioner's Court, and, as such, succeeded to the legal title to official bond. (*a*) We think the suit was properly brought. There was no error in sustaining the demurrer to the pleas, and the judgment of the circuit court must be affirmed.

SKINNER, J., having tried this cause as judge of the Circuit Court, did not participate in the decision in this court.

Judgment affirmed.

JOHN WEIGTMAN, *et al.*, Plaintiffs in Error, *v.* REUBEN HATCH, Defendant in Error.

ERROR TO TAZEWELL.

A party has right to the same remedies to enforce the collection of a decree in chancery, for a specific sum of money, that he has to enforce a judgment at law; and he may remove fraudulent conveyances out of way of his execution. (*b*)

A bill may be filed to remove fraudulent incumbrances or conveyances, as soon as judgment is obtained, without proceeding to obtain satisfaction out of other property.

THIS was a bill in chancery filed in the Tazewell Circuit Court, 15th March, 1852, by Reuben Hatch against John Preston and John Weightman, to set aside a deed made by Preston to Weightman of certain lands situate in said county, which was alleged by complainant to be fraudulent and void, as against the creditors of Preston.

The bill sets out, that at the October term, A. D. 1851, of the Pike Circuit Court, in a certain cause, on the chancery side of said court wherein the said Hatch was complainant, and the said John Preston and others were defendants, the said Hatch, by decree of said court, recovered of said Preston the sum of

(*a*) L. of 1855, p.159, County of Warren vs. Jeffreys, 18 Ill. R. 329.
(*a*) Farnsworth vs. Strasler, 12 Ill. .R 482.

three thousand and sixty-nine dollars and fifty cents, and which was, by the decree of said court, ordered to be paid by said Preston into the hands of the master in chancery of said court, within thirty days from the date of the decree, together with legal interest and costs to be taxed by the clerk; and, in default thereof, an execution was to issue therefor, as in cases at law; and that the decree should be a lien on the real and personel estate of said Preston—an exemplified copy of which decree was made an exhibit in the cause.

The bill further charges, that said Preston did not pay the sum in said decree ordered to be paid by him to the master in chancery, nor any part thereof, nor at any other time; that, thereupon, complainant caused an execution to be issued against the said Preston, for said sum, which was directed to the sheriff of Pike county, to be executed; and that the same was returned wholly unsatisfied, no property found by said sheriff—an exemplified copy of which was also made an exhibit in the cause.

The bill further charges, that the said Preston was wholly insolvent, and that he had no property of which said debt could be made, except as thereinafter specified; and that, at the time said complainant commenced his suit in the Pike County Circuit, against said Preston and others, said Preston was the owner, in fee simple, of a large quantity of real estate lying mostly in Tazewell county; that said Preston continued to hold said real estate in his own name, until about the 20th Sep., 1851, at which time, the bill charges, he made a colorable and fraudulent conveyance of the same to said Weightman, for the purpose of hindering, delaying and defeating complainant in the collection of the decree, which complainant was about to obtain against the said Preston, as aforesaid. The bill further states, that complainant's suit, in the Pike Circuit Court, was commenced on 8th March, 1848, and that the same was not brought to a hearing on the merit until the March term, 1851. On the 16th of July, 1851, an interlocutory decree was filed in the cause, from which it was clearly to be ascertained that the said Preston would be found debtor to the complainant in a very large amount.

The bill further charges, that the said defendant, foreseeing, from said interlocutory decree, that a final decree would be entered against him, in said cause, for a very large amount, for the purpose and intent of placing his property beyond the reach of an execution which might be awarded for the purpose of satisfying the same, on the 20th Sept., 1851, colorably and fraudulently conveyed, to John Weightman, a large amount of real estate, in the bill particularly described, all lying in Tazewell county, the consideration, expressed in the deed from Preston to Weightman, being only five hundred and twenty dollars. The

bill further charges that said consideration was colorable only, and wholly inadequate compared with the value of the lands; that said lands were worth from three to five thousand dollars at the time of conveyance.

The bill then charges, in the alternative, either that said conveyance was fraudulent, and intended to delay complaninant from obtaining satisfaction of his decree, or that said conveyance was only intended by said Preston, to clothe said Weightman with the legal estate in said lands, to enable said Weightman to sell and dispose of the same with greater facility, as the agent or trustee of said Preston, and as such trustee or agent to account to Preston for the proceeds thereof, the equitable and beneficial interest still remainiug in said Preston. The bill charges either one state of the case or the other to be true, in regard to said conveyance of said land; and in either state of the case, the bill charges that said lands and the proceeds thereof should be applied in satisfaction of said decree.

The bill charges, that since the conveyance of lands above mentioned from Preston to Weightman, said Weightmau had conveyed certain portions of these lands to one Albert Parker, for the consideration of two hundred and twenty-five dollars, to wit: east half north-west quarter, and west half north-west quarter, north-east quarter, Sec. 35, Town. 25 N., R. 2 W.

The bill charges that complainant then caused an execution to issue upon said decree rendered in Pike county circuit court, directed to the sheriff of Tazewell county, Illinois, and which, by the sheriff of said county, has been levied upon the lands before decribed as conveyed by Preston to Weighrman, except the lands conveyed by Weightman to said Parker; that said execution bears date the 8th March, 1852, the levy and certificate thereof filed with the recorder of said county, 13th March, 1852; that the conveyance from Preston to Weigthman stands in the way of said execution, and is a hindrance to the satisfaction of complainant's decree, by reason of the doubt which would be thereby thrown over any preceedings against said lands, under said execution; and prays the assistance of the court in the premises, and that Weightman and Preston may be made defendants to the bill, and then calls upon them to answer specifically the interrogations.

The bill then prays that, upon proof of matters in the bill alleged, the lands conveyed by Preston to Weightman, except those conveyed to Parker, may be subjected to the satisfaction of complainant's debt, interest, costs, &c.

Weightman filed his separate answer, in substance as follows: Denies all knowledge of the cause in Pike county circuit court, referred to in plaintiff's bill, and denies all knowledge of any

decree rendered therein. That he does not know whether the paper filed with the bills, described as a certified copy of said decree, is a copy thereof or not; that he knows nothing of the date of said decree, if any there was, nor if the said Preston had paid the master in chancery of Pike county circuit court the amount of said decree; that he knows nothing of the issuing and execution, or of a levy, or if property was found or not; that he knows nothing touching the solvency or insolvency of said Preston, nor does he know that complainant had an execution against said Preston—knows nothing of the residence of Preston at the time of filing the bill, but that he now resides in Pekin —knows not into whose hands the execution, if any, was placed, or what has become of it, whether it was presented to Preston, or whether sheriff found property belonging to Preston or not, but demands proof of all the above matters. Says that he knows nothing of Preston's circumstances, whether he is totally insolvent, partially insolvent, or very wealthy; that he knows nothing of Preston's property, and whether complainant is remediless or not; that he does not know when complainant commenced his suit in the Pike county circuit court—believes that for many years Preston has been owner of real estate in Tazewell county —denies that Preston continued to hold the same in his own name until Sep., 1851, but is informed and believes that some months before that time, Preston sold all of said lands in the bill described, to John A. Jones, for the consideration of one dollar per acre, and recieved his pay therefor, all of which took place before respondent knew anything of said lands or defendant, Preston, and before he even heard of complainant or his Pike county suit. That, before the purchase by respondant from Preston, the sale from Preston to Jones was rescinded by mutual agreement; that the charge in the bill, in which it is stated that on the 20th Sept., 1851, the said Preston colorably and fraudulently conveyed the premises in the bill described, is false. Whatever reason private or otherwise, induced Preston to make sale thereof to respondent, over and above the consideration at the time paid by respondent, and, agreed to be paid, respondent is ignorant.

As to the charge that the consideration paid for said land, and to be paid, was only colorable and entirely inadequate, and the lands were worth from three to five thousand dollars, respondent can only answer, that he is ignorant as to what would be the value of the lands, if no shadow rested upon the title; that, when respondent purchased the land, he did so at the suggestion of a disinterested person, knowing nothing of the land himself, or the title thereto. Respondent denies all knowledge of any fraud in the conveyance from Preston to him, or any intention

to hinder and delay complainant from getting satisfaction of his decree. Denies all knowledge of any intention on the part of Preston to clothe respondent with the legal title in said land, to enable respondent to sell the same, as agent or trustee, the beneficial interest remaining in Preston. Admits that he has conveyed, to Albert Parker, the east half north-west quarter, and west half north-west quarter, north-east quarter of Sec. 35, in T. 25, Range 2 W., for the nominal sum of $225, and received, in part payment therefor a horse, at much more than its cash value. Knows nothing of an execution, in favor of complainant against Preston, issued from Pike county to the sheriff of Tazewell county, nor of its levy upon the lands, nor of any steps taken in relation thereto. Admits that the conveyance from Preston to respondent stands in the way of complainant's execution and satisfaction of his decree, by reason of the cloud thrown thereby over any proceedings against said lands under said execution. Denies that there was any further or other understanding, between Preston and respondent, than that already stated.

To the foregoing answer complainant filed his general replication.

Preston having failed to answer, the bill was taken for confessed as to him.

The decree in this case was ordered by DAVIS, Judge, at May term, 1853, of the Tazewell circuit court, setting aside the deed from Preston to Weightman, except as to land conveyed by Weightman to Parker.

J. ROBERTS, for Plaintiffs in Error.

W. HAYS, for Defendant in Error.

CATON, J. This is a creditor's bill filed by Hatch, against Weightman and Preston, to set aside an alleged fraudulent conveyance, made by Preston to Weightman. Notwithstanding the very able and learned argument for the plaintiffs in error, after a full consideration of all the objections, we find we must affirm the decree excepting as to one hundred and sixty acres of the land which Weightman had sold to Duval, and twenty acres sold to Bogle, neither of whom were made defendants to the bill, and as against whom no decree should have been made.

The bill alleges that the complainant had obtained a decree in a suit in chancery in the Pike circuit court, against Preston, for $3069.56 and costs, on which he had an award of execution; that an execution had been issued to Pike county and returned *nulla bona*; that an alias execution had been issued to Tazewell

county, and levied upon the land in question; that Preston had previously conveyed the land to Weightman, by a colorable conveyance and without an adequate consideration, and for the purpose of defrauding his creditors, and prays that the conveyance may be set aside, and the lands subjected to the payment of the decree referred to above. As to Preston, the bill was taken for confessed. Weightman answered on oath, denying the fraud, and showing that he had conveyed to other parties, porrions of the land as above stated, in good faith. Those grantees have not been made defendants to this bill. We think the evidence is quite sufficient to overcome the defendants' answer, and to show that the conveyance to him was not made upon a bona fide sale. He distinctly stated to at least two witnesses on different occasions, that he held the lands in trust for Preston, and from his statements it very clearly appears that that conveyance was made because of Preston's embarrassments, and to put the property beyond the reach of his creditors. Upon the hearing the complainant attempted to prove the alias execution as alleged in the bill by parole proof of its contents, after having attempted to explain its absence. This explanation was not sufficient, and were proof of that execution necessary to entitle the complainant to the relief sought, the decree would have to be reversed. But that averment was not necessary in the bill and it was not necessary to prove it on the hearing. A party has a right to the same remedies to enforce the collection of a decree in chancery for a specific sum of money, which he has to enforce a judgment at law. Our statute gives him an execution upon such a decree, the same as upon a judgment at law, and he must have the same right to remove out of his way fraudulent conveyances. For all the purposes of this bill, therefore, that suit must be regarded the same as a judgment at law. Where a party seeks to remove a fraudulent conveyance or incumbrance out of the way of his execution, he may file his bill for that purpose so soon as he has obtained his judgment, and before he has made any effort to satisfy his judgment out of other property of the creditor. I cannot do better than to quote what was said on this subject by this court in the case of Miller et al *v.* Davidson, 3 Gilman 518. "Where a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to a levy and sale under an execution at law then he must exhaust his remedy at law, by obtaining judgment and getting an execution returned *nulla bona*, before he can come into a court of equity for the purpose of reaching the equitable estate of the defendant, and this is necessary to give the court jurisdiction, for otherwise it does not appear but that the party has a complete remedy at law. This is what may be

strictly termed a creditor's bill. There is another sort of creditor's bill very nearly allied to this, yet where the plaintiff is not bound to go quite so far before he comes into this court, and that is where he seeks to remove a fraudulent incumbrance out of the way of his execution. There he may file his bill as soon as he obtains his judgment." Whether our statute, which subjects equitable interests in land to sale on execution, has done away with this distinction, it is unnecessary now to inquire. It is enough for this case that it came strictly within the rule that prevailed before that statute, which allowed the party to file his bill to remove a fraudulent conveyance, without showing that he could not obtain satisfaction out of other property of the defendant. As to him, the conveyance being void, the creditor has the right to place himself in the same position which he would have occupied had it never been made, and first seek satisfaction out of this land. The grantee's title being tainted by fraud, he has no right to say that all other means to satisfy the debt shall be exhausted, before he shall be disturbed in his title. In this case, then, the complainant was not bound to issue any execution, whatever. He was as much entitled to the relief asked, without it as with it. It was an immaterial averment in the bill, and not necessary to be proved at the hearing.

Again, it is objected that the complainant did not show a complete record of the suit in the Pike Circuit Court, This was not necessary; the decree alone was sufficient, *prima facie*, to entitle the complainant to relief, the balance of the case being made out. That would have been sufficient to have maintained an action of debt, upon the decree. The complainant was not bound to show that the decree had never been set aside, reversed or satisfied, That was for the other party to show in his defence, were it true.

We are of opinion that the decree as amended in the circuit court must be affirmed so far as it annuls and sets aside the conveyance of Preston to Weightman, except as to these tracts of land sold to Duval, amounting to one hundred and sixty acres, and the tract of twenty acres sold to Bogle, as to which it must be reversed. Also, that portion of the decree which directs the sheriff to proceed to sell under the execution from the Pike Circuit Court, for the reason that we find the proof of that execution to be insufficient. Each party must pay one-half of the costs of this writ of error.

ANDREW J. BATTERTON, *et al.*, Plaintiffs in Error, *v.* WILLIAM YOAKUM, Defendant in Error.

ERROR TO MENARD.

To recover in ejectment the claimant must have such an estate in the land as entitles him to the present possession; and where there is an outstanding life estate in the land claimed, or where a valid sale of it has been made, to pay the debts of the ancestor; the heirs cannot maintain such action.

A husband by his last will gives to his wife all his estate, except so much of a described piece of land as it might be necessary to sell to pay all his just debts, to own as long as she should remain his widow; this will invest her with a life estate, if she continues unmarried.

Such a will is not to be understood as creating a charge of the debts of the deceased upon the life estate.

THIS was an action of ejectment for several tracts of land, commenced in the county of Menard, by the heirs of David Batterton, deceased, against William Yoakum, and tried at the October term of the Menard County Court, A. D. 1855.

The plaintiffs and defendant waived a jury, and the case was tried by the court.

The plaintiffs proved that they were the heiri of said David Batterton, and that their ancestor entered one piece of land from the United States of America, and another piece of land, both claimed in the declaration, from the State of Illinois, and known as school lands.

For the first tract of land, the plaintiff introduced in evidence the certificate of the register. For the second piece he introduced the following evidence, to wit: The certificate of the Secretry of State, of the State of Illinois, first making affidavit of loss or destruction of original deed from State. The plaintiff further proved the marriage of some of the plaintiffs, and the marriage of their ancestors. The plaintiff further proved, that said defendant was in possession of eighty or ninety acres of said land, claiming title thereto.

The defendant then introduced in evidence the last will and testament of said David Batterton, deceased.

The plaintiffs then read in evidence, an application of the widow, who was executrix of the will, to the Sangamon Circuit Court, for the sale of said land, or so much thereof, &c., together with the exhibits filed therewith, showing the amount of the Indebtedness of said David Batterton. The plaintiffs then proved the sale of the lands claimed in the declaration, and offered in evidence, the report, &c., of the sale by the executor, with the will annexed, showing the sale by report, and how much the land sold for, &c., and that the whole 160 acres were sold in a

lump, at $2.37 1-2 per acre, making $380, and that said defendan became the purchaser, and that he was crier at the auction.

The conrt gave judgment for defendant.

W. HERNDON, for Plaintiffs in Error.

STUART and EDWARDS, for Defendant in Error.

SKINNER, J. This was an action of ejectment, brought by the heirs of David Batterton, to recover the premises in controversy.

The plaintiffs proved title in fee in their ancestor, that they were his legal heirs, and that Yoakum was in possession.

The defendant proved the last will of Batterton, and which contains the following clause: "I give and bequeath unto my beloved wife, Nancy Batterton, all my goods and chattels, together with all my stock, lands, household and kitchen furniture, only so much of the north end of the west half of the south west quarter of section seventeen, township seventeen north, of range six west, as may be necessary to pay all my just debts, with what other property she may think fit to sell, so far as to pay all the estate may be in debt; the said Nancy Batterton, to all and everything over, so long as she, the said Nancy Batterton, remains my *widow* and no longer, then the estate to be equally divided among my heirs.

The plaintiffs then proved an order of the circuit court of the proper county, in a proceeding of Nancy Batterton as administratrix of the estate of David Batterton, against the heirs of said Batterton, to sell the lands in controversy, to pay the debts against said Batterton's estate. The order directs the sale of the lands, or so much thereof as should be necessary to pay said debts. They also proved a sale and conveyance under the decree, and that the defendant who was the crier or auctioneer at the sale, became the purchaser. Trial by the court and judgment for defendant.

From the view we take of the case, it is necessary to examine but one question. The proof shows that Nancy Batterton is still living, aud remains the widow of David Batterton. If there is an outstanding life estate in Nancy Batterton in the lands, the plaintiff cannot recover in ejectment.

To entitle them to recover in this action, they must have such estate in the lands as entitled them to the present possession. If the proceedings under which the sale had conveyance were made to the defendant are valid, the title to the lands is in him. If these proceedings are valid, and ineffectual to vest the fee in the defendant, then the life estate of the widow, if such

estate is created by the *will*, either passed to the defendant by operation of her deed as administratrix, or remains in her.

In either event, then, the plaintiffs cannot now recover possession of the lands, unless the deed of the widow, under the order of court, purporting to convey the fee, operated to forfeit her life estate and desolved the whole estate upon the heirs.

At common law, a conveyance in fee by the tenant for life, forfeited the life estate, and those having the remainder or reversion became at once entitled to the entire estate. But this depended upon *feudal* principals that have no existence here, and hence a conveyance in fee by one having a less estate, not affecting those seized of ulterior interest in the lands is harmless, and will operate simply to convey such interest in the lands as the grantor in fact has. 4 Kent's Com. 83, 84 ; Rogers *v.* Moore, 11 Conn. R. 553, 557.

The whole question then depends upon the effect of the will.

We think the evident intention of the testator was to vest in his widow a life estate in his lands, subject to be defeated during her life by subsequent marriage ; and this estate remains in her, unless it has passed to the defendant, and if it has so passed, the plaintiffs' action is equally defeated.

The expressions used in the will in relation to the payment of debts, cannot be constructed into an intention to create a charge of the debts upon the life estate devised, and are, but a direction as to what portion of his lands he desired to have disposed of to pay debts.

These debts were a lien upon the lands, which, however devised, the law would appropriate to the payment of.

It is unnecessary in this case to decide upon the validity of the proceedings under which the lands were sold, though there would seem to be little difficulty upon this point, where, as in this case, they are *collaterally* brought in question. Nor, is it necessary to decide upon the effect as against the heirs, of the defendant being both auctioneer and purchaser.

The plaintiff having no right of present possession, can have no remedy by ejectment ; but if the purchaser at the sale occupied a *fiduciary* capacity, the sale may perhaps be avoided by them : and equity, perhaps, by reason of their ulterior interest in the lands, and to avoid consequent of delay, will afford relief. Thorp et al. *v.* Mc Cullum, 1 Gil. 516.

The plaintiffs not being entitled to possession of the lands, the judgment of the circuit court is not erroneous.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, *v.* THE COUNTY OF McLEAN and GEORGE PARKE, Sheriff, &c., Appellees.

APPEAL FROM McLEAN.

It is within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum.(*a*)

The provisions, in the charter of the Illinois Central Railroad Company, exempting its property from taxation, upon the payment of a certain proportion of its earnings, are constitutional.

THIS is a suit in chancery, from McLean county, to enjoin the collection of a tax, assessed by the county assessor of McLean county, upon the money and property of the Illinois Central Railroad Company. It comes to this court by appeal from a decree of dismissal, entered *pro forma.* The decree contains a stipulation, that the only question to be made in the Supreme Court is, whether the property and franchises, attempted to be taxed by the defendants, or any part of them is, in law, liable to county taxation. In case of reversal of the decree of the circuit court, the injunction is to be made perpetual.

M. BRAYMAN, J. F. JOY and A. LINCOLN, for Appellant.

S. T. LOGAN, and STUART and EDWARDS, for Appellees.

SCATES, C. J. The question is one of the *power* of the legislature, under the second section of the ninth article of the present constitution, to exempt, or rather to commute, by payment of a gross sum, to be ascertained by a fixed rule of computation, the property of the corporation from the payment of any portion of the taxes authorized to be levied for county purposes. It is contended that the power is restricted to a rule of "*unifomity*," that will compel every owner to pay his due "*proportion*" according to the "*value*" of his "*property.*" This is doubtless the general rule intended to be laid down, and is well and clearly repeated in other words, in the fifth section of the same article; and we must consider all the provisions of the constitution together, in ascertaining the true intent and meaning of the convention in laying down the rule.

The policy adopted in taxation has always been one of great delicacy in its exercise and discriminations, and the power one of vital interest to all governments, of whatever form; and we have not been wanting, in the examination and discussion, in

(*a*) State Bank vs. People, 4 Scam. R. 304; Hunsacker vs. Wright, 30 Ill. R. 147; Neustadt vs. Ill. C. R. 31 Id. 485; The Board &c. vs. Mc'Donough Co. 42 Ill. R. 490.

anxious and earnest search after the true interpretation of our own on this subject. And we feel authorized and required, as we beleive, from that consideration, to sustain the provisions of the twenty-second section of the act incorporating the plaintiffs; and that the payments provided for in the eighteenth section of their charter, have been constitutionally substituted under the second section of the constitution, in lieu of the general rule of uniformity and proportion fixed in its first clause.

A superficial examination of the ninth article of the constitution presents apparently obvious difficulties, in sustaining the composition rule prescribed in the charter, as violative of both unifomity and proportion; and this cause stood over, and a reargument was ordered, that full discussion and deliberate examination might remove these apparent difficulties.

If the rule of uniformity and proportion was to be taken, not only as a general but a universal and inflexible one, upon all taxable property, its true *spirit* would seem to be violated by any practical exercise of the power given in the last clause of the same section, which authorized various callings and occupations, with franchises and privileges, to be taxed, in addition and without respect to the property already taxed under the rule in the first clause, which may be used by parties in carrying on these callings, occupations and franchises.

" Property " is a term of very large and general import, in wills and various transactions, and we are not prepared to doubt that, in the constitution and the revenue laws, it includes all values, nay, even more than could be claimed by creditors, heirs, legatees, or next of kin, as belonging to an estate.

The *general* rule, then, of the constitution intended to *apportion* the burthen upon the actual appraised value of all *property*, and in a manner which would, as far as may, make its operation " uniform in respect to persons and property within the jurisdiction of the body imposing the same." And had the rule stopped here, there could be little room left for construction. But there are exceptions to it, which show that an inflexible, universal rule was not intended. And it becomes a question how far the legislature may depart from it—in what instances—and whether the present is warranted as one falling within the exceptions. The first exception is to the very basis of the rule itself, for the first section of the ninth article authorizes a capitation tax.

The second section lays down the general rule, and the second exception is contained in the last clause of that section. It provides that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such

value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have the power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, toll bridges and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct." The third exception is in the sixth section, which provides that "the specifications of the objects and sbujects of taxation shall not deprive the General Assembly of the power to require other objects or subjects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this constitution." In laying a tax upon peddlers and others enumerated, and in selecting and taxing other "objects and subjects" not specified, what mode and manner of taxation will "be consistent with the principles of taxation fixed in this constitution?" It was contended that the tax contemplated upon "peddlers" and others, is in the nature of a poll or capitation. This is not a satisfactory interpretation. The poll is provided—merely arbitrary assessments and discriminations, to throw personal burthens upon the persons engaged in laudible and useful occupations, could not have been the motive or reason, for the provision. By examining the original report of this article, as made to the Convention (Convention Journal, 79 to 81), and the various propositions of amendment (pages 214, 215, 221, 222, 226), it will be apparent that the design was not merely to tax the u-eful professions, or industrious callings which do not need or use property in their prosecution, but those only which held or used but an uncertain or small amount, and those of an useless character, as showmen, jugglers, &c. It was proposed to include "doctors, lawyers, and clerks of the circuit and county commissioners' court," (p. 215) but rejected, evidently showing that the design was not to tax professions merely as such, nor incomes. The whole design, as we apprehend the constitution, was to enable the legislature to make the burthen proportionate, by applying a different rule to these occupations. For peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, inn and grocery keepers, may, and most usaully do, carry on large salesand exchanges of property, and at no one time have in possession anything like a fair proportionate amount of property to their annual sales and profits, which could be assessed or taxed. So with toll bridges, ferries and corporations exercising some of the franchises and privileges, as bankers. Again, showmen and jugglers, with little property, and itinerating, would bear no fair proportion to the amount gained by their arts, with a little trumpery for deception. Some

corporations invest all the capital used by them in taxable subjects, lands, houses, manhinery, materials and mauufactures from them ; others have a portion, while another class, like merchants and others, is in floating, exchangeble values, in goods, produce, and bills and notes ; and others with little taxable property, and large but profitable credits. Power, then, to make a flexible rule became indispensable to reach and remedy an inequality inseparable from the nature of these circumstances, and irremediable by a uniform and proportionate rule, assessed on actual appraisements of visible property. Therefore, this general power to tax these, which, when exercised generally upon all, or specially upon one corporation, may well commute, estimate, include and compound within the rule of assesement, whatever of real or personal property the individual or corporation may use in the calling, or with the franchise.

Such, we view the rule adopted with the plaintiff, by taking five per cent. of the gross income, in lieu of all taxes for a period of six years, as well as for the grants, privileges and franchises conferred, and after that period expires, to put them upon the footing of an assessment equal to two per cent. addition to the five per cent.

If the power is given to discriminate, as we think clearly is the intention, we have no right to scrutinize its policy, to determine whether a greater approach to, or degree of, equalization has been attaind by the mode adopted, than would have resulted from the general rule applicable to the property of persons.

The power, then, to fix upon some other rule than actual appraisement of property, as applicable to the calling, &c., enumerated, leaves the mode of assessment and valuation to the wisdom of the General Assembly, and the question ceases to be one between the railroad and the county, and becomes one, in the light in which it has been discussed, between the county and the State, in relation to the rights of the former to a share of the revenue so raised, proportioned to the per cent. levied for county purposes. We do not here intend to discuss the power and right of the State, to appropriate to State purposes, all the revenue derived from taxes on peddlers and others enumerated.

It is enough for the purposes of this case; if the legislature had the power exercised in this case, and if the plaintiffs are exempt from taxation under the general mode by appraisement, when they are taxed under a special provision authorized by the latter part of the second section. The only restriction upon the powers contained in the old constitution in this respect, is that forbidding a legislative, and requiring an actual appraisment. In other respects the powers would seem to be enlarged, or rather, those formerly implied, because not forbidden, are now

expressed. Courts will not seek by contruction to deny or destroy the essential powers of the legislature, nor hold their acts void in mere cases of doubt.

There is no subject upon which the courts have sustained legislative power with greater liberality of construction than on this of the revenue. And it is needful that they should have a power commensurate with the means required to furnish vitality to the body politic.

Under the old constitution, with provisions very similar to the first clause of the second section, and without any like the last, or like the sixth section, the court held, that an exemption of the State Bank of Illinois from all taxation in consideration of the payment of half per cent. on their capital stock, was valid and constitutional; State Bank of Illinois *v.* The People, 4 Scam. R. 303; and the court cite and rely on The State *v.* Berry et al., 2 Harrison N. J. R. 80, where it was held that the property generally of a railroad was exempted upon the payment of a certain sum, under a provision " that no further or other tax or impost shall be levied or assessed upon said company." This was again confirmed and followed, on a similar provisons in the Camden and Amboy Railroad Co. *v.* Hellegas et al., 3 Harrison R. 11; the same plaintiffs *v.* the Commissioners of Appeal, 3 Harris. R. 71, the court again decide, that the payment of a gross sum is not a tax for their franchises, but all their property, and there is no distinction between State and county township taxes, for every tax is a State tax, and the State appropriates the proceeds to what purpose she pleases. And again in 1845, in Gardner, Assessor of Jersey City *v.* The State, 1 Zabriskie R. 557, the court adhere to and approve the former decisions.

A like commutation of the tax by provision of the charter was recognized and enforced in O' Donnell, President, Yazoo City *v.* Bailey et al., Assignees Commercial Bank of Manchester, 24 Miss. R. 386. In Debolt *v.* The Ohio Life Insurance and Trust Co., 1 Ohio State R., N. S., 569, the court deny the power of the legislature to surrender the power of taxation to a company as an exemption, but hold that they may tax the property of corporations as they do others, from time to time. They construe the sixtieth section of the general banking law of 1845, which provided for banks paying semi-annually six per cent. on the profits after deducting expenses and losses, and which was declared to be " in lieu of all taxes to which such company or the stockholders thereof, on account of stock owned, would otherwise be subject," not to be a contract, but to be subject to repeal and alteration by the legislature, and other taxes or modes of assessment may be adopted.

Courts will not intend any provisions of the kind to curtail, abridge or suspend the power of regulating the tax laws, and changing the rate or mode unless clearly expressed and so intended. So a bonus paid by a company on obtaining its charter, will not be construed as an agreed tax or in lieu of taxes. If so, it would be void under the bill of rights in the constitution of Maryland. But the corporate property and shares in the Baltimore and Ohio Railroad Company were exempted from taxation by the act of 1826, and that exemption was sustained. Mayor and C. C. of Baltimore *v.* Balt. and Ohio R. R. Co., 6 Gill. R. 288.

Pennsylvania and Massachusetts hold railways exempt from taxation, upon the ground that they are public works, established by public authority, like canals, turnpikes and highways. Inhabitants of Worcester *v.* The Western Railroad Corporation, 4 Metcalf R. 564 ; Railroad Company *v.* Berks County, 6 Barr. R. 70 ; and so of other works. Schuylkill Bridge Co· *v.* Frairley, 13 Serg. and Rawl. R. 422 ; Leheign Coal and Navigation Co. *v.* Northampton county, 8 Watts Serg. R. 334. But I know of no other State which extends this immunity upon this ground.

But an express exemption upon paying a school tax and making a road, was sustained in the cases of Gorden and Cheston *v.* The appeal Tax Court, 3 How. U. S. R. 133.

In Arkansas the constitution requires a rule of equality, and forbids a discrimination between different species of the same kinds, selected for taxation. Stevens et al. *v.* The State, 2 Arkans. R. 291 ; Pike *v.* The State, 5 Arkans. R. 204. Such is the rule settled by this court in The President and Trustees of Jacksonville *v.* McConnell, 12 Ill. R. 138.

But this principle is not violated, by the levy of a local tax upon a particular district, for local public uses. Shaw *v.* Dennis, 5 Gill. R. 405 ; Kirby *v.* Shaw, 19 Penn. State R. 258.

Nor does it prevent a discrimination of the subjects and objects of taxation, (Sawyer *v.* City of Alton, 3 Scam. R. 127 ; Artcile 9, Sec . 6, New Constitution,) but only requires the objects and subjects enumerated in the constitution, and those additional ones authorized to be selected when taxed, to be made to bear their just proportion with all of like kinds within the jurisdiction.

I have presented these decisions to show the constant support given to this vital power of government, not only to levy such taxes as the public exigencies demand, but every disposition the legislature may in their wisdom make, with a view to promote the public good, unless in palpable violation of the constitutional rights of the tax-payer. The case before us is not

an exemption or immunity from the payment of taxes. Nor do I hold to a power to discriminate and exempt the owners of the same kinds of property provided to be taxed, of a change of the rule of valuation and assessment. But the exemption of the donated lands may be regarded as an exemption of the public property until its sale, or the performance of the condition which will release the lien of the State. The other property of the company falls within the power of the State, as I have shown, to be assessed by such rule as the legislature may adopt, and in this instance have adopted; for taxing those corporations or persons, "using and exercising franchises and privileges." It is for the legislature and not this court to determine the "manner" in which this shall be done. And it may include the property owned or used by them, and is not necessarily confined to a tax upon the franchise or privilege itself.

We are therefore clearly of opinion that the act of the legislature in these provisions is constitutional. (*a*)

Judgment of the Circuit Court is reversed

Separate opinion by Skinner, J. By an act of Congress, approved September 20th, 1850, the federal government granted to the State of Illinois certain of the public domain lying within this State, to aid in the construction of a railroad in said act named, and now called "The Illinois Central Railroad." The 5th section of the law making the grant is as follows: "*And be it further enacted*, that if the said railroad shall not be completed within ten years, the said State of Illinois shall be bound to pay to the United States the amount which may be received upon the sale of any part of said land by said State, the title to the purchaser under said State remaining valid; and the title to the residue of said lands shall re-invest in the United States, to have and to hold the same in the same manner as if this act had not been passed." U. S. Laws of 1850, 466.

The legislature of this State, by an act, approved February 11th, 1831, created the "Illinois Central Railroad Company," and authorized said Company to build and operate the railroad contemplated by the law of Congress. By the act of incorporation, the company undertook, "in consideration of the grants, privileges and franchises conferred," to complete the entire enterprize within six years, and to pay annually to the State a certain per centage of the gross earnings of the railroad

The act provides for vesting in the company the title to the lands granted by the United State to this State, for the purpose

(*a*) Sedg. C. L. 631; Gordon vs. The Appeal Tax, Comt. 3 How. U S. R. 133; Jefferson Branch Bank, 1 Black U S. R. 436, Cooley Con. L. 127 & note.

of enabling the company to build the railroad, and for taking, simultaneously therewith, from the company, a deed of trust to certain persons named on the part of the State conveying the same property, and also the railroad to be coustructed, and all property of the company appertaining thereto, in trust, to secure to the State full performance on the part of the company, and to "indemnify the State of Illinois against all and every claim of the United States government, "under the act of Congress making the grant tothe State ; and provides, that " the lands so selected under said act of Congress, and hereby authorised to be conveyed, shall be exempt from all taxation under the laws of this State, until sold and conveyed by said corporation or trustees, and the other stock, property and effects of said company shall be in like manner, exempt from taxation, for the term of six years from the passage of this act." Laws of 1851, 61. No question is made in this case as to the due execution of the conveyances and investitures of title contemplated b y legislature.

The third section of the ninth article of the State constitiontion declares that "property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for schools, religious and charitable purposes, may be exempted from taxation." The right therefore of the legislature to exempt the property of the State from any and all taxation is unqustionable. Although the deed of trust vests the legal title to the property of the Illinois Central Railroad Company, in the trustees in the deed named, the conveyance in trust is for the benefit of, and operates as a mortgage to the State. The State is the party beneficially interested, and occupies substantially the relation of mortgagee, and the company that of mortgagor. A sale of the property for taxes, in pursuance of law, would vest the whole title in the purchaser, and thereby defeat the operation of the deed of trust and destroy the security it was intended to create in favor of the State. Atkins *v.* Hinman, 2 Gil. 449.

I do not doubt that the State, by virtue of the act incorporating the Illinois Central Railroad Company, the conveyance to the company, and the deed of trust from the company, has such an interest in the property of the corporation, as it contemplates by the clause of the constitution before quoted, and that, therefore the legislature may rightfully exempt from taxation the property so conveyed in trust, while the same remains a *subsisting* security to the State.

The act of incorporation evidently contemplates the completion of the railroad within six years from the passage of the act and that until such completion, the property, the right to tax which

is in question, should remain free from taxation. The period for performance on the part of the company has not expired, and nothing appears in the record to show that there has been full performance on the part of the company, and that the State is discharged thereby from liability to the United States arising out of the grant to the State. Until such performance, the State has a *subsisting* interest in the property, and the necessities of self-protection incident to sovereignties, as well as to persons, would seem to suggest the propriety and right, in the State, of protecting the security from destruction by sale of the property for taxes, had the constitution been silent upon the subject.

For these reasons I concur in the judgment of this court reversing the decree of the circuit court. But I cannot concur with the majority of the court in the construction given to the last clause of the second section of the ninth article of the constitution : "but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, toll-bridges and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct." I understand this clause as inserted to avoid all question, and as an express declaration of the power of the legislature to tax *franchises* and *privileges* exercised by regulation, of law by some, to the exclusion of others, and which are not common to all the people of the State, without reference to municipal regulation, and as having no sort of reference or application to the *property* of the corporations or persons *exercising* such franchises and privileges. To my mind, this seems too plain for argument.

Judgment reversed.

NOTE BY THE REPORTER.—At December term, 1856, of the Supreme Court of Ohio, the following points where ruled which, from their similarity to those decided in the foregoing case, it is thought proper to insert here :

Matheny, for himself and others, vs. *Golden, Treasurer of Athens county.*

Brinkerhoff, J., delivered the opinion of a majority of the Court. Where the State, by an act incorporating the Ohio University, vested in that institution two townships of land, for the support of the University and the instruction of youth and, in the same act, authorized the University to lease said lands for ninety-nine years, renewable forever, and provided that lands thus to be leased should forever thereafter be exempt from all State taxes; *Held*—

1. That the acceptance of such leases at a fixed rent or rate of purchase by the lessees, constitutes a binding contract between the State and the lessees.
2. A subsequent act of the legislature, levying a State tax on such lands, is a "law impairing the obligations of contracts," within the purview of the tenth section of the first article of the constitution of the United States, and is, therefore, pro tanto, null and void.
3. Where one of the lessees of such lands sues, as well for himself as for many other lessees of the same lands, holding on like terms with himself, equity will interpose to prevent multiplicity of suits and afford a remedy by injunction.

CALVIN STEIGLEMAN *et al.*, Plaintiffs in Error, *v.* A. McBRIDE, Defendant in Error.

ERROR TO MADISON.

A mechanic's lien, created by the statute, is not upon the specific thing furnished, nor upon the interest alone of the party in the land, for whom fusnished, but, against the land, to be satisfied in any way consistent with the statute and the principles of equity.
Generally, although all the materials, furnished, upon which the lien accrues, are destroyed or removed, the lien still continuies against the land.
In proceeding, under this lien, against a party in possession, though he should not be the owner, the land may be sold, and the purchaser will take the title as against him ; and whatever interest he had in the land will vest in the purchaser
Persons not parties to the proceeding will not be affected by it.
If the work done or the materials furnished, is so furnished or done upon distinct primises, the lien must be against each of tne several premises, according to the value of work and materials and not against both for the aggregate amount.
The lien does not follow the materials furnished, from place to place, but is upon the land ; severed from the land, they become personal property until again united or merged in the land.

The facts of this case will be found in the opinion of the court.

S. T. SAWYER, for Plaintiffs in Error.

H. W. BILLINGS, for Defendant in Error.

SKINNER, J. This was a petition for Mechanics' lien, by Steigleman and another, against McBride and another. The petition shows that petitioners had furnished labor and materials for defendants, in the erection and repair of a certain saw-mill and barrel machine, situated upon certain premises in Alton, in the possession of defendants ; that defendants afterwards removed said mill and machinery to and upon other premises in Alton, in their possession ; and that, after the removal, petitioners in like manner furnished labor and materials in the repair of the same. The circuit court sustained a demurrer to the petition, and this decision is assigned for error.

The defendants below contend that the petition is insufficient because it does not show that they are the owners of the premises, and because the mill was removed from the ground upon which it was originally erected.

Although the first section of the mechanics' lien law gives, in terms, the lien against the land upon which the work is done, and for improving which the materials are furnished, as against the party contracting for the same, yet the seventeenth section provides, " that if the person who procures the work to be done, or materials furnished, has an estate for life only, or any other

estate, less than a fee simple, in the land or lot on which the work is done or materials furnished, or of such land or lot, at the time of making the contract, is mortgaged, or under any other incumbrance, the person who procures the work or materials shall nevertheless be considered the owner, within the meaning of this chapter, to the extent of his right and interest in the premises; and the lien herein provided for shall bind his whole estate and interest herein, in like manner as a mortgage would have done; and the creditor may cause the right of redemption, or whatever other right or estate such owner had in the land at the time of making the contract, to be sold, and the proceeds of sale applied according to the provisions of this chapter." (*a*)

The twentieth section provides for the payment of incumbrances, prior and subsequent, and of the mechanics' lien, and for the application of the proceeds of the sale, according to the rights and liens of the respective parties ; paying the mechanics' lien before subsequent incumbraces, and to the exclusion of prior, except to the extent of the value of the land, excluding the improvements on account of which the lien accrued. When work is done or materials furnished under the provisions of this law, they become a part of the *land*, and, together with the ground upon which the improvements is made, form one entire thing, that is, real estate ; and, however many interests there may be in the land, and by what ever names they may be kown, all together constitute the *land*.

The land may be be sold in this proceeding, the value evolved into money, and the money applied according to the rights of all parties in interest and before the court. The lien created by the law is not against the specific thing furnished, nor necessarily against the interest alone, in the land of the party for whom they are furnished, but againist the land, and should be satisfied out of the same in any manner consistent with the statute, and the principles of equity.

Although the entire materials, buildings and improvements, on account of which the lien accrued, be removed, rendered worthless, or destroyed by accident, the lien still continues against the land. Exception may of necessity perhaps exist to these general rules.

The person for whom the work is done or materials furnished may have a life estate in the land, determinable at a period uncertain, as the life may be long or short ; he may have a right of possession for a period certain, and the improvements and erections may be of a character entitling him to remove them on the surrender to the owner of the fee. In the like case we do not attempt a construction of the statute. A party in posses-

(*a*) Donaldson *vs.* Holmes, 23 Ill. R. 86.

sion of land is presumed to be in rightfully, and with *claim* of the fee, to be the *owner* of the fee. Mason *v.* Park, 3 Scam 532; Davis *v.* Esley, 13 Ill. 192, 198.

In a proceeding against the party in possession, though he be not the owner, the land may be sold and the purchaser will take the title, as against him. Switzer et al. *v.* Skiles, 3 Gil. 529, 533; Ferguson *v.* Miles, ibid. 358, 365.

Under the statute relating to mechanics' liens, as against the party for whom the work is done or materials furnished, and who is in possession, the land may be subjected to sale, and whatever interest he may have therein, be it more or less, will vest in the purchaser. Turney *v.* Saunders et al., 4 Scam. 527; Garrettt *v.* Stephenson et al., 3 Gil. 261, 280. (*a*)

But persons not parties to the proceedings would in no manner be affected thereby. It then follows, that whatever interest these defendants had in the several premises at the time the liens accrued, in this proceeding against them alone, may be subject to satisfaction of the debt for the work done, and materials furnished; and the lien must be against each of the several premises, according to the value of work done and materials furnished upon them respectively, and not against both for the aggregate amount.

The lien, being against the land, does not follow the materials furnished, from place to place. When served from the land, they became persona oroperty, and must be governed by the land rules relating to such property, until again united with, or merged in the land.

Taking the petition as true upon demurrer, the petitioners are entitled to liens against each of the premises described in their petition to the extent of the work done and materials furnished, and to a decree subjecting them separately to sale, for the satisfaction of the liens against them respectively. (*b*)

Decree reversed and cause remanded.

Decree reversed.

JOEL JOHNSON, Appellant, *v.* WILLIAM B. RICHARDSON *et al.*, Appellees.

APPEAL FROM SANGAMON.

In an action in *tort*, founded on a breach of duty, seeking the recovery of damages and not a specific thing, the non-joinder of any of the owners can only be taken advantage of by plea in abatement. If such plea is not interposed, the plaintiffs recover proportionately to their interests or damages, and the other joint owners may afterwards sue and recover their proportion of the whole damages.

(*a*) Donaldson vs. Holmes, 23 Ill. R. 87.
(*b*) James vs. Hambleton, 42 Ill. R. 308.

Guests at an inn. although they know that an iron sale is provided for that purpose, are not bound to deposit their money therein or with the innkeeper.
Innkeepers are bound to protect the property of their guests, and in case of loss or injury to it can only absolve themselves from liability by showing that they were not in fault. The burthen of proof is upon the innkeeper.
If the guest should unnecessarily expose his money to danger, or carry too large a sum with him, a different rule might prevail.

The only questions raised upon this record are fully presented in the opinion of the court, and render any other statement of the case unnecessary.

A. Lincoln, for Appellant.

S. T. Logan, for Appellees.

Skinner, J. This was an action on the case by Richardson and Hopkins against Johnson. One Brush, who was a copartner of the plaintiffs below, having in his possession $434 of the partnership money, in company with one Thompson arrived by railroad late in the night at Springfield and put up at the hotel of the defendant.

Thompson, in the presence of Brush, deposited with the clerk of the hotel a package of $3,000, which he was conveying for other persons, and the same was placed in an iron safe kept in the office of the hotel for such purposes.

After supper Brush and Thompson were put into one room to lodge, Brush having the $434 in his pocket and Thompson having some $300 in his pocket. They found a good lock on the door and locked it, leaving the key in the lock on the inside, and the room was apparently safe against entry by thieves. In the morning the door was found open and Brush's money stolen, but Thompson's was not.

No special notice was given as to the keeping of valuables, nor touching liability for their loss. The cause was tried by jury, a verdict found against the defendants for $286, and judgment was rendered thereon. The defendant asked for two instructions which the court refused to give, and upon these instructions the only questions of law involved in the case arise.

The first is based upon the supposition that the plaintiffs cannot maintain their action because of the non-joinder of Brush, who was joint owner with them of the money stolen. The action is in *tort* founded on a breach of duty devolved by the law upon the defendant by reason of his calling—a duty the law imposes on him towards all his guests from considerations of public policy and without regard to any implied contract of bailment.

The proper plaintiffs, in action in form *ex delicto* for injuries to, loss, or destruction of property, are all the joint owners of such property; but where the remedy adopted seeks the recovery of damages and not the specific thing, the non-joinder of one or more of the joint owners can only be taken advantage of to defeat the action by plea in abatement. If such plea be not interposed the plaintifis may recover according to their proportionate interests in the property injured, or their proportion of the damages sustained by all; and the other joint owners, not joined, may afterwards sue and recover their proportion of the whole damages. Therefore the non-joinder of Brush under the general issue could only be available to lessen the plaintiffs' damages; and the damages actually recovered in this case was *these* plaintiffs' portion only of the whole money stolen. 1 Chitty's Pl. 76; 2 Saunders' Pl. and Ev. 536; Edwards *v.* Hill, 11 Ill. 22; Hart *v.* Fitzgerald, 2 Mass. 509; Wheelwright *v.* Depyster, 1 John. 471; Brotherson *v.* Hodges, 6 John. 108 Bradish *v.* Schenk, 8 John. 151.

The second instruction refused, assumes the law to be, that if the defendant kept an iron safe for the deposit and safe keeping of money of his guests, and Brush knew the fact, but chose himself to keep the money, the defendant as innkeeper is not liable for the loss. (*a*)

The general doctrine deducible from the authorities, ancient and modern, is, that keepers of *publi cinns* are bound well and safely to keep the property of their guests accompanying them at the inn; and in case such property is lost or injured the innkeeper can only absolve himself from liability by showing that the loss or injury occurred without any fault whatever on his part; or, by the fault of the guest, his companions, or servants; or, by superior force; and the burden of proof to exonerate the innkeeper is upon him, for in the first instance the law will attribute the loss or injury to his default. (*b*)

These rules, though seemingly hard on innkeepers, are founded on considerations of public utility, and deemed essential to insure a high degree of security to travelers and strangers, who of necessity must trust to and confide in the honesty and vigilance of the innkeeper and those in his employ. 2 Kent. Com. 592 to 596; Jones on Bailments 95, 96; Story on Bailments 471, 472. Some of the cases hold innkeepers liable in regard to the property of the guest at the inn, to the same extent that common carriers are in reference to goo ls committed to them for transportation, that is, for all loss or injury not the result of *inevitable accident*.

But it is not necessary in this case to extend the doctrine relating to the liability of innkeepers, beyond the limit of uni-

(*a*) See law of 1861, p.133.
(*b*) Kelsey vs. Berry, 42 Ill. R. 469.

versal recognition. Richmond *v.* Smith, 8 Barn. & Cress. 9; Bennett *v.* Miller, 5 Dun. & East. 273; Quinton *v.* Courtney, 1 Haywood 40; Towson *v.* The Havre de Grace Bank, 6 Harris. & Johnson 47; Mason *v.* Thompson, 9 Pick. 280; Shaw *v.* Berry, 31 Maine 478; Berkshire Woolen Company *v.* Proctor, 7 Cush. 417; Piper *v.* Mann, 21 Wend. 282; Nelson *v.* Axon, 1 McCord 509; Metcalf *v.* Hess, 14 Ill. 129.

In this case the money is shown to have been stolen, and it being the duty of the innkeeper to keep honest and faithful servants, and to use every practicable guard against thieves, *prima facie*, the law holds him responsible for the loss, for, from the nature of the case the guest cannot be presumed to have the means of proving who is the guilty party, nor of establishing the fact of delinquency on the part of the innkeeper.

Every traveler must carry with him more or less money, and it would be unreasonable to limit him to a sufficient amount for immediate use. His journey may be long, and its exigencies may require a much larger sum than the amount in this case. Strangers are usually compelled to rely wholly on their money for living and transportation, and without money their condition would be such as none would willing hazard.

To compel them to place their money in the custody of the innkeeper, his clerk, or servant, would create new perils in traveling, and place the guest at the mercy of the publican, honest or dishonest, and he would be likely to know nothing of the character of the person into whose keeping he might chance to fall.

If the traveler is compelled to give his money over for safe keeping on his arrival at a hotel, what proof could he be expected to retain of the fact, or of the amount? and how practically unavailing would be the remedies of the law in case of the dishonesty of those to whom the surrender must be made. Such a rule we think not only inconvenient, but unreasonable and impracticable.

We do not intimate an opinion that innkeepers are responsible in all cases of loss of their guest's property. The guest may unnecessarily expose his money to danger, or unnecessarily carry with him large sums, which no prudent man would do in a country where exchange can be readily obtained.

In this case, the sum was not unreasonably large to carry about the traveler's person, and we cannot hold that he was at fault in not depositing it with the innkeeper.

Judgment affirmed.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

JUNE TERM, 1856, AT OTTAWA.

NICHOLAS P. IGLEHART, Plaintiff in Error, *v.* ABIJAH W. PITCHER, Defendant in Error..

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

The statute of 1853, regulating practice in certain courts in Cook County, does not intend to make the service of a copy of declaration and rule to plead a part of the record; these should be incorporated into a bill of exceptions if objection to them is to be taken. The absence of them from the record will not be taken as evidence that they were not served.

THE judgment in this case was rendered by J. M. WILSON, Judge, at *vacation* term of the Cook County Court of Common Pleas, in January, 1855. The judgment recites that, it appearing to the court that due personal service of summons had been had upon Iglehart, at least ten days previous to the first day of the term, but not appearing, judgment was entered, &c. Errors assigned are, that court had not jurisdiction to render judgment, because it does not *appear by the record* that Iglehart was served with a copy of the declaration ten days prior to the said vacation term, and because said judgment was rendered at a vacation term and no copy of the declaration or rule to plead was served ten days before the term.

ARNOLD, LARNED and LAY, for Plaintiff in Error.

SCAMMON and MCCAGG, and SHUMWAY and WAITE, for Defendant in Error.

Scates, C. J. A default being entered in the court below, for want of a plea, the only question we deem it necessary to notice is, whether it be necessary to show service of a copy of the declaration and rule to plead, to sustain the default.

We are of opinion that the statute of 1853, regulating the practice in these courts, does not require nor intend to make the service of these copies a part of the record any more than the copies of the instruments or account sued on. They must be incoporated into the record by bill of exceptions. Their mere absence from the record cannot, therefore, be taken as evidence that they were not served, and can raise no presumption against the correctness and validity of the judgment.

Every reasonable intendment will be made in support of the judgments of courts of general jurisdiction.

We not only presume in their support due notices and rules, to support the default—for it is the act and order of the court, and not of the plaintiff—but we will also presume that the plaintiff produced, and the court heard, sufficient evidence to sustain the finding and judgment thereon.(*a*)

The assignment of error in this case seems to proceed upon the assumption that a default is erroneous, not only if taken without giving copies, but unless the fact of sereice of them affirmatively appear in the record.

But we do not think this view supported by the provisions of the act. Proof of the rule to plead, and the services of copies need not appear, any more than rules to plead under the old practice, with the copy of the instrument; and I am not aware that this was ever considered necessary to be shown by any practice on the circuit, or decision of this court. It might be otherwise, and placed upon a different and stronger reason, were the plaintiff entitled, as at common law, to enter up his own order for default, at the clerk's office in vacation, without the intervention of the court.

Judgment will be affirmed.

Judgment affirmed.

(*a*) Rich v. Hathaway, 18 Ill. R 549.

GEORGE W. ROSE, Appellant, v. THOMAS A. BUCKLAND, Appellee.
DANIEL W. WHITTEMORE, Appellant, v. THE SAME, Appellee; and
AMOS WHITTEMORE, v. THE SAME.

APPEAL FROM BUREAU.

Congress has power and jurisdiction, over land granted as bounties to soldiers of the war of 1812, for the purposes of protection, disposition and investiture of title, so long as the title remains in the United States.

The limitations and prohibitions of the act of Congress of 1812, as also the act of 1842, in relation to bounty lands, restricting the sale and transfer of such lands, are constitutional, and do not infringe the rights of the States. All assignments or conveyances of such bounty lands, or of warrants therefor, prior to the issuing of the patent, are void.

It appears by the bill for an injunction filed in the case of Rose, that Whittemore. his grantor, purchased of Daniel Clough, the son of David Clough, who had been a soldier in the war of 1812, all the right which he had to any land that might be granted to said David Clough, for services in said war; and that Mary Clough, a daughter of said David, (Daniel and Mary being the only children and sole heirs of David,) gave him a power of attorney, to procure the warrant for the lands from the United States, to which her father was entitled, to locate the same, sell the land and divide the proceeds with her. At the time of these bargains between Daniel and Mary Clough and Whittemore, the circumstances of the death of David Clough, were unknown, and Whittemore was put to expense and trouble in finding them out, and in procuring the facts requisite to obtain the warrant for the land. Daniel Clough gave a quit-claim deed to Whittemore, for his interest in the land to be obtained, for $75. Whittemore subsequently settled with Mary for her interest, and obtained that also. After these bargains, Whittemore obtained the patent for the land, located it and sold to Rose. Rose resided on the land and has paid taxes for more than seven years. After the patent had been issued, the grantees of Buckland, the appellee, obtained a quit-claim deed from Daniel and Mary Clough, for the land located by the patent, for a consideration of $24, with a full knowlege, as the bill alleges, of all the facts of the agreements and bargains between Daniel and Mary Clough and Whittemore. That the property at the time of the quit-claim to Buckland, was worth $3,600. Buckland brought ejectment against Rose, and Rose filed this bill for an injunction, seeking to restrain Buckland in the prosecution of his ejectment. A demurrer was sustained, and the

bill was dismissed for want of equity, by LELAND, Judge, at January term, 1855, of the Bureau Circuit Court. Complainants appealed. The facts and questions in the three cases were similar, in so far as the opinion of the court affects the same.

GLOVER and COOK, for the Appellants.

M. T. PETERS, for the Appellees.

SKINNER, J. The laws of Congress, of December 24th, 1811, and January 11th, 1812, gave one hundred and sixty acres of land to each of the non-commissioned officers and soldiers, who served in the late war of the United States with Great Britian, upon their discharge and faithful performance of their duties while in service, and upon such terms and conditions as Congress should thereafter by law provide.

The law of Congress of May 6th, 1812, provides for the survey of certain of the public domain; for the locating of military bounties therein; for the issuing of warrants for the period of five years, to the parties entitled to such bounty; for the granting of patents to them; and provides; "that no claim for military land bounties shall be assignable or transferable in any manner whatever, until after patent shall have been granted in manner aforesaid. All sales, mortgages, contracts, or agreements of any nature whatever, made prior thereto, for the purpose, or with the intent of alienating, pledging or mortgaging any such claim, are hereby declared and shall be held null and void."

This law also declares that the land shall not be subject to sale on account of the debts and contracts of the party entitled thereto, existing at the date of the patent. The law of Congress of April 16th, 1816, upon the same subject and carrying out the intention of the former law, provides: "That no transfer of land granted by virtue of this or any other law, giving bounties of land to non-commissioned officers, musicians, or privates, enlisted during the late war, shall be valid, unless the contract or agreement therefor, or letter of attorney giving power to sell or convey, shall have been executed after the patents shall have been issued and delivered to the persons entitled thereto."

By the law of Congress of July 27th, 1842, the party, entitled to land bounty for services in the war of 1812 with Great Britian (his heirs or legal representatives), is authorized to enter the amount of land he is entitled to under the previous laws, at the public land offices of the United States.

This law provides: that the certificate of location issued under the provisions of this act, shall not be assigable, but the

patent shall in all cases issue in the name of the person originally entitled to the bounty land, or to his heirs or legal representatives." From the passage of the first laws, granting land bounties up to almost the present time, Congress has enacted laws reviving and continuing expired authority to prove right to and obtain military bounties under those early laws, and carrying out their spirit and intent.

These bills show that the ancestor of the patentees of the land in controversy was entitled to bounty land as a soldier of the war of 1812, and that it was patented to them for such bounty; that the entry was made under the act of Congress of 1842; that the patent issued to them in 1845 and that the complainants claim under the patentees by conveyance executed *before* the issuing of the warrant upon which the entry was made, and of course before the entry and before the issuing of the patent. The main question in these cases is, as to the validity of these conveyances. If Congress has power under the constitution of the United States to impose the limitations and restrictions upon the sale of the *inchoate* interest existing in the patentees by virtue of the laws prior to the granting of the warrant, or prior to the entry or to the granting of the patent and those limitations and restrictions extend to these conveyances, it follows that they are void. Without the laws of Congress of 1812 and 1816 the law of 1842 would be wholly ineffctual. The bounty is given by these first laws, and the manner of dispensing it—of selecting the land—only is changed.

Under the first laws the land was drawn by lot; under the last, the warrantee may select the land by entry and the patent issues by authority of the laws creating the bounty, and the subsequent laws keeping them alive, and giving them more complete efficacy.

The limitations and restrictions imposed by the laws creating the bounty follow it until they are removed by law. There is no retrospective operation of law in these cases, in the light of invalidating contracts between individuals. The limitations and restrictions upon sale of the bounty are contained in the laws creating it, and without which it would not exist; and the prohibition against assigning the certificate of entry contained in the law of 1842, is a part of the law giving the right to make such entry.

The northwest territory embracing this State was ceded by individual States to the United States before the federal constitution went into operation, the proceeds of which were to constitute a common fund for the benefit of the whole. The ordinance of 1787, establishing political goverment over this

territory, contains this clause: The legislature of the district or new States created out of said territory "shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to *bona fide* purchasers." The constitution of the United States, subsequently adopted, provides, "that the Congress shall have power to dispose of, and make needful rules and regulations respecting the territory or other property belonging to the United States." U. S. Constitution, Art. 4, Sec. 3.

This constitution and the acts of Congress passed by authority thereof are, within their sphere, the supreme law of the land

That the federal government is one of limited and enumerated powers, and that Congress can exercise only such authority as is conferred by the federal constitution, is universally conceded. But in respect to those subjects where the power is expressly conferred by the constitution, it is supreme, and may execute the power by such laws as are necessary and proper for that purpose.

The power to dispose of and make needful rules and regulations respecting the territory, or public domain, being expressly delegated by the constitution to the United States, it follows that the laws of Congress, made for the purpose of such disposition and for the complete investiture of the title in the purchaser or donee, are made in pursuance of the powers delegated. 3 Story on Const. Secs. 1319—1322; 1 Kent's Com. 242; Rawle on Const., 237, 240; Sergeant on the Const., Chaps. 31 and 33.

The power and jurisdiction of Congress over the land in question, while it remained the property of the United States, for the purposes of protection, disposition and investiture of title, I cannot doubt. And such has been the practice of the general government, with the acquiescence of the States generally, since the adoption of the federal constitution. 1 Kent's Com. 258 to 260.

Laws granting bounties of land for meritorious public service have been passed by Congress at various times up to 1855, and most of them contain prohibitions against sale of the bounty while the title remained in the United States, or until the right should become tangible, by the issuing of a warrent or location of the land.

Congress has passed pre-emption laws, provided for abjubicating upon rights of individuals arising out of them; and although by the laws of this State these pre-emption rights are treated as property, this court has uniformily recognized these adjudications as valid and conclusive upon the parties. Gray *v.* McLance,

14 Ill. 434 ; Bennett *v.* Farrar et al., 2 Gill. 598 ; McConnel *v.* Wilcox, 1 Scam. 354 ; Delanney *v.* Burnett, 4 Gill. 492 ; Turney *v.* Saunders, 4 Scam. 527 ; French *v.* Carr, 2 Gill. 664.

Congress has enacted penal laws against trespassing upon the government lands, and these laws have been recognized by this court and enforced within the States. Carson *v.* Clark, 1 Scam. 116.

As a simple proprietary of the public lands, the federal government would undoubtdly have the same power to attach conditions and restrictions upon grants to individuals as would ppertain to other proprietors. But in these cases it is not necessary to ascertain the limit of legislation relating to the public lands, prescribed to Congress by the constitution. The conveyances which I hold invalid under the laws of Congress of 1812 and 1816, were executed before the warrant was obtained upon which the entry was made, and the patent afterwards issued. At that time nothing existed but an *inchoate* right of the vendors to *have* a warrant authorizing the entry of 160 acres of land; the land was not selected, and the title to it, both legal and equitable, was in the United States. The laws which gave the bounty, prohibited its sale while in this imperfect, intangible condition, as a "rule and regulation" respecting the public property, and the prohibition operated upon the contract. To hold these prohibitions unconstitutional, at this period, would unsettle titles to lands in this State to an alarming extent, and lessen the public confidence in the security of estates.

I do not wish to be understood as conceding that Congress has power in any manner to affect or control State laws operating upon the contracts or property of its citizens. It does not follow that because Congress may not exempt land from the operation of the State laws when it has become private property, that Congress may not exercise jurisdiction over it for public property of the United States. Nor do I wish to be understood as intimating an opinion as to the effect of the prohibitions of the laws of Congress of 1812 and 1816, upon conveyances of the land executed after entry under the law of 1842, and before the issuing of the patent.

In the case of Dyke et al. *v.* McVey, 16 Ill. 41, similar prohibitions against sale before the issuing of the warrant, under the late law of Congress granting bounties of land, approved September 28th, 1850, came before this court, and although the question of their validity was not raised, the power of Congress to prohibit such sales is clearly conceded.

Until the United States have substantially parted with the land, and thereby divested the federal government of that juris-

diction over it conferred by the constitution, I cannot question the rightful power of Congress to provide for its protection and disposition in such manner as may be necessary and adapted to those purposes.

I concur with the chief justice upon the other questions pre sented by record and discussed in his opinion.

The several decrees of the circuit court are affirmed.

Decrees affirmed.

Scates, C. J., dissenting. The only difference in the questions presented in these three cases is, that the bill in No. 1, Rose *v.* Buckland, sets forth facts sufficient to raise questions upon the statute of limitations, and constructive notice of title by recording. The others do neither, as to the first purchaser from the common vendors, the Cloughs, but all aver possessions and improvements, and constructive notice from these facts.

We have gone into the question of the character of title and possessions necessary to a defence under the statute of limitations and its constructions, in Woodward *v.* Blanchard, at this term, 16 Ills. R. 424, and need not repeat the arguments or authorities here again. This title falls within the reasoning, arguments and conclusion of that case, and is supported by the cases referred to in it. The only difference which we need notice is, that there, the statute was set up as a shield, and here, it is, by the bill, asked to be made a sword, or so in part for compelling a quit-claim under decree for quieting title. We need only remark upon this ground of equity, that, standing alone, in the bill, it should have been dismissed, because it will constitute a good defence, if proven to the action of ejectment, sought to be enjoined. Though we may consider it in connection with other grounds of equity in the bill, and decree upon the whole, if sustained, as they are admitted by the demurrer; yet the statute of limitations alone, would be no ground for retaining the bill for purposes of relief. So, in any point of veiw, we deem it very unimportant to discuss it.

We have, in like manner, reviewed and discussed the question of implied notice by the recording acts, and need only to refer to the case of Bourland *v.* the The County of Peoria et al., 16 Ill. R. 538. The recording in No. 1 was constructive notice, and is sanctioned in Bourland *v.* The County of Peoria, and cases there referred to, and others, and all the usual modes of actual and constructive notice sanctioned by courts of equity may still be shown, to charge the adverse title as not innocent. These bills all aver actual possession, and the making of improvements at the time of the sales and conveyances from David Clough, on

the 3rd July, and Mary Clough, on the 22nd July, 1852, to Paul Morrell. These are sufficient notice to put him upon inquiry. These were continued, and the recording of all the deeds under adverse claim of title added to them, (except that of David Clough to Amos Whittemore, of 25th Nov., 1840, and from him to Wintz,) (see 3 Sugd. Vend. and Purch. 469. and references,) before Bestor filed his deed for record, and before Buckland purchased. We think the facts and circumstances averred sufficient to put him and all prior grantors, under whom he claims, upon inquiry of the tenant or occupant in possession. This view must bring us to the consideration of the two titles, and a determination as to which is best in equity.

The objections to the title are, fraud on the part of Amos Whittemore, for which we see no foundation in the bills, and that Whittemore's contracts and conveyance of the land were void under the acts of Congress. The title emanated in the bounty of the government to the ancestor, Danial Clough, for military services as a soldier of the revolutionary and late war of 1812. See act of Congress, 24 Dec., 1811; 2 Story L. U. S., p. 1205, Sec.; 2 p. 1208, Sec. 12. The act of May 6, 1812, set apart lands to satisfy these bounties, limited applications for warrants to five years, and declared that the bounty land warrants should be issued only in names of the persons entitled, and that such warrants should not be assignable. 2 Story L. U. S., p. 1243. Sec. 1, 2.

By the 4th section, page 1244, it is provided, "that no claim for the military land bounties aforesaid shall be assignable or transferable in any manner whatever, until after a patent shall have been granted in the manner aforesaid. All sales, mortgages, contracts or agreements, of any nature whatever, made prior thereto, for the purpose, or with intent of alienating, pledging or mortgaging any such claim, are hereby declared, and shall be held, null and void; nor shall any tract of land, granted as aforesaid, be liable to be taken in execution or sold on account of any such sale, mortgage, contract or agreement, or on account of any debt contracted prior to the date of the patent, either by the person originally entitled to the land, or by his heirs or legal representatives, or by virtue of any process or suit at law, or judgment of court, against a person entitled to receive his patent as aforesaid."

The act of 1816 renews the bounty in section three, and in section five provides, " that no transfer of land granted in virtue of this or any other law, giving bounties of land," "shall be valid, unless the contract or agreement therefor, or letter of attorney, giving power to sell or convey, shall have been executed, after the patents shall be issued and delivered to the persons entitled

thereto." 3 Story Laws U. S., p. 1563. The time for issuing and locating warrants extended to 1819. 3 Story L. U. S., p. 1661. These powers were extended, and revived and extended, from time to time. See 3 Story L. U. S., p. 1664. Sec. 1; p. 1721, Secs. 1. 2; p. 1969, Sec. 1; 4 Story L. U. S., p. 2410, Sec. 1, Caps. 279, 280; 5 Story L. U. S., p. 2873, Secs. 1, 2. This last act was dated in 1842, and again extended the time for issuing, and allowed a locatian of them upon any land subject to entry, and provided "that the certificate of location obtained under the provisions of this act shall not be assignable, but the patent shall in all cases issue in the name of the person originally entitled to the bounty land, or to his heirs or legal representatives." How far do these provisions affect the complainants' title in equity? The Cloughs had only an equitable claim upon the government for land, and which was, by the receipt and deed, sufficiently described and assigned, for a valuable consideration; and so, with the power of attorney, to operate on such an interest. This was settled, in principle, in Fisher *v.* Fields, 10 John. R. 502, in a strongly analagous case.

The strongest ground assumed in the argument is, that by these several acts, the contract, sale and conveyance being made before the patent issued, were null and void. Such a position demands very grave and serious consideration, before I can sanction it. State governments are supposed to represent and exercise all the general powers of government, not delegated to the United States, nor prohibited to them by the constitutions of the United States, or the particular State. The government of the United States is one of special delegated authority, and is confined to those powers expressly so delegated, and such implied powers as are necessary to the exercise of those delegated, (Article 10 of amendments;) the remainder not prohibited, are reserved expressly to the state or the people. And the enumeration in the constitution is not to be construed as denying or disparaging the remaining powers of government. Article 9. In suits at common law, for values above twenty dollars, the trial by jury, and the rules of the common law are preserved in the courts of the United States. Article 7. The articles, from one to six, inclusive of amendments, contain a bill of declarative rights, restrictive of the powers granted to the United States.

Article four of constitution, sections one and two, declare in like manner general rights; and clauses two and three of section two, prohibit certain action of the States, to defeat the rights therein declared. So section three, clause one declares further rights and restrictions upon the power; and section four is a declaration of rights, and a delegation of power to secure them.

But the great mass of powers delegated to the general government are found in the 8th section of the 1st article; and the general explanatory restriction upon the powers granted is found in the 9th section. But no where in the whole instrument have I found a section or clause authorizing local territorial legislation upon contracts generally, or upon the common domestic and business relations of citizens of the States, or United States, within the States, unless it be over the territory of the District of Columbia, and such places as are purchased with the consent of the State or States, in which they are situated, for forts, magazines, arsenals, dock yards and other needful buildings, as provided in clause seventeen of section eight.

The 18th clause gives the power to make all necessary and proper laws to carry into execution the powers delegated; and amongst them we find (article 4, section 3, clause 2,) power to dispose of, and make all needful rules and regulations respecting the territory and other property belonging to the United States, but not to be construed to the prejudice of the claims of the United States or any particular State; and, also, that the constitution and treaties made under its authority, and laws made in pursuance of it, are the supreme law of the land. We are bound by them and will obey them.

But I claim the right, in adjudicating upon the rights of parties, before me, and in cases within the jurisdiction of the court, to examine whether the law of Congress, under which either party may claim or defend, is in pursuance of, conformable to, and within, the express or implied powers granted. After thus presenting a general outline of the delegated powers, and the restrictions and explanations of them, with those declared to be reserved and secured to the States and people, I come to the examination of the acts of Congress, upon the rights of the parties in the case before us. It is a new phase, and, I am persuaded, a rare instance of the claim and exercise of such power, as being within those expressed or implied. A part of these acts I am unable to distinguish away, but feel compelled to understand the intention of the makers as asserting the power and right to legislate upon that class of contracts, &c., debts, judgments and executions, which respect to bounty land claims, and bounty lands after patent issued; and under the best and soundest view I am able to take of the constitution, its objects and intent, I am constrained to say, that the subject matter of these provisions is not included in, or contemplated, or intended to be within, the express or implied powers. Congress, I conceive, has no power to legislate upon the subject of contracts, rights, property, real or personal, laws of descent or distribution, the domestic relations, or intercourse of the citizens in their

social or business relations; nor to repeal, alter, or change the principles of the common law, in its most comprehensive sense, as including the commercial, ecclesiastical, and civil law, as it respects their relation to these transactions, relations and property, or their appropriate remedies. Commonwealth *v.* Murray, 4 Binn. R. 495, per Breckinridge, J.

Congress has the power to sell or dispose of the public lands, and may pass such laws and make such rules and regulations as are found necessary and are deemed judicious to accomplish this object, and to secure the title to the purchaser or donee. But the contract, sale, or conveyance of the land, when made, is interpreted in its terms, and its obligations ascertained by the rules and principles of the general or common law of the place of the contract, or the *situs* of the property, as would be done on a similar contract between private persons. 3 Story on Const. 200, Sec. 1324; United States *v.* Barker, 12 Wheat. R. 559; Sergeant's Const. Law 290.

Congress may provide, as in these acts, that they will recognize no purchaser or assignee of an equitable claim for bounty land, nor the rights of any save the donee or his heirs, &c., but will issue the patent to him or them alone. But when they undertake to go a step beyond this, and not only refuse to recognize such purchase or assignment as giving any right to demand the land or patent, but also to provide and declare such contract, purchase, assignment, and all agreements for such equity or land void as between the parties to it, although such argreement is lawful, valid, binding, and enforcible by the laws of the State where it is made or the land lies, as between the parties to it, I am constrained to regard it as an unauthorized and unconstitutional invasion of State sovereignty, and such acts are null and void. Under the laws of Illinois this contract for an equitable claim on the United States for a quarter section of bounty land was lawful. When made between parties capable of contracting, for a valuable consideration, and without fraud, it is capable of being enforced by specific conveyance, or damages may be recovered for its breach. I am not advised that it was void by the laws of N. Hampshire, where made, and it may be enforced as made for land, or an equitable interest in the land, within the jurisdiction of this State. A power in a landholder—and it is in such light as a trustee, that I regard the United States in relation to the power to sell and dispose of this land under the constitution—to exempt the land on sale or donation from the general or special authority and jurisdiction of the laws of the State is not recognized, conceded, or compatible with political sovereignty. Nor can it find any sanction or place in the constitution of the United

States. Neither is a power to make a particular disposition of it by entailment, or will, any exception to the general rule It is not an incident to proprietorship, but must depend upon the local institutions and laws. As well might Congress, by virtue of its ownership and power to sell and dispose of it, under the constitution, change, alter, or amend the law of descents, testaments, and intestacies and distributions, and the settlement of estates so far as subjecting lands to the payment of debts is concerned, and the law of judgment and other liens upon and their sale for debts of any description, as to alter, amend or change the laws of Illinois, under which this contract may be enforced, or under which plaintiff might have satisfaction of damages for its breach, or other creditor, prior to patent, have the same for his debt by a sale of this land on mortgage or execution. Nearly the whole domain of Illinois has been originally derived from the same original ownership; some States, and many territories yet to become States, entirely so. If Congress has this power over the contracts, &c., and all rights relating to the land by virtue of that ownership and the power of its disposition under the constitution, I know of no legitimate argument that would limit or prevent their moulding and controlling the institutions and laws of the States for ages, and that by laws regulating the powers and rights of all owners of it, and regulating their duties and liabilities.

When we have acquiesced in the power of Congress to secure the land and the title to the purchaser, we have reached the boundary of political and proprietary jurisdiction and right. The doctrine laid down in Wilcox *v.* Jackson, 13 Pet. R. 498, in relation to the evidence, of title and the power of the State to establish the character and kind of evidence, reached that boundary. But the court distinctly recognize the politcal right and power of the State to legislate as she deems proper in relation to the property of the citizens, and this may well include their contracts. The first acts of the general government, in usurpation of powers acquiesced in nuder a law of necessity, (see Federalist, Nos. 38, 42, 43 ; 3 Story Com. Const. 186-7,) but the power of sale has been confided since by the constitution, that I will snpport; but I should feel derelect in my duty, if I sanction acts that would sweep away the jurisdiction of the State to regulate its landed interest and all the contracts and remedies of its citizens respecting it, and quietly suffer a centralization of this power over both, in the United States. I do not pretend that these acts alone would effect so disastrous a state of things, but if the power exercised in this instance exists, we hold our jurisdiction as a State by the uncertain

tenure of national discretion. Congress passed laws inflicting penalties for trespasses committed upon the public lands, thus exercising acts of political sovereignty within the terriorial limits of this State, and regulating acts and remedies in relation to the property within its jurisdiction. I need not characterize these acts, nor examine their claims to constitutional sanction after the formation of a State government, but I may be allowed to believe that such acts and pretensions by any other land-holder, individual or corporate, would have excited attention and rebuke. But even admitting this as a necessary rule or regulation, for its disposition, without appealing to the laws of the State for its protection equally and alike with all other proprietors, still they may not therefore assume to regulate and control it after they have sold it, nor intermeddle with lawful contracts between citizens of the State concerning it, nor make void all the judgments that are rendered for debts due prior to their patent, and entitled by the laws of the State to satisfaction by a sale of it, after the title is made. I do not suppose that Congress, in these instances, designed to interfere with State jurisdiction. But through a high and tender regard to an improvident class of individuals, objects of their bounty, these provisions were inserted for their protection and security, as well as for protection of the United States, from fraud and imposition. But no motive, however exalted or commendable, will satisfy or palliate the invasion of the State's sovereignty and right to regulate the protection and rights of her citizens, either in their persons or property. As well might Congress declare that lands sold or given, should not descend to an alien heir in this State, because it might endanger the peace, safety and stability of our institutions, while the laws of the State allow such alien to take by descent. See Justice Johnson Arguendo, Ogden *v.* Saunders, 6 Cond. R. 531 ; Lessee of Jackson *v.* Burns, 3 Binn. R. 84.

This contract was made on the 25th Nov., 1840. The last act of Congress, which revived the former acts, and under which this land was obtained, passed in 1842. If the act was allowed to be valid as to the character of its provisions, it might still be held invalid as to this contract, because it impairs the obligation by declaring the whole void, and this retrospectively.

I know, literally, by the terms of the tenth section of the first article, that the prohibition to pass laws impairing the obligation of contracts is confined to the States. See 3 Story Com. Const., Sec. 1339, p. 212. Satterlee *v.* Mathewson, 2 Pet. R. 416, per Johnson, J.

The reasoning of Judge Story in 3 Story Com. on Const. 268, Sec. 1393, is altogether applicable to the United States as well

as to the several States, the principles of our institutions and natural justice should shield parties from a wanton destruction of their contracts and rights where no principles of public policy are contravened by them.

It is with diffidence that I approach a subject so grave, and the first of its character I have met with. But I feel sure that precedent is not wanting, to show that State courts will declare the acts of Congress invalid, when properly presented, and essential to the rights of parties before them. See U. States *v.* Lathrop, 17 John. R. 10; Sergeant Const. Law 279 to 290; though most of the cases I have examined were cases of habeas corpus.

JAMES H. REED, Appellant, *v.* CYRUS P. BRADLEY *et al.*, Appellees.

APPEAL FROM COOK.

Where a corporation is authorized to execute a mortgage, and the exigency of its affairs and its interests demanded that one should be made, of which it should be the proper judge, it will be sustained.(a)

The seal of a corporation is *prima facie* evidence of the assent of the company.

A mortgagee of a telegraph company who has advanced money in good faith, to organize and maintain its business, having taken the management of its affairs upon himself, to secure the repayment of his loan, can maintain replevin for the mortgaged property; although a circular may have been issued in the name of the company, soliciting business, he could only use the franchise in the name of the corporation, and such circular would not conclude his right.

A bill of exceptions, which shows that all the evidence in the case is set forth in it, will be sufficient.

THE action below, was repleven. The declaration contains one count, charging that the defendants took from the plaintiff several articles connected with a telegraph office, and all the polls and wires in the county of Cook, and attached to the office, known as the Southern Michigan Telegraph Company, in the city of Chicago, of which the plaintiff was entitled to the possession.

To this action the defendants filed two pleas. 1st plea, that they did not take the said property. Issue joined thereon. 2nd plea, that Bradley was sheriff, and defendant, Norton, was his deputy, and are lawfully entitled to the possession of the property, because they seized and held the same under a writ of attachment, in favor of Julius G. Lombard against the Southern Michigan Telegraph Co., returnable to the Cook county Circuit Court, at the November term, 1853; and under said writ they,

(a) Ottawa N. P. R. v Murray 15 Ill R. 338.

on the 17th day of October, 1853, seized and held said property, &c., with usual averment of ownership. To this plea there was a replication that plaintiff was entitled to the possession, &c.

The cause was submitted to the court, MORRIS, Judge, presiding, at November term, 1853, who found the issue of the first plea for the plaintiff, and on the second for the defendant, and ordered a *returno* of the property, and divided the cost.

The only error assigned is in these words: "The finding of the court, upon the issue presented by the defendants under the second amended plea, and avowry, and the judgment therein rendered in awarding a return of the property in the declaration mentioned to the defendants, was against evidence in the case, and the law as applicable thereto."

The taking was admitted on the trial, and the only question was, whether, at the time of the taking, the plaintiff was entitled to the possession of the property.

The plaintiff claims to have held the property under two certain mortgages, executed by the Southern Michigan Telegraph Company, on the 5th day of April, and 4th day of August, 1853, to secure certain advances made by him to said company, for the purpose of repairing their line and putting it in a working condition, and also claimed that he had furnished all the materials with which that portion of the line lying within the limits of the county of Cook was constructed, and had advanced all the money, which had been used for that purpose. And that he had, therefore, a clear right to retain the possession thereof until such advances were repaid to him.

The defendants justify the taking by virtue of an attachment writ, issued at the instance of a creditor of the Southern Michigan Telegraph Company, October 15, 1854.

The first mortgage under which the plaintiff claims. recites the condition of the entire line of the company, lying in the States of Michigan, Indiana, and Illinois, its want of repair, &c., and the proposal of the plaintiff to advane to the company the means necessary for repairing their line, such advancement not to exceed the sum of $5,000. The said company, in consideration of such advances, sold and transferred to said plaintiff their entire line or lines of telegraph owned by them, and extending from Detroit, in the State of Michigan, to Adrian in the same State, and from the city of Monroe to the city of Chicago, through portions of the States of Michigan, Indiana and Illinois, together with all the property appertaining thereto. And as a further security for the repayment of such advances, the plaintiff was authorized to take immediate possession of the property so transferred, and to have the entire management and control of the same, and to apply the profits over and above the

expenses of operating the line, to the satisfaction of the mortgage debt.

The mortgage also contained the usual power to sell in case of default.

The second mortgage recites the former mortgage, that the sum of $5,000 had been duly advanced to the company, and that the same had been found insufficient, and provides for the further advancement of $2,000, for the purpose of putting the line in a working condition. The sum advanced under the second mortgage, is to be repaid in one, two and three years from the date of the mortgage, with annual interest at the rate of ten per cent. per annum. This mortgage also provides for a sale of the mortgaged property in case of default in either of the payments.

Possession was to accompany the first mortgage, and was expressly made a condition upon which the advancemeut was to be made, and the sum advanced was to be repaid in four equal annual payments, from the 1st day of May, A. D. 1853.

The corporate seal of the company was duly attached to each of the mortgages, and the signatures of the proper officers were duly proved.

Neither the act of the legislature of Michigan, incorporating the company, nor the act referred to in the act of incorporation, provides any particular mode in which the deeds of the company shall be executed or acknowledged; and besides, the evidence clearly shows that the authority was duly given for the execution of the mortgages.

The witness, George Allen, after proving the execution of the mortgages, states that he was employed by Mr. Reed, about the 1st of March, 1853, to come to Michigan for the purpose of taking charge of the property of the company, as the agent of Mr. Reed, and to rebuild and repair the line, in case the terms proposed by Mr. Reed were acceded to by the company; that he took possession of all the property mentioned in the mortgages, as the agent of Mr. Reed under the first mortgages in the course of two or three weeks after its execution, and as soon as he could leave; that Mr. Reed had accepted of the mortgages; and that he took possession as the agent of Mr. Reed. He states the condition of the line at the time he took possession; that some portion of it had been sold under executions against the company; that the line originally extended from Monroe and Detroit by the way of Adrian to Chicago; and that that portion of the line lying within the limits of the county of Cook, had been sold under executions against the company and taken away; that Mr. Reed advanced to him under the first mortgage $5,000, including wire sent to him by Mr. Reed from New

York, and with this money and wire, he reconstructed and repaired the line to a point somewhere between South Bend and Laporte, in the State of Indiana, when the second mortgage was executed; that Mr. Reed advanced $2,000, under the second mortgage, including wire which he purchased in New York and sent to him; and that with this money, and wire so sent, he reconstructed the line from Laporte, Indiana, to or near Chicago; that Mr. Reed made other advances to him for the company, which were secured by a subsequent mortgage executed by the company in April, 1854, with which the whole line was entirely completed; that it was finished by the 17th of November, 1853; that all the materials which that portion of the line lying within the limits of the county of Cook, was reconstructed, including the property taken by the defendants, were either sent by Mr. Reed or purchased wirh money sent by him; that at the time of the taking of this property by the defendants he was in possession of it and of all the property of the company, as the agent of Mr. Reed, and had been in such possession, as the agent of Mr. Reed, from the time he first took possession, some two or three weeks after the execution of the first mortgage; that the possession of the property had never been given to the company, but was retained by him as the agent of Mr. Reed, and that from the time when he first took possession, until the 14th of November, 1854, he worked and operated the line as the agent of Mr. Reed, and charged him with receipts; and that the company never interfered with his management and control of the property, as the agent of Mr. Reed; and being questioned by the court he says: I kept, with Mr. Reed, a regular account of the advances made by him, and of the amount received in operating the line. In my transaction as the agent of Mr. Reed, in operating the line, I signed receipts, and executed all papers in his name, and as his agent, and it was known by those acquainted with the affairs of the line, that I was in possession as his agent.

In June, 1854, there had been paid to Mr. Reed on the first mortgage, from the earnings of the line, $1,818.73, which is thereon indorsed, and on the third mortgage $1,174, which is also indorsed thereon. Allen states, that he was during this time, also, the secretary of the company; but states as a reason why he was appointed secretary of the company, that it was supposed he should be better acquainted with its affairs, while acting as agent of Mr. Reed.

The only evidence offered by the defendants was the circular issued in the name of the Southern Michigan Telegraph Company, dated September 26th, 1853, addressed to the merchants and public generally of Chicago. Which announced the com-

pletion of the line, described the material of which it was constructed, and recommending it to the patronage of the public, soliciting business.

Hoyne and Miller, for Appellant.

Miller and Fowler, and Shumway and Waite, for Appellees.

Scates, C. J. The charter of the Southern Michigan Telegraph Company, fully authorizes them, as we think, to make the several mortgages relied on by the plaintiff, as showing property and a right of possession in him. If the exigency of their affairs, and the interests of the company demanded that these incumbrances should be made, and of this they must be allowed to judge, and not a stranger, we should not feel warranted in setting aside a fair contract, with which both parties were content, although it be at the instance of a creditor, unless such creditor can show that his rights are prejudiced by it. These are under the signature of the president and the seal of the company regularly made, and the subject matter of them, calculated to promote the objects contemplated by, and within their charter, and the interests of the company. The seal is *prima facie* evidence of the assent of the company. Lovett *v.* Steam Saw Mill Association et al., 6 Paige R. 54; Johnson *v.* Bush, 3 Barb. Ch. R. 207; Angell and Ames on Corp., 192, Sec. 6, 194, Sec. 7.

We have heard no solid or valid objection urged against the fairness or legality of these mortgages. The plaintiff has insisted upon his right to retain the possession of the telegraph line, with all its fixtures and attachments, under a right of lien in the nature of the lien of mechanics, for labor in making or repairing articles of personal property, and upon the materials they may provide and use for these purposes. (See for this principal of law Moore *v.* Hitchcock, 4 Wend. R. 292; Gregory *v.* Styker, 2 Denio R. 628.) But I am not prepared to admit the analogy, or the application of the principle to this case. The plaintiff does not present himself in this record as a mechanic, but rather as a capitalist. Rather as investing his money in an enterprise of others, taking a mortgage of the property and the management of the expenditure, and the operation of the enterprise for a security. Neither does he stand before us in the character of a vendor, insisting upon retaining possession of the article sold, until paid the price. He is in the attitude of bailee or mortgagee, and upon that he must stand, and defend his rights. In this character he has very clearly shown title in himself sufficient to entitle him to recover the articles

replevied, unless defendants can show that the rights of Lombard, the attaching creditor of the Telegraph Company, is injured thereby, or has paramount right to satisfaction out of this property, as the property of the company.

There is nothing shown in the transaction itself, as between the plaintiff and the telegraph company, to set the mortgages and arrangements aside. On the contrary it not only appears to have been fair, and *bona fide*, but eminently for the benefit of the company, as well as their creditors. When Reed took it, the enterprise seems to have proven a failure, either for want of sufficient means to develope it, mismanagement, or its intrinsic worthlessness. Having furnished the means to repair, rebuild, and put it in operation, under his management it had already on the day of trial, within about a year, repaid him from profits about $3,793.73, which had been indorsed upon the mortgages.

The only grounds presented, to impeach this transaction, and subject the property to the payment of the company's debts, without regard to Reed's rights, are, that it has been held out to the public as the property, and in the name of the company, in a circular inviting patronage, and that Lombard is a creditor of the company.

Taking all this for truth, and still the rights of Reed are not impaired or affected. The simple existence of a debt, does not put it out of a debtor's power to sell or incumber his property in an ordinary, fair, business way. It must be fraudulent, or done to hinder and delay creditors. This does not appear. Besides the equity of redemption in the debtor, mortgagors may be liable to Lombard's claim. Taking this, might be just and right, while it would be iniquitous to take with it, not only all that they pledged to Reed for security, but some five thousand dollars' worth of Reed's money spent in improvments upon it. Defendants should have shown that Lombard was a creditor by proving a debt from the company to him, in order to put him and themselves in a position to question this transactson as between the parties.

How and when was that debt contracted? Was credit given the company on account of the circular? No such facts are shown. See Damon *v.* Bryant, 2 Pick. R. 413; Pierce *v.* Gibson, 2 Carter Ia. R. 408.

The use of the name of the company was proper and necessary in the management of the telegraph line.(*a*) The company, and not Reed, owned the franchise to build and operate the line. This franchise had not been forfeited, lost or waived by the mortgage arrangement; nor had Reed any right to exercise this franchise in his owe name, but only in the name, and as

(*a*) Palmer vs. Forbes, 23 Ill. R. 318, 319; Bouffett vs. G. W. R. Co. 25 Id. 356 Wilkinson vs. Flemming, 30 Id. 362

assignee, of the company. He was assignee only of the property with liberty to operate and manage—which could only be in the name of the corporation. This he had a right to use for the purposes provided in the mortgages. We use these arguments as illustrations of this case only ; for Reed, in this case did not claim, or profess to operate this line in his own name, but under the company as mortgagee in possession. We, therefore, pass no judgment on his right to exercise the corporate franchises in his own name as mortgagee or purchaser. The explanation seems full, fair and consistent, why the circular invited public patronage in the name of the company. But, at the same time the property was, and had been actually in Reed's possession under the mortgage, which was notice to all concerned to put them upon inquiry. It is true that George Allen was, a portion of the time, both secretary of the company and agent for Reed. No one might know his character either as secretary or agent, without inquiry—and by it, they could easily learn that he claimed and possessed the property, as agent of Reed. He held the secretaryship for the convenience of keeping the mutual accounts. His possession should have put Lombard upon inquiry into the ownership, before he trusted the company, on the faith of the property. Such inquiry would have led him to a true knowledge of all the facts.

In every light in which we have been able to view these facts injustice seems to have been done Reed by the finding and judgment.

After hearing a second argument of this cause and careful consideration of the bill of exceptions, we deem the same sufficient to show that all the evidence in the case is set forth in it. This is all that is required by Stickney *v.* Cossell, 1 Gil. R. 420. And it is not obnoxious to the objection in Buckmaster *v.* Coal, 12 Ill. R. 74, of being a mere outline. This bill recites at large the evidence of both parties, and concludes that "upon the evidence aforesaid" the cause was submitted, and the court found the issues. This phraseology necessarily excludes that any further, other, or more was before it.

Judgment reversed and cause remanded.

Judgment reversed.

EDWARD MCALLISTER, Appellant, *v.* WILLIAM SMITH, *et al.*, Appellees.

APPEAL FROM WILL.

Any rate of interest which is authorized by the law of the place where a contract is made, or of the place where it is to be performed or paid, will be recognized and enforced in the courts of other governments, whose laws would otherwise make such rates of interest usurious.

When a note is made payable in a particular locality, it will be presumed that the parties intended to adopt the laws of that locality in reference to the rate of interest.

A plea which avers that a bill of exchange was drawn to a bank in Illinois, made payable in New York, with express reference to the laws of New York, but bearing twelve per cent. interest, besides the price of exchange between the two places, and was therefore void by the statutes of New York setting them out is not an immaterial plea, as such a plea, if true, presents a good defence to a suit on the bill.

While the court will not administer the penal exactions of a foreign law by enforcing forfeitures, it will, when a contract is void by the law of the place where it is made, hold it to be void here; although the same contract, had it been made here, would be held valid.

A notarial certificate of protest is not of itself evidence of that fact.

The law of evidence of this State will be enforced when a plea of usury is set up as a defence, so far as to permit the party pleading it to give testimony in its support.

(A party to negotiate paper may impeach it for usury as to witness.)

THE plaintiffs below brought this action, which is assumpsit, against the defendant as the acceptor of five several bills of exchange. The declaration contains five special counts, and the common counts with copies of the bills set out.

The first count is upon a bill of exchange drawn by McAllister & Co., bearing date the 2nd day of September, A. D. 1854, upon the defendant below, for the sum of two thousand dollars, payable to the order of the drawers, at the Merchants' and Drovers' Bank of Illinois, ten days after date, accepted by the defendant and indorsed by the drawers to the plaintiffs.

The second count is upon a bill of exchange, drawn by McAllister & Co., bearing date the 5th day of September, 1854, upon the defendant, for the sum of one thousand dollars, payable to the order of the drawers, at the office of Wadsworth and Sheldon, in the city and State of New York, sixty days after date, accepted by the defendant, and indorsed by the drawers to the plaintiffs.

The third count is upon a bill drawn by McAllister, bearing date the 7th day of September, 1854, upon the defendant, for the sum of one thousand dollars, and accepted by the defendant, payable at the office of Messrs. Wadsworth and Sheldon, New York, to the order of the drawers, sixty days after date, and indorsed by the drawers to the plaintiffs.

The fourth count is upon a bill of exchange drawn by McAllister & Co., bearing date the 11th day of Septebmer, 1854, upon the defendant, for the sum of two thousand dollars, payable to the order of the drawers, sixty days after date, and accepted by the defendant, payable at Wadsworth and Sheldon's, New York, and indorsed by the drawers to the plaintiffs.

The fifth count is upon a bill drawn by McAllister & Co., bearing date the 18th day of September, 1854, upon the defendant, for the sum of one thousand dollars, payable to the order of the drawers, sixty days after date, accepted by the defenedant, payable at the office of Wadsworth and Sheldon, New York, and indorsed by the drawers to the plaintiffs.

The common counts are in the usual form.

The defendant pleaded firstly, the general issue to the whole declaration.

Secondly—To the secnod, third, fourth and fifth counts in the declaration, specially, that previous to the making of said bills in said counts mentioned, to wit: On the 20th day of August, A. D. 1854, at Joliet, in the county of Will, &c., the Merchants' and Drovers' Bank of Illionis was a body corporate created under the statute of the State of Illinois, entitled "An act to establish a general system of banking;" that said Wm. Smith was then and there and still is the president, and the said R. Eaton Goodell the cashier thereof. That said bank being such body corporate, and the plaintiffs president and cashier thereof, it was, to wit, at Joliet aforesaid, on the day aforesaid, corruptly, and contrary to the provisions of the statute of the State of New York, hereinafter set forth, agreed by and between the said bank, by the said plaintiffs, the agent and officers thereof as aforesaid of the one part, and the said McAllister & Co., and the said defendant of the other part that the said bank should lend and advance to the said McAllister & Co., and to this defendant for the purpose of buying by the parties last named a quantity of grass seed, during the then coming fall, such sums of money as they, the said parties last named should desire, not exceeding the sum of seven thousand dollars, in manner following, that is to say: in such sums as should from time to time be required by the said McAllister & Co. and the said defendant, for the purpose aforesaid; and should forbear and give day of payment of said sums to be so lent and advanced at the said bank as aforesaid, and each and every thereof, for the period, to wit, of sixtv days upon each, from the time of advancing the same, and the said sums, to be so advanced were each to be paid in the city and State of New York, reference being had to the laws of said State by said parties in the making of such corrupt agreement and that for

the forbearing and giving day of payment of the said sums of money, so to be advanced as aforesiad by the said bank, the said McAllister & Co. and the defendant should give and pay to the said bank as interest, at the rate of twelve dollars for a hundred, for one year upon all the money to be so advanced, by the said bank as aforesaid, besides the difference in exchange between Joliet and New York.

And to secure the repayment of said sums of money so to be lent, the said McAllister & Co., should draw and indorse and the defendant accept a bill of exchange payable in the city of New York, for such an amount as would cover the sum advanced, with the interest, at the rate aforesaid, added; which draft or bill, so made, drawn, indorsed and accepted, should be delivered to said bank at the time of receiving the money as aforesaid.

The plea alleges the advancing of the money and giving said bills in persuance of the said agreement, and that the whole amount of money received did not exceed in all the sum of four thousand eight hundred and ninety-five dollars, and that the amount agreed to be received as interest for such loan exceeded the rate of seven dollars for the loan of one hundred for one year. The plea sets out the New York statute, alleges that said bills are void by said statute, and the premise concluding with a verification, &c.

The third plea is likewise to the second, third, fourth and fifth counts of the declaration, which are framed upon the bills payable in New York, and is the same as the foregoing, except that the corrupt agreement is alleged to have been made between the plaintiffs, of the one part, and McAllister & Co.,of the other part, to loan by the plaintiffs to McAllister & Co. and the defendant, such sums of money, &c., refers to the usury laws of New York, set out in the second plea; and alleges that the said money was to be repaid in the city and State of New York, and that the said agreement was made by the parties thereto with reference, in all respects, to the laws of the said State of New York, and that by virtue of said statute the said bills were wholly void, concluding with a verification, &c.

The fourth plea is to the first count of the declaration, which is based on the bill payable at the Merchants' and Drovers' Bank. It alleges the incorporation of said bank under the general banking law of the State of Illinois, that the plaintiffs were and are the president and cashier of said bank, and as its officers and agents, made an agreement with McAllister & Co. to loan them the sum of nineteen hundred and ninety-one dollars and thirty-three cents, and to give a day of payment thereof, ten days, and the said McAllister & Co., for such loan and forbearance, agreed to pay, and the said bank to receive,

the sum of eight dollars and sixty-seven cents being at the rate of twelve per centum per annum and the said McAllister &Co. were to make and indorse, and the said defendant to accept, said bill of exchange as security for the repayment of said sum; that said sum was received and said bill given in pursuance of said agreement, and that said bill was void by the provisions of said statute, concluding with verification, &c.

The plaintiffs filed replications to said pleas as follows:

To the general issue added the similiter.

To the second plea—1st, denying the usurious agreement.

To said second plea —secondly, protesting that there was no such usurious agreement, &c., and that said bills of exchange in second, third, fourth and fifth counts in said declaration were not respectively made, accepted and delivered in pursuance of such alleged contract as set forth in said plea, nevertheless say that such contract was not made nor were said bills of exchange made, accepted, or indorsed, with reference to the laws of New York, by the several parties in the making of said contracts or writings, or in the accepting, indorsing, or delivering of said several bills of exchange in said plea mentioned, concluding to the country, &c.

And to said second plea —thirdly, protesting, &c., and denying that the bills mentioned were drawn, accepted, indorsed; delivered or given in pursuance of such usurious agreement, or for such usurious considerations,concluding to the country.

And to said second plea—fourthly, protesting, &c, and alleging that said bills of exchange were severally drawn, signed, accepted, indorsed, delivered and given in the State of Illinois, viz. : in the county of Will aforesaid, and that all and each of the parties to said several bills of exchange, and each of the parties to this suit were then and there residents and citizens of the State of Illinois, and transacting business in said State of Illinois, and that in drawing, accepting, indorsing and delivering said several bills of exchange, reference was had by all the parties thereto, to the laws of the State of Illinois, and not to the laws of the State of New York, all of which said plaintiffs are ready to verify, wherefore, &c.

The same replications were filed to the third plea.

To the fourth plea the plaintiffs replied—

1st Denying the illegal agreement, and concluding to the country

2nd. Denying that the bill of exchange, mentioned in the first count of the declaration, was drawn, accepted, indorsed, delivered or received in pursuance of any illegal agreement, and concluding to the country.

The defendant's counsel entered a motion to strike out the

fifth and ninth replications of the plaintiffs, (which are those alleging that the parties contracted with reference to the laws of Illinios, and not those of New York, and concluding with a verification,) which motion the court overruled and the defendant excepted.

The defendant filed rejoinders to the plaintiffs' replication thus: to the fifth replication alleges that reference was not had by the said parties, or any thereof, to the laws of the State of Illinois in either the drawing, the indorsing, the delivery, or receiving said several bills of exchange, or either of them, in said plea mentioned in manner and form, &c., but the same were drawn, made, indorsed, accepted, delivered and received by and between said parties with reference to the laws of the said State of New York, concluding to the country, &c.

To the ninth replication, which was the same as the fifth, the same rejoinder as above.

To the replications concluding to the country, the defendant added a similiter.

The cause was tried before the Hon. S. W. RANDALL, Circuit Judge, and a jury, at the December term, 1855, of the Will County Circuit Court.

On the trial the plaintiffs read in evidence to the jury five bills of exchange, drawn by McAllister & Co., and accepted by E. McAllister, three of which were accepted, payable at the office of Wadsworth and Sheldon, New York.

The plaintiffs then offered in evidence four notarial certificates purporting to be made by J. C. Ambler, notary public, New York, and which were in the usual form, having a seal attached, and one of which certificates was attached to each of said bills. The defendant objected to the same being read as evidence. The court overruled the objection and said papers were read in evidence, and the defendant then and there excepted.

The plaintiffs rested their case.

The defendant then called Archibald McAllister, and said Archibald McAllister, upon the request of the plaintiffs below, was first sworn on his voire dire and testified as follows: "I am a member of the firm of McAllister & Co., (the bills of exchange were then shown to him,) I am one of the drawers and indorsers of these bills. The name of McAllister & Co. was signed by me." The plaintiffs then objected to the witness testifying in this suit. The said witness was then interrogated by the counsel for the defendant and testified as follows: "I have a release, which was executed and delivered to me by the defendant." The defendant's counsel then read said release, which was produced by the witness.

The defendant's counsel then made a statement as follows: The defendant offers this witness to prove that the bills of exchange, given in evidence, were made with reference to the laws of New York, and that they were drawn in pursuance of a contract made with the Merchants' and Drovers' Bank, for the loan of money, by the said bank, to the defendant and McAllister & Co., at twelve per cent. per annum, payable in the city of New York, and as security for such loan, and to prove the facts set out in defendant's pleas. The court excluded said witness, sustaining the objection made by the plaintiffs.

The defendant gave evidence in the cause, tending to prove the issues on his part, and his counsel offered the defendant as a witness, to which the plaintiffs objected, and the court decided that the defendant was not a competent witness, and refused to permit him to testify in the cause, to which ruling the defendant's counsel excepted.

The defendant read in evidence an exemplified copy of so much of the laws of New York, as is material to this case.

After the evidence was closed upon said trial, and before the case was submitted to the jury, the court, without any motion from either party, ordered and directed that the said second and third pleas and replications be stricken out as presenting immaterial issues in the cause, and they were accordingly stricken out, and the defendant then and there excepted.

SIDNEY SMITH and W. K. MCALLISTER, for Appellant.

T. L. DICKEY, and GLOVER and COOK, for Appellees.

SCATES, C. J. The correctness of the order, striking the second and third pleas from the files for immateriality, depends upon the proper application of the principles of the law, which entered into and became part of the contract, within the intent and meaning of the parties. For the *lex loci contractus* and the *lex loci contractus rei sitæ*, when, respectively applicable, enter into and from part of every civil contract, respecting rights of property, in things, and choses in action. and so of *lex domicilie*, respecting mere personal contracts, such as marriages, &c. This is the general rule, and apparently of great simplicity in the abstract. Its application however, under certain states of facts and circumstances, becomes exceedingly difficult, and is left inextricably confused, by the authorities.

The rule, when properly understood, has its apparent substitutions as well as exceptions. The case before us, as made by the pleas, is an instance of the former. The contracts were made in this State, and the laws of this State would, had the parties

been silent, have become part of the contracts for the construction and meaning of the parties, in ascertaining and fixing their mutual rights and obligations. But parties may substitute the laws of another place or country, than that where the contract is entered into, both, in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms. This I call a substitution of the laws of another place or government, for those of the place of entering into the contract, and which is noted by the authorities as an exception to the general rule. This is allowed in all civilized countries, and recognized as part of the *jus gentium*, or law of nations, respecting private and personal rights, and in all cases, where the subject matter of the contract is not *malum in se*, immoral, or contrary to the local policy, or dangerous to the peace and good order of the particular communtiy, in which it is sought to be enforced. When parties seek to enforce such obligations, in the courts of the country, whose laws have been adopted as those of the contract, it presents only an ordinary case of jurisdiction to the court, over a contract made under the same laws of the *forum*, and by parties within its jurisdiction. But when the enforcement of the contract is sought in the courts of a country, governed by a different rule than the local or adopted law of that contract, the law governing it has no force or obligation *ex proprio vigore*, in that *forum*, but *ex comitate*, under the general public law, the court will enforce it, giving *extra* territorial effect, to the laws of another government, where it is not dangerous, inconvenient, immoral, nor contrary to the public policy of the local government. (*a*) Where the legislature does not define and prescribe the extent of this comity, it must be declared by the courts in each case, governed by precedents, under the general public law.

On examining these, we find numberless cases, with great uniformity, sanctioning the enforcement of contracts made under and sanctioned by the laws of another State, which are not allowed by the laws of the State where suit is brought, or where a different rule prevails.

Thus we find the marriage contract, legally solemnized or dissolved, under one jurisdiction, respected and enforced in another, under whose laws neither the obligation, nor its rescission would have been allowed. And so of the sale of lottery tickets and conduct of lotteries. So it is in relation to express or implied contract for interest on money. Any rate per cent. sanctioned by the laws of the place where the contract is made, or by the substituted laws of the place where it is to be performed, or paid, will be recognized and enforced in the courts of other governments, whose laws would make

(*a*) Adams vs. Robertson 37 Ill R. 45

such rate usurious. But there is a jealous vigilance of the courts to detect evasions of the usury laws, and when discovered, courts will withhold any aid to those who make foreign contracts a pretence for exacting usury at home.

The following authorities fully sustain the principles I have laid down. Story Confl. Laws, Secs. 241 to 246, 280 to 282, 299, 304, note 1, 304*a*, 305, 311*a* and note, 312 ; 2 Parson on Cont. 94, Sec. 5 ; 2 Kent Com. 457 to 461 and notes ; Byles on Bills (marg.) 314 to 318 ; Andrews *v.* Herriott, 4 Cow. R. 510 and note (*a*), which contains a good summary on this subject. Sherman et al. *v.* Gassett et al., 4 Gil. R. 523 ; Robinson *v.* Bland, 2 Burr R. 1077 ; Van Schaick *v.* Edwards, 2 John. Cas. 355 ; Thompson *v.* Ketchum, 4 John. R. 287 ; S. C. 8 John. R. 192 ; Fanning *v.* Consequa, 17 John. R. 516 ; Sherril *v.* Hopkins, 1 Cow. R. 105 ; Commonwealth of Kentucky *v.* Bassford, 6 Hill 528 : Jacks *v.* Nichols, 1 Seld. R. 183 ; Cox and Dick *v.* United States, 6 Pet. R. 198 ; Andrews *v.* Pond et al., 13 Pet. R. 77 ; Reimsdyk *v.* Kane et al., 1 Gallis C. C. R. 374 ; Harman *v.* Harman, 1 Baldw. C. C. R. 130 ; Bainbridge & Co. *v.* Willcocks id., 537 ; Pecks et al. *v.* Mayo Follett et al., 14 Vermt. 36.

In Pecks et al. *v.* Mayo Follett et al., the contract fixed a time and place in Albany, New York, for the payment of the note made in Canada, but no rate of interest was specified. The court assumed or presumed from the place of payment that the parties intended to adopt the laws of New York, in reference to the rate of interest, and accordingly gave seven per cent. And this rule seems to have received the common sanction of American and English courts. Sec. 2 Kent Com. 460, 461 and notes. I do not regard the case of Depan *v.* Humphreys, 20 Mast. La. R. 1, as in conflict with the authorities, but sanctioning fully the right of the parties to fix upon the higher rate of interest, where the contract is made in one, and to be executed or paid in another State.

The case before us is precisely like the case in Vermont, in reference to interest, and what laws should govern the contract, except that there the facts were found, here they are averred by the pleas, which also insist, that the interest taken was usurious, and therefore, the statute of New York makes void the contract.

With the consequences we have nothing more to do than to declare the effect of the law, upon the contract, when it is admissible to administer its provisions in our courts. This court has properly declared, it would not administer the mere penal sanctions of a foreign law by forfeitures. 4 Gil. R. 523. But when by those laws the contract itself is void there, it is void here and everywhere, and this court will not enforce here,

even though it might have been valid if made under our law. This principle is, I believe, without exception. Such is the case presented by the pleas, which presented a good defence to the bills of exchange, if true, and the plaintiff should have been allowed to make and insist upon his defence under them. The court erred in striking them from the files, as immaterial.

The notarial certificate of protest is not evidence of that fact, as was ruled in Bond *v.* Bragg et al., ante, p. 69, and Kaskaskie Bridge Co. *v.* Shannon et al., 1 Gil. R. 15, in relation to inland bills.

In revising the ruling of the court below, in excluding McAllister, the drawer and accepter, for incompetency, we must kee p in mind that there is a distinction between the law of the contract and the law of the forum. The former will be enforced in our courts as entering into and forming part of the contract of the parties, with the exception that if those laws operate criminally or penally upon the parties, our courts are under no comity to enforce them in this respect. Sherman et al., *v.* Gassett et al., 4 Gil. R. 523. But where the law makes the contract void there, it will in like manner make it void here. But in administering this measure of relief, we do it through our own forms of action, according to our own rules of evidence, and pursuant to our own rules of practice. By these must the disclosure of the fact of usury be made and the defence sustained.

Our law has ever condemned usurious interest. It does not, however, avoid the contract, but forfeits three-fold the amount of usurious interest. Still, this forfeiture is inapplicable to a contract made under and governed by the laws of another State. If, however, we do not, in the true spirit of the law's repugnance to usury, apply the rule laid down for discovery of its own violations, to the discovery of like violations of the usury laws of other States, when sought to be enforced in our courts, we shall be left without any rule especially applicable to this class of cases, not equally applicable to all.

My present impressions are, that the witness is expressly made competent by the seventh section of chapter 54, Rev. Stat. 45, p. 295. Its language is broad and general, embracing the real actors in the usurious transaction, with a view to a full disclosure, whenever the fact of usury is put in issue by the pleadings. The tenor of the act does not confine the rule given, to violations of our own laws, but enlarges it to " the fact of usury" being " put in issue " " by the pleadings." Foreign usurers shall find no greater facilities for concealment of their practices, than domestic ones, if resort be had to our courts for remedies, to extort the excess. I understand the rule given there, as a general one for the detection of the fact, by the oath of the debtor,

upon whom the usury has been practiced without regard to the time, place, or laws violated by it, restricted only by the fact, that the creditor be still living, and who also may be heard on oath as a witness to this fact.

It is further noticeable, in confirmation of this veiw of our own statute, that different courts in the different States have pressed the policy of the usury laws as proper exceptions, to the rule laid down by Lord Mansfield in Walton *v.* Shelley, 1 Term R. 296, even should the rule be adopted. Taylor *v.* Beck, 3 Rand. R. 324; Stump *v.* Napier, 2 Yerg. R. 37.

I must regard that policy of the law for detection and prevention of usury, introduced by recent statute regulation, as paramount to the supposed policy of protecting negotiable paper, by denying the competency of the maker or indorser, to impeach the consideration or validity of notes singed by him. And this brings me to the consideration of the general rule, without respect to the statute rule.

The rule was laid down in Walton *v.* Shelly, generally, excluding as incompetent any original party to any contract, which he had signed to impeach its validity. The general proposition was denied in Bent *v.* Baker, 3 Term R. 27, by Lord Kenyon; and Mr. J. Butler, who concurred in laying down the rule, qualified and confined it in this case to negotiable instruments. Afterwards, in 1798, the case was expressly overruled and denied to be law, by the court of King's Bench in Jordaine *v.* Lashbrook, 7 Term R. 602, in which Mr. J. Lawrence, concurring in overruling Walton *v.* Shelley, treated usury, gaming and infancy, as exceptions, even should the rule be recognized. It was expressly so ruled in Smith *v.* Prager, 7 Term R. 56, in a case of usury. But the Supreme Court of the United States, in the Bank of the United States *v.* Dunn, 6 Pet. R. 56, adopt the rule in Shelley' case, as applicable to negotiable notes. Although he remarks of the court are general, the facts of the case, in 6 Pet. R. 56, show a proper case for the application of the rule in Shelley's case, and upon a further distinction upon which some of the States adopt and apply it; and that is to exclude the witness in cases where negotiable instruments have been actually negotiated, and are in the hands of *bona fiae* holders, in the due course of trade. See Pennsylvania cases cited below.

Such was the case in 6 Pet. R. 56. So should be understood my approval of the rule in Lyon et al. *v.* Boilvin, 2 Gill. R. 637, where I noted one, but did and could not note every exception and distinction to it as a general proposition. I intended to refer to this case in 6 Pet. R. 51, 57, but it was printed as the 9 Pet. by mistake. There is some reason, justicd and policy

support of the rule excluding the maker or indorser of negotiable paper, when he comes to impeach it, after negotiation, in the hands of the innocent purchaser; but this reason will not apply to protect the original parties, while it remains in their hands, or is sued on merely for their use and benefit.

There are many and irreconcilable decisions in the different States. Most of the courts, if not all, have adopted the rule with qualifications, in Bent *v.* Baker, confirming it to negotiable instruments; and others alone, to those actually and *bona fide* negotiated. See 1 Grenl. Ev., Secs. 383, 384, and note 1, of last section; 6 Ohio R. 246; 14 Ohio R. 487; 17 John. R. 176; 11 Pick. R. 416; 1 Metcalf R. 416; 2 Dallas R. 196; 2 Binney R. 165; 4 Serg. & Rawl. R. 397. The Pennsylvania rule confines it to negotiated instruments, which were commercially negotiable; and so I might understand the rule in Masschusetts from the cases of Churchill *v.* Suter, 4 Mass. R. 162; and Fox et al., admrs., *v.* Whitney, admr., 16 Mass. R. 120.

On the contrary rule, I have referred to 3 Rand. R. 316, and would add 3 Grattan R. 90, which appears to be a naked judgment the other way. Connecticut repudiates the rule. 1 Conn. R. 265. New Jersey—2 Harrison R. 194.

New York admits the competency of the witness, overruling Winton *v.* Saidler, 3 John. Cas. 185, by Stafford *v.* Rice, 5 Cowen R. 23, [see id. 153; 3 Wend. R. 416] and they hold expressly, that the maker is competent to impeach it for usury. Tuthill *v.* Davis, 20 John. R. 285; Bank of Utica *v.* Hillard, 5 Cow. R, 153; Truscott *v*, Davis et al., 4 Barb. S. C. R. 495.

The authorities are to numerous to pursue them further. I have presented enough to show and sustain the exceptions and distinctions taken, and, I think, to sustain the rule adopted by this court, as embracing all that is demanded by public policy in maintenance of commercial credit; and yet, without trenching upon that other rule of public policy, adopted by positive legislation, to detect and prevent usury, and a similar one to avoid gaming contracts, in the hands of assignees, and judgments and conveyances given in violation of the act. Rev. Stat. 1845. p. 263, Cap. 46. There being a release of plantiff here, as acceptor, to the witness as drawer, we are of opinion he was competent while the security remained in the hands of the orignal party, to prove the fact of usury, independent of the provisious of the statute. (*a*)

Judgment reversed aud cause remanded,

Judgment reversed.

(*a*) Not competent to t prove failure of consideration, Walter vs. Smith, 23 Ill. R. 346, 342.

JAMES WELSH *et al.*, Plaintiffs in Error, *v.* THE PEOPLE.

ERROR TO RECORDER'S COURT, CITY OF CHICAGO.

If the owner of goods, alleged to have been stolen, voluntarily parts with the possession and title, then neither the taking or conversion is felonious. But if he parts with the possession, expecting that the identical thing will be returned, or that it shall be disposed of on his account, or in a particular way, then the thing may be feloniously converted, and the bailee be guilty of a larceny.(a)

The question in such case is, did the owner *voluntarily* part with the legal title to the thing, and did it become vested in the accused?

After the case has been declared closed by both parties, it is discretionary with the court, and not assignable for error, whether the case shall be again opened, and further evidence offered to the jury.

THE defendants were indicted for larceny, tried and convicted, at September term, 1855, before R. S. WILSON, in the Recorder's Court of the city of Chicago. They were sentenced to three years' confinement in the penitentiary. The accused were practising upon Hall, what is known as the ball and safe game, and borrowed of him the money, to wager. Hall was the principal witness on the trial.

M. T. BURGESS, for Plaintiffs in Error.

W. H. L. WALLACE, District Attorney, for the People.

CATON, J. The question now again presented, of the right of the court before which this conviction took place, to try the prisoners, was carefully considered and decided in the case of Ex parte Welsh, ante, 161, and we do not think it necessary again to discuss the subject.

Where, as in this case, the alleged larceny is perpetrated by obtaining the possession of the goods by the voluntary act of the owner, under the influence of false pretences and fraud, when the cases are carefully examined and well understood, there is no real difficulty in deducing the correct rule, by which to determine, whether the act was a larceny and felonious, or a mere cheat and a swindle. The rule is plainly this: if the owner of the goods alleged to have been stolen, parts with both the possession and the title to the goods to the alleged thief, then neither the taking or the conversion is felonious. It can but amount to a fraud. It is obtaining goods under false pretences. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way as directed or agreed

(a) Stinson *vs* People. 43 Ill. R. 397.

upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny. The pointed inquiry in such a case must always arise, did the owner part with the title to the thing, and was the legal title vested in the prisoner? If so, he was not guilty of a larceny. This distinction has not, in all cases, where the question has arisen for adjudication been clearly pointed out. The question has been sometimes stated in more general terms, as, did the prisoner obtain the goods with a felonious intent, or feloniously? If so, he is guilty of larceny. In this general expression the distinction, however, is still preserved; for if the title was obtained with the possession, the taking and conversion could not be felonious, although fraudulent and with the design to cheat the former owner out of them. Hence, however, has arisen much of the apparent confusion on this subject.

A critical examination of the instructions given and refused by the court, is necessary to determine whether the law as thus settled was violated. The first instruction asked for the prisoner, was as follows: "The jury are instructed that if they believe from the evidence that the money in the indictment mentioned was loaned by the witness, Hall, to the defendant Kinney, for the purpose of enabling Kinney to bet with Welsh, then such taking of said money and carrying it away does not amount to larceny and the jury should acquit the defendants, even though such loan of the money was obtained by false and fraudulent pretences, and with the design to cheat and defraud the said Hall out of the same." This instruction the court refused to give without a qualification which will be subsequently noticed. Does the instruction as drawn present the law of the case properly? Clearly not. It assumes, what is expressed in more distinct terms in the fourth instruction, which was refused. That instruction is this: "that although larceny may be committed by stealing or otherwise converting to the use of the borrower, a chattel, which has been loaned to him, yet such is not the case when the property loaned is money." This assumes, that under no circumstances can money be loaned without the absolute legal title passing to the borrower. This certainly is not the law. Money as well as chattels, may be loaned for a specific purpose, and to be returned in the same identical pieces. Money may be, and frequently is, loaned for the purpose of making a formal tender, where there is no expectation of its being accepted, and where it is agreed, that in case unexpectedly the party should offer to accept it, the tender shall be withdrawn and the same money returned. In such a case, as between the lender and borrower at least, the title to the money does not pass, however it might be as to the third party who should accept the

tender, the borrower not having withdrawn it as agreed. And so in a thousand other instances money may be loaned for a specific purpose, which when the purpose is subserved the indentical money is to be returned. In all such cases, the absolute title does not pass, but only the right to its temporary use, any more than would the title to a horse or other chattel, which had been loaned for a time and then to be returned. The question, whether the general or only a special title passes, must always be determined by the inquiry whether it was the intention of the parties that the same indentical thing is to be returned or only its equivalent or value, in something else. Nor will the legal effect of the transaction be different, although the lender be indifferent, whether the same thing be returned or its value in some other thing or money. The question is, what was the intention of the parties at the time?—what did they agree to? not what would they have agreed to had something else been proposed.

By the first instruction, the court is asked to tell the jury, that if they believe the prosecutor loaned the money to Kinney, to be bet with Welsh, there could be no larceny. This was assuming that the absolute title passed if such a loan was made. Such was not necesarily the case. If it was loaned under the absolute assurance that Kinney must win and that the same money should be returned to him, then it was loaned for that specific purpose, and he parted with the temporary use of the money only, and not with the absolute title. If, however, he loaned it, expecting the money might be lost by the bet, and if lost, that it should be repaid in other money, then he parted with the absolute title to the money when he loaned it, and there could be no felonious taking, although it was obtained by fraud and deceit. The first and fourth instructions were properly refused.

The second instruction is still more objectionable. It is this: "That to constitute the crime of larceny there must be a taking of the property against the will of the owner; therefore, in this case, if the taking of the property from Hall, was not against his will, the jury should acquit the defendants." It is a well settled rule that where a party obtains possession of goods by fraud and deceit, not with the intention of returning them, but with the design of appropriating them and depriving the owner of them, and of all remedy for their loss, and does so appropriate or dispose of them, that is as much a larceny as if the possession had been obtained against the will of the owner. Indeed in many adjudged cases, the rule has been enforced with less restrictions than I have here stated, and possibly the true rule may be found to be broader that I have stated it. But this is sufficient to show that the instruction as asked is not the law. I shall only

refer to the familiar instance, of a party hiring a horse, for a specified service, with the intention at the time of running away with or selling him, and who executes such intention. I know of but one single case in this country or in England, which does not hold this to be larceny. The third instruction asked for the prisoners, was the same in principle as the first, and was obnoxious to the same objection.

I now come to the instruction given by the court as a qualification to those asked for the prisoners. It is this: "If the jury believe from the evidence that all three of the defendants fraudulently considered together, and agreed to practice a fraud on the witness, Hall, to induce him to deliver his money to the defendant, Kinney, for the purpose of his (Kinney's) making a bet with the defendant, Welsh, with the intent to feloniously take and appropriate the money of Hall, to the joint use of the three defendants, and if such delivery to Kinney was procured by means of such fraud, and with such intent to feloniously take and appropriate, it was no such delivery in law as would legally pass the possession of property to him." While this instruction is strictly and technically correct, I could wish that the court had been more particular to point out to the jury the distinction, which I have attempted to explain, as to whether it was the intention of the parties to transfer the absolute title to the money by the transaction. The instruction however is nearly in the language of many of the reported cases. It applies to the appropriation of the money of Hall and could have no application, if the money had ceased to be Hall's, and become Kinney's, by the loan. Nor could there be the felonious intent required in the instruction, if the title to the money had absolutely passed to Kinney by the transaction, for Kinney could have no felonious intent against Hall, in reference to money, which had become his, by the act of delivery to him and the intent with which the delivery was made. The instruction is in fact hypothetical, and only became operative in case the money still continued Hall's. I repeat a regret that the distinction referred to was not more clearly pointed out to the jury, and if the evidence which is sent up in the record convinced us that the title to the money had been, in fact, transferred to Kinney by the loser, we might possibly be justified in inferring that the jury were misled in some way, as to the principle of law by which they should have been governed, and grant a new trial.

The first instruction asked on the part of the prosecution and given, is much like the one just considered, which was given by the court, and what has been said of the one applies equally to the other.

The second and last instruction given for the people does

clearly point out the distinction between a mere temporary loan and an absolute transfer of title, and is the only one in the whole series, which does, to my mind, present the distinct question upon which I think the whole case properly depended. That instruction was right.

Another objection of a minor character, it may be proper to notice. After both parties declared the case closed; and the case had been opened to the jury by the people's counsel, they were permitted to call and examine another witness in the cause. It is enough to say that this has been always held a matter of discretion with the court, and not assignable for error. Without such a discretionary power, sometimes the greatest injustice would be done. Courts will always exercise this discretion with caution, and to promote the ends of justice, and guard against suprise to the opposite party.

The prisoners' counsel asked the prosecutor this question: "Have you stated that you expected to receive a part of the money if the bet was won?" The court refused to allow this to be answered, upon the ground that it was necessary to call the attention of the witness to the time, and place, and to whom the declaration was made. The restriction which the court placed upon the examination was proper, as well settled by authority and sustained by reason. The objection taken was properly sustained. An objection was also sustained to this question put to the prosecutor: "Did it make any difference to you whether you got the identical money which you lent him back again, or other money? " Had I been trying the case, I think I should have allowed the question to have been answered, and yet, strictly, it was not pertinent. The inquiry for the jury was, whether the understanding and intention was, that Hall should have the same money back, and not whether it was a matter of any moment to him, whether he got the same money back, or other money as good?

On the whole we are of opinion that the judgment must be affirmed.

Judgment affirmed.

ADAMSON B. NEWKIRK, Appellant, v. ROSELLA CHAPRON, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

a The act repealing the Municipal Court of the city of Chicago was absolute and unqualified.

Courts must look to the act repealing, rather than to the repealed act, to fix upon the powers and duties which remain in existence.

A delay, occasioned by a change of jurisdiction from one tribunal to another, does not impair the obligation of contracts. One remedy may be abolished, if another is substituted, so that a party may obtain the same substantial aid or relief. It is not necessary that there should be, at all times, a person having power to issue or execute judicial process.

A party having the custody of records does not, from that fact, become authorized to issue process.

A fee bill, when designed to be used as a levy and sale, must issue as process of, and under seal of, the court, and run in the name of the people. The debt and damages in a case cannot be included in it; nor can a clerk issue an execution, by which to collect his fees; nor has an officer of the court control over an execution because his fees are included in it.

A fee bill becomes an execution when issued for the collection of fees for the benefit of the officers to whom they belong.

THIS was an action of ejectment, brought in the Cook County Court of Common Pleas, by the appellant, against the appellee, to recover the possession of a part of the west half of the north-east quarter of section eighteen, in township thirty-nine north range fourteen east of the third principal meridian.

The declaration was in the usual form under the statute of ejectments, particularly describing the premises, and claiming the same in fee. Plea of general issue pleaded, and joinder by plaintiff.

Upon the trial, the evidence produced by the plaintiff showed a connected title, from the United States down to himself, of the whole of said west half of the north-east quarter of section eighteen aforesaid.

The defendant admitted possession at the time the declaration was served, and set up a title under a sheriff's deed, giving in evidence a judgment of the Municipal Court of the city of Chicago, rendered at the November term of said court, A. D. 1837, against the patentee of said land, in favor of one Robert Gracia.

The defendant offered in evidence a paper, purporting to be an alias execution upon said judgment, issued out of and under the seal of the " Municipal Court of the city of Chicago, " tested the 20th day of February, 1839, (five days after the court was abolished,) and directed to the sheriff of Cook county, who (as appears by indorsements thereon,) by his deputy, levied upon the said above described land, by virtue of said execution, on

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the 21st day of February, 1839, and on the 25th day of March following, sold the same to the plaintiff in the judgment.

The defendant further offered in evidence a deed, executed by the sheriff of Cook county, purporting to convey to the purchaser aforesaid, the above described land, in consideration of the sale aforesaid; also deeds purporting to convey to said defendant the title of the grantee in said sheriff's deed.

The defendant further offered in evidence a number of papers, purporting to be process of "the Municipal Court of the city of Chicago," dated after the 15th day of February, A. D. 1839, and in no way connected with, nor having any relation to, the title set up by said defendant, nor any other title to the said land; to the admission of which said paper, purporting to be an alias execution as aforesaid, and said sheriff's deed, purporting to convey the land as aforesaid, and all the deeds purporting to convey to said defendant the title of the grantee in said sheriff's deed as aforesaid, and to the papers purporting to be process of the Municipal Court of the city of Chicago, as aforesaid, in evidence on the trial of the issue aforesaid, the plaintiff, by his counsel, objected. The court below overruled the said several objections, and the plaintiff excepted to the several decisions of the court thereon.

The issue being found for the defendant, the plaintiff, by his counsel, moved for a new trial, on the grounds that the court erred in admitting in evidence the paper purporting to be an alias execution, and the deeds so offered by the defendant, and that the finding of the court was against the law and the evidence and that it should have been for plaintiff; which motion was overruled by the court, and the plaintiff excepted.

Judgment having been entered for said defendant, the plaintiff prayed an appeal to this court.

This action was tried before J. M. WILSON, Judge, without the intervention of a jury.

The following is a copy of the repealing act:

"An act to repeal part of 'An Act to Incorporate the City of Chicago.'"

SEC. 1. *Be it enacted by the People of the state of Illinois, represented in the General Assembly*, That so much of an act entitled "An Act to incorporate the city of Chicago," approved March 4th, in the year of our Lord one thousand eight hundred and thirty-seven, as establishes a Municipal Court in the said city of Chicago, and all matters connected therewith, be, and the same is hereby repealed.

SEC. 2. That all suits or matters, both at law and in equity, now pending and undetermined in the said Municipal court, shall be heard, tried and prosecuted to final judgment and execution, in the Circuit Court of the county of Cook, in the same manner as they would be if the said suits or matters had been originally made returnable, or had in the Circuit Court for the said county of Cook; and all records, dockets and papers, belonging to, arising from, or connected with, the said

Municipal Court, shall, by the clerk of the said Municipal Court, be transferred and delivered over to the clerk of the circuit court for the said county of Cook; *Provided*, That this section shall not be construed as a release of errors that might have been taken advantage of in said Municipal Court; *Provided further*, That it shall be no ground of error in or to any judgment heretofore rendered in the said Municipal Court, that it does not appear by the record or proceedings that the defendant resided in the said county of Cook.

SEC. 3. It is hereby made the duty of the high constable, elected under the provisions of the said act, entitled "An Act to incorporate the city of Chicago," hereby in part repealed, to make returns of all process of summons, executions, or of whatever nature, to the said circuit court of the county of Cook; which said circuit court is hereby invested with the same powers to enforce a compliance with the law in this behalf, that it would have had if the process had been originally issued from the said circuit court; and all executions hereafter to be issued upon any judgment rendered in the said Municipal Court, shall be directed to the sheriff of Cook county.

SEC. 4. That the transcript of any record of the said Municipal Court, of any judgment rendered therein, may and shall be furnished by the clerk of the circuit court of the said county of Cook; and any such transcript shall have the same force and effect, to all intents and purposes, that the same would have had, if the suit, process or proceeding, whether in law or equity, had been originally commenced or instituted in the said circuit court.

SEC. 5. That the clerk of the said Municipal Court shall deliver over the records, dockets and papers, as provided in the second section of this act within six weeks after the passage hereof; *Provided*, That nothing in this act contained, shall be so construed as to prevent the clerk of the said Municipal Court from collecting his fees in the manner now provided by law; and the clerk of the said Municipal Court shall, for that purpose, have free access to the said records, dockets and papers, and copies thereof, without costs or charge.

SEC. 6. That the sheriff of Cook county is hereby authorized to give deeds of conveyance for any real estate which may have been sold by the high constable of the city of Chicago, as fully and effectually as he might or could do, if the said real estate had been sold by the sheriff of said county.

SEC. 7. That nothing in this act contained shall be construed to prevent the high constable of said city of Chicago from proceeding to collect executions which have been levied.

Approved February 15, 1839.

J. E. CONE, for Appellant.

G. MANNIERE and I. N. ARNOLD, for Appellee.

SCATES, C. J. The first section of the repealing act, repealed so much of the original act "as establishes a municipal court, in the said city of Chicago, and all matters connected therewith," absolutely and unqualifiedly. The language is clear, plain, and explicit, and cannot be misunderstood. And were we to entertain a doubt of the intention to do so, in this act,

which was to take immediate, full effect, that doubt would be removed by the intention disclosed in its subsequent provisions. By them, every evil and inconvenience likely to arise, or be produced, by the abrogation of the court were anticipated, and remedied, as far as provision was deemed necessary. Thus clearly is the legislative intent of an immediate and complete abolition of the court, with all its incidents, manifested by the re-enactment and substitution of such provisions as were deemed essential and adequate to obviate any injury, delay, inconvenience or deprivation of any right, of any person, dependent upon or connected with that court.

We cannot interpret these provisions, as manifesting an intention to limit or modify the system or powers in relation to the fact, or extent of the repeal, or abolition of the court; but as a new grant of powers, to obviate any inconvenience or injury from it. And in this light, we must look to the provisions of the repealing, and not the repealed act, to ascertain, and fix upon the powers, and duties which remain in existence. One misapprehension of counsel, I conceive has arisen from this source. Because the repealing act, granted certain powers to persons engaged in the execution of the system abolished, they have treated it as a partial or modified repeal, and still look to the provisions of the repealed law, by constructing implication, as still in operative force, in a much larger sense, than can be legitimately inferred from the provisions of the new grant.

A liberal and sound rule of construction of statutes, as well as contracts, authorizes, in ascertaining the true intention which is to prevail, a general view to be taken of the situation of the parties, and of the subject matter of the provision. And under a full view of these, we are authorized to reject a conclusion manifestly at war with the interest involved, and subversive of the general and true intent indicated by the language used, the situation of the parties, and the condition of the subject matter.

Viewing the subject matter of this act—the abolition of the municipal court—in connection with the situation of suitors, and judgment creditors before it, whose remedies are transferred, to be prosecuted before, and administered by, another forum, with circuit court, and it evidently may delay temporarily a hearing to the former, and an execution to the latter. The former, with a standing in the court of many terms a year, are transferred to a court of two terms annually; the latter may not sue out final process, until the delivery of the records over, which may not be coerced under forty-two days.

This latter, it is contended, would be a violation of the constitutional right of the judgment creditors in the municipal

court, who, it is claimed, are entitled to a speedy remedy, for the enforcement of their contracts and obligations.

Although the subject is not new, it is, to me at least, a new application of the provisions of the constitutions.

They have totally abnegated all power in State legislation to impair the *obligation* of contracts, and this may well extend, by implication, to the national legislature.

Courts and commentators have argued, and forcibly too—though I know of no decision, because no such case has transpired—that a deprivation, by an act of the legislature, of all remedy, and such modification of the remedy in particular cases, as deprived the suitor of the benefit of his contract, would be unconstitutional. 3 Story Com. Const. 245 to 251; Odgen *v.* Saunders, 12 Wheat. R. 284, *et seq.*; Bronson *v.* Kinsie *et al.*, 1 How. U. S. R. 311; McCracken *v.* Hayward, 2 How. U. S. R. 608; Jackson *v.* How, 19 John. R. 82, 83.

But we need not anticipate a case of this character. It is not before us in this record. The remedy is not denied, or repealed; it is simply transferred to another, and equally competent tribunal, for administration in another forum, and for application of it by other officers.

While the *lex loci* of the contract is looked to, to interpret, explain, and determine the contract, and its obligations, and the *lex fori*, for the application, and enforcement of the proper remedy, yet it is said neither becomes a part of the contract itself, or of its obligation. 3 Story Com. Const. pp. 247, 248, Secs. 1377, 1378.

A distinction is also taken, and notable, between the *obligation* of the contract, and the proper remedy to enforce it. And it would seem, that while the obligation is sacredly held inviolable, the remedies existing at the making and maturing of the contract, may be abolished, if others remain, or are substituted for its enforcement. 3 Story Com. Const. p. 250, Sec. 1379; 12 Wheat. R. 284, *et seq.;* 4 Wheat. R. 200, *et seq.* Sturgis *v.* Crowninshield; Springfield *v.* Hampden Com'rs of Highways, 6 Pick. R. 508.

Every change or modification of the existing, is not to be treated as an abolition of all remedy.

The legislature may prescribe the times and mode, in which remedies may be pursued, so that some substantial remedy is always left in existence. See same authorities referred to above, and Mason *v.* Haile, 12 Wheat. R. 370.

It is not true as a proposition of law, or of fact, that there must be, ever, and continually in being, officially, a person, with power to issue process, and toexecute it. There may be vacan-

cies in the office of the Judges, clerks and sheriffs, by deaths, resignations, removals, or efflux of time, as well as in changes of jurisdiction, by abolishing and remodeling judicial or ministerial systems. These may occur, where there is no provision in law, for the officer to hold over, until a successor is qualified. And this would not meet the exigency of a death, removal, or resignation.

The office may be vacant, and no one in being, in whose name writs bear test, as well as that from which it issues, or that to which it is directed. From any of these, delays in the instant prosecution of remedies, may be unavoidable, and yet afford no solid ground to allege the want of constitutionality of the law, in not preventing such interruption of the redress.

General bankrupt, insolvent and limitation acts have been sustained as constitutional. And yet in the administration of them, the obligation of the contract has been more essentially affected by this modification and limitation of the remedy, than is ever done by the abolition of one for another judicial system—one tribunal for another.

Acts of our own and other States, have been passed, from time to time,— altering, changing, modifying, or repealing the rules of evidence and the systems of practice, and abolishing one and substituting another form of action. And none have doubted the constitutional power thus to consult and foster the highest supposable public good. Whole systems of pleading and practice have been swept away in New York, Missouri and Kentucky, and supposed reforms substituted, and I am not aware that professional opinion has ever challenged the power.

There are two notable changes of our own judiciary system, by a general repeal of the law under which the circuit courts were organized; when the jurisdiction, causes and general business pending in them were all transferred to other courts, newly created and organized afterwards. See Acts 1819, pp. 381, 382, Secs. 36, 37, 38; Acts 1827, pp. 118, 119 and 121, Sec. 2; Acts 1841, pp. 103, 104, Sec. 2, 3, 6, 7, 8, pp. 173, 174.

Apart from their effect upon judicial commission, I am not aware that their constitutionality was ever questioned; and I believe in all respects these acts have been acquiesced in, without a single case to test the question of their effect upon suitors' rights. Though these acts contained provisions for the state of things consequent upon the repeal of the organic law of the court, by validating the acts of the clerks thus repealed out of office, there seemed never to have been entertained any such idea, as that contended for here—that suitors' rights were violated by a repeal of one court and a transfer of its jurisdiction and business to another,—not even in criminal causes; or that

the power and duties of clerks would continue by implication, to keep the court ever open for the emanation of process, for the preservation of suitors' rights to speedy redress.

Many such illustrations might be given of similar effects and consequences from the operation of different laws, and of the constitutionality of which no one ever expressed a doubt.

There may occur delays of this kind in transferring the dockets of justice of the peace, upon deaths, resignations, or removals from the county, as is provided for in the Rev. Stat., Cap. 59, Secs. 110. 112.

In Martin *v.* Walker, 15 Ill. R. 377, this court held, that the nearest justice to whom the dockets had been transferred might issue execution upon the judgments upon the dockets so transferred. And this might, in principle, sustain an execution from the circuit court in this case, to which, by this act, these records and judgments were to be transferred.

But I may be allowed to repeat, that the doctrine contended for here is new to me in its application, and would lead us to sanction, as official, the acts of every temporary custodian of the records, as clothed by implication, with the power to issue processs, even without a court or jurisdiction in whose name to test it. Fixing the authority and power of a custodian of the records to issue process upon the ground of the suitor's constitutional right to immediate redress when applied for, and we should find difficulty in setting aside an execution issued by the administrator, executor, wife or friend of a deceased justice, where the transfer was delayed, and application pressed in vindication of constitutional rights thus interpreted.

We are not able to sanction such an interpretation of the provision which secures every one a trial, though speedily and without delay, because it must be conformable to the laws; and no private person is invested with power, authority, or jurisdiction to issue writs of summons, execution, or other process.

Such a construction, instead of securing would put our lives, liberties and properties to all the uncertain hazards of violence, fraud and chicanery of the powerful and the cunning, when combinations alone might afford adequate protection in a race and contention, for the custody and possession of the records and *indicia* of office.

We should find difficulty in distinguishing between an execution, or a *capias*, or summons, issued upon these principles and under such circumstances.

We cannot look to or derive any powers from the law organizing the municipal court with a judge, a clerk, a seal, and a jurisdiction, and still bring its officers and their acts within the

general provisions of the laws in relation to the judiciary after the repeal of the court and the abrogation of its jurisdiction; for in relation to such powers and acts, under the repeal they become private and unofficial, both in their acts and persons. We therefore look alone to the new powers granted in the repealing law.

I speak not here of a total destruction of all remedy. It is objected to this delay of forty-two days, that if the legislature may suspend the right and remedy one day or forty-two days, they may do so forever. But such a case as the latter is not before us. And we must not forget that there is, or confound, the distinction between the regulation and the total destruction of right and remedy. The latter will never be intended, an such was the ruling of this court in *Bruce* v *Schuyler et al.*, 4 Gil.R. 270, *et seq.*, where the power of the auditor to complete a sale of land for taxes, was so far sustained, as to enable him to convey after the repeal of the act under which he sold, there being no provision in the repealing act enabling another to do so.

This principle is constantly applied, in analogy, to sheriffs and constables, who have power to sell after levy, although the writ may expire, or their terms of office. But this principle may not include the transaction of new business, where no personal right or property has accrued or attached. Hence we find special acts or general provisions enabling ex-sheriffs to complete the collection of taxes, &c., and clerks still to recover their fees in certain cases.

So I understand the provisions of this repealing act. It might have been understood and contended that a simple repeal of the organic law of the court abrogated all the judgments and rights of suitors and officers, leaving no mode of enforcing the judgments, prosecuting the pending suits, or collecting fees.

To obviate this difficulty and avert such mischief and injury, the business and jurisdiction of the court was transferred to, and conferred upon, the Circuit Court, and the clerk enabled to enforce the collection of his fees without expense, in the mode provided by law. A like provision was made for the completion of business in the hands of the high constable.

It is, therefore, in no sense such an extreme case as the one put in argument, of a destruction of rights and remedies, and we need not discuss or decide upon such a case until presented. It is only a simple change of the court and officers, who are to administer the identical same remedy; and only with the delay necessary, to make the change or transfer from one court to the other. And we have shown, as we think, most conclusively, that such delay for such an object, can, in no sense or light be

regarded as violate of a suitor's constitutional redress; —nor will it enable a mere private custodian of judicial records officially to issue process as clerk—and much less of a court not in existence— or for the Circuit Court, having another, as clerk.

The next position assumed in the argument is, a power in the clerk, under the repealing act, to issue executions for his fees; and such executions would be regular, and sales under them valid, although the debt or damages of the party might be included. For even should the inclusion of the debt or damages with the clerk's costs, make the execution irregular, yet it would not be void; and so a sale to a third person would be good.

This reasoning may be just and logical when based upon sound premises, but finds no legitimate conclusion from a false assumption upon which it is based. And that is, that the clerk had a right to collect his fees by *execution.*

In what manner did the statutes authorise clerks and other officers to collect their fees? The answer is given in the Revised Statutes, *v.* 249, Sec. 28, and p. 418, Sec. 40, as interpreted and settled is *Reddic* v. *Cloud's Administrators*, 2 Gil. R. 674, to be by certified fee bill, and not by execution.

The special provision for executions in Rev. Stat., p. 186, Sec. 192, p. 262, Sec 7, and p. 311, Sec. 19, are not intended as remedies to the clerks or other officers, for the collection of their own fees, but for the collection of fines and costs generally, &c. The repealing act has conferred no power, but preserves by proviso the right to collect in the manner then provided by law, with free access to the records, for that purpose without charge. The fee bill, when intended to be used for a levy and sale, must issue as process of the court, run in the name of the people, and under sale of the courts, as writ of execution. We are by no means prepared to admit, what seems also to have been taken as granted in the argument, that the municipal clerk had, under that proviso, the power to issue these fee bills as executions. He might have obtained this process from the clerk of the Circuit Court, without charge to him it may be, upon fee bills made up by himself.

The proviso may be better understood as rebutting and negating the inference that, by repealing the court, the clerk's claims for fees were cancelled, than as intending to authorize him to issue his own process as clerk, or as a private citizen, The fees were still deemed to be due, as to an officer, and collectable by certified fee bill. But the statute, as it then stood and as it still remains, would not authorize an ex-clerk or one out of office to certify, address and seal the fee bill, as process. But such a process, not being before us, we need not decide whether a fee

bill so issued as process, would be valid as such. I have adverted to this view, to show that the provision was more obviously intended as a preservation of his right to his fees, than to confer a power or fix a mode for their collection.

We may admit for the purposes of this case, that the clerk could issue a certified fee bill for that purpose, and yet it by no means follows that, therefore, he might issue also, an execution for that or any other purpose, nor could he include the debt or damages in the fee bill. The clerk has no right to issue an execution for the collection of his fees. That is the process of the judgment creditors, and the costs are included, to reimburse him, for what he is supposed to have paid to the officers, or if not paid, to enable him to pay the fees, for which he is liable to them. The officersi have no right, power or control over the execution. If the party will not advance his fees, or sue out his execution for their collection, for the benefit of the officers, to whom they belong, they may enforce the payment against each party from whom due, by this certified fee bill, which becomes, for this purpose, like an execution against the cost debtor.

The clerk took, therefore, no power under the 5th section, to issue an execution for his own costs. Giving the section the broadest construction possible, and it could only authorize him to issue, certify and seal his own fee bills.

But this view will prove too much. For if he has such power before the transfer of the records, can we limit it to the time of the transfer? May not the power continue for his benefit, after the transfer and delivery of the records to the Circuit Court? Such would also be the effect of the general power to issue executions, if it exist at all. And thus would be presented the uncertainty and confusion, growing out of a double clerkship, over the same records, one acting in the name of a court, *functus officio*, and the other in that of the existing jurisdiction. And all this confusion and difficulty, this double-offircering, this galvanizing defunct tribunals, this official custodianism, must be encountered, reconciled and submitted to, upon the constitutional postulate, that a party has, in the prosecution of his remedy, a right, at any moment, and without delay, to any appropriate process for its enforcement; and when there is no authorized official in a position to issue such process, it may be done by the temporary keeper of the records.

We do not admit the correctness of either of the two main positions assumed, and upon which the arguments are made, and from which, all the conclusions are drawn, and without one or both of which, it is impossible to sustain this judgment.

The act simply and absolutely repealed the acts organizing

the court, abolished its jurisdiction, and transferred the whole to the Circuit Court. From thence, thereafter, only could executions issue.

It is needless to speculate upon what may have been the effect of a simple repeal, without the provisions transferring the jurisdiction and business, and preserving the rights and remedies of the suitors. Such difficulties may be fairly met when presented. But the present regulation of the parties' remedy, by a change of the forums for its administration, is not to be confounded, although attended with a temporary delay, with its total abolition, and under this perverted view, to overturn the salutary powers of the legislature to amend and regulate the remedies, or to substitute private for public authority, in the administration of them.

We, as much as any one, regret the great mischiefs, growing out of this oversight of authority, for this sale, and the great losses of improvements and disturbance of titles. As far as such considerations could, they have had their full influence with us, as inducements to weigh fully and carefully, and anxiously investigate, all the arguments and reasons offered for our consideration. And the result has been, that we are unable to find any legal foundation for the power claimed and exercised in this case.

Judgment reversed and remanded.

Judgment reversed.

JOSEPH A. MCCONMELL, Appellant, *v.* JACOB BRILLHART, Appellee.

ERROR TO STEPHENSON.

To take a case out of the statute of frauds, no form or language is necessary; anything from which the intention may be gathered is sufficient, whether in memoranda books, papers or letters.

These must contain enough on their face, or by reference to fix the names of the parties, the interest or property to be affected, and the consideration to be given.

The party to be charged, or his agent, must sign the obligation; and parol proof of agency will hold the party who acts by agent.

The signing may be in the caption, in the body or at the end of an instrument.

The contract must be signed with an intent to enter into it, be mutual, reciprocal and upon good consideration.

Such contracts are not subject to alteration, but mistakes in them may be corrected—or the identity of parties, or the quantity of an interest, may be sometimes established by extrinsic facts.

THIS was a bill filed in the Circuit Court of Stephenson county,

in August, 1853, by Jacob S. Brillhart, complainant, against Joseph A. McConnell, to compel a specific performance.

The bill sets forth that on the 1st day of July, A. D. 1853, one Robert McConnell, in consideration of the written undertaking of said Brillhart to pay him, the said Robert, and the said Joseph A., the sum of one thousand dollars by the 1st day of August, 1853, for the N. E. quarter of Section 25, and the S. E. quarter of Sec. 25 T. 26 N., R. 7 E., 4th principal meridian, in the State of Illinois, the said S. E. quarter belonging to said Robert, and the N. E. quarter to said Joseph, did make under his hand and seal a deed for said S. E. quarter, and placed the same in the hands of said Joseph A., and directed him to deliver the same to said Brillhart, upon the payment of said $1,000, for said land,—$500 to said Robert, and $500 to said Joseph. And said billcharges that said Joseph A. is now in possession of said deed. That on the 3rd day of August, A. D. 1853, said complainant tendered said sum of $1,000 to said Joseph A., for the use of said Robert and Joseph A., and demanded said deed, with which demand said Joseph A. refused to comply.

Said complainant also alleges that on the 2nd day of July, A. D. 1853, said defendant was seized in fee of said N. E. quarter of said section, and that he entered into a written agreement to sell the same together with said S. E. quarter of said section, to said complainant for the sum of $1,000, and that he would on the 1st day of August, 1853, on the payment to him of $1,000—five hundred dollars for the land of said Robert, and five hundred dollars for Joseph A.—make to said complainant a good and sufficient deed for the same; that on said first day of August, said sum of money was tendered and demand made for a deed, but that said defendant then refused to execute the same; and said complainant avers his readiness to pay said sum; and seeks discovery, on oath, as to matters above charged.

And said complainant prays that said defendant be decreed to deliver to him the said deed so left in his hands; and also to "specifically perform said agreement to convey the tract of land secondly above described."

The defendant answered on oath to the matters charged in said bill, and denies that said Robert McConnell placed in his hands the said deed in the said bill mentioned, with instructions to deliver the same to the said complainant upon the payment of five hundred dollars to said defendant for the use of said Robert; and denies having any such deed in his possession, or under his control, at the time this suit was commenced, or since: denies that any tender was made to defendant, of $500 on the 3rd of August, 1853, for the use of said Robert, in payment for said tract

of land; denies entering into a written agreement with complainant to sell him the S. E. quarter of Section 25, for $500, or that tender was made thereof on the 1st day of August, 1853, in payment therefor.

Defendant admits that he wrote a letter to Dr. Michener, of Freeport, Ill., dated about the 17th May, 1853, in which he informed Dr. Michener that his and defendant's father's lands lying contiguous to his (Michener's) would be sold for one thousand dollars, and that said offer would hold good till July 1st, 1853, but that said letter contained no description of the land referred to; that about July 1st, 1853, defendant received a letter bearing date June 22, 1853, and signed by J. S. Brillhart, stating that the said Brillhart did not get the money he had expected; that a delay of about two weeks was necessary for him to get the money, and asking an extension of two weeks from the 1st day of July, and saying that at the end of that time "he would be ready to fulfil his agreement for this land."

That afterwards, on the 24th June, 1854, said claimant wrote defendant from Freeport, Ill., that he had so arranged his business that he could pay at any time if said defendant would "come out" and make a deed to him; and inquiring of said defendant when he would "be out."

That defendant wrote a letter in reply to the first of said letters, stating that " if said complainant would be ready by Aug. 1st, 1853, perhaps this defendant would be out to Illinois prepared to make a deed for lands."

Defendant denies that any written agreement was ever made between him and said complainant, and claims the benefit of the statute of frauds.

That on the 9th of July, 1853, defendant received another letter from said complainant, stating that said complainant was "ready at any time;" advising defendant to execute a power of attorney to Dr. Michener, to make deed, saying that complainant desired a warrantee deed, and that he would if Michener made deed, give him a draft on any bank defendant might direct. And defendant prays to be dismissed, etc.

To which answer complainant filed replication.

Said cause came on for final hearing upon bill, answer, pleadings and proofs, both written and oral; and at April term, A. D. 1856, said Court, SHELDON, Judge, presiding, rendered its decree, setting forth that it appears upon the proofs made in the cause, that defendant can make to the complainant a good title to a part of the land described in complainant's bill, to wit: the N. E. quarter of Sec. 25, T. 26 N., R. 7 E. 4 principal meridian, in the county of Stephenson, and State of Illinois; and it appearing

that the defendant did agree to convey said land to complainant, as stated in said bill, and that said defendant agreed to convey, or cause to be conveyed, the land above described, together with the said south-east quarter of said section belonging to one Robert McConnell, for the sum of 1,000, and that said defendant was to have $500 from complainant for the land first above described, and that said complainant has in all things complied with the terms of said agreement; it is therefore ordered, adjudged and decreed, that complainant, within thirty days, pays to the clerk of this court, for the use of the defendant, the sum of five hundred dollars, with interest from the first day of August 1853, also the further sum of thirty dollars for taxes, etc.

And that if said Joseph A. McConnell shall, within thirty days, file his election, in writing, to cause a conveyance of both of said quarter sections to be made to complainant for the sum of $1,000, with interest, and thirty dollars to be applied for taxes, etc., and shall within that time make conveyance to said complainant therefore, on said complainant paying to him said sum, then the said complainant shall, within thirty days, pay to said clerk, for the use of said defendant, said last named sums, and in default of so doing, shall not be entitled to any conveyance hereunder.

Upon the rendition of the foregoing decree, the said defendant prayed an appeal to the Supreme Court.

The following written testimony was introduced. First, a letter addressed to one Dr. Michener, as follows:

McCONNELLSVILLE, O., May 17, '53.

DR. MICHENER:

SIR—My brother arrived home last week in good spirits, and giving in his wild imagination a glowing description of your country. He informs me of the rapid growth and continued prosperity and advancment of that portion of our wide domain.

He also wishes me to drop you a note informing you whether *we* would dispose of some lamd lying contiguous to yours, and on what terms, as a friend of yours desired the information. In the first place, *we* are not eager to make sale, for I have serious thoughts of commencing improvements thereon the present summer. Had it not been owing to some indisposition, I would have arrived as early as this epistle, but cannot now tell how long it will be, as I am troubled with the chills and fever. occasionally, but will endeavor to break it up as early as possible *Provided, however, any person sees fit to give one thousand dollars for the half section and informs accordingly,* ONE OF US *will go out immediately with full power to convey the same to the purchaser.* Terms, cash in hand. Should this seem too steep for the buyer we will hold on, and if too low on our part, will abide the consequences.

And this agreement (proposition) will hold good until the first of July.

Yours, &c.,

TO DR. B. MICHENER. JOSEPH A. McCONNELL.

McConnellsville, O., July 2, '53.

Mr. Brillhart :

Sir—We received your note on yesterday, and hasten to reply. We feel willing to extend the time you require, although it has kept me at home during the past month awaiting your arrival, and do not feel like incurring much expense in order to effect a sale at this time. *And I am unable to tell* whether you expect to come again to Ohio, or look for *us* to go out there; but I think I shall go out to Illinois about the first of August, and if you will hold yourself in readiness, and let us know accordingly, I will go prepared to make conveyance, &c. Perhaps you are aware my father has not received his patent for his part, but no doubt it is at Dixon by this time; please write.

JOSEPH A. McCONNELL.

Although not offered in evidence, the following letters from the complainant to the defendant are stated in their answer to be all that ever were received by the defendant, and show clearly that no agreement was completed.

Stephenson House, Freeport, June 22d, '53.

Mr. McConnell, Esq.:—I have been to Ohio last week, but could not arrange my matters so that I could come and see you before I left. I did not get my money as I expected, but got checks which I had to send to New York to get indorsed, and as soon as they will be returned to me (which will be about two weeks) I will be there ready to fulfill my agreement for this land. This delay was unavoidable on my part, and hope you will extend the time about two weeks from the first day of July. As soon as I will be ready I will let you know. Please and let me hear from you soon, and also if I can send a telegraph dispatch to you, as it takes some time for a letter to go there. Yours, &c.,

J. S. BRILLHART.

Freeport, Ill., June 24th, 1853.

Mr. McConnell :

Sir—I wrote to you a few days ago that I would not be ready to pay you that money for your land by the first of July; but my business has made a turn so that I can pay you at any time, *if you will come out* and make a deed to me. I would like to hear from you, to know what time you will be out, so that I will be here when you come. *I would like to know soon*, for I want to build on it this fall, and would also like to get some broke in July, *or as soon as I can hear from you.*

Yours respectfully, J. S. BRILLHART.

Freeport, Ill., July 9, '53.

Mr. McConnell:

Sir—Yours of the 4th was received this morning, and in reply I would say that I am ready at any time. I should think the best way would be for you to send a power of attorney to Doctor Michener, and then he could make me a deed. I want a warrantee deed. By so doing you would save me expense of coming out to Ill. I intend to go to Iowa in a week or ten days. If I will go I will leave the money here for you, and if Michener will make me a deed I will give him a draft on any bank you may direct. I would like to improve the land this fall, or build a house

at least. It is more than likely that I will come to Ohio in five or six weeks, but if I will I shall leave the money, so that Dr. Michener can get it. Please answer soon.

Yours respectfully, J. S. BRILLHART.

Upon the hearing of said cause, the following *oral* testimony was introduced:

Barah Michener, a witness called on the part of the complainant, testified that he was acquainted with the complainant and defendant; that he has acted as agent for complainant, Brillhart, in negotiating with defendant, a purchase by complainant of defendant, and Robert McConnell, of land in Stephenson county, Ill.; that about the last of July or first of August, 1853, complainant informed witness that he had agreed to pay one thousand dollars for said land, and in his absence left that sum with witness to pay defendant upon delivery of deed: that witness informed defendant that he was prepared to pay the money and receive the deed; that witness showed defendant complainant's funds, to which he made no objection, but declared himself satisfied with them; that the land negotiated for is the east half of section twenty-five, township twenty-six north, of range seven east, in Stephenson county, Illinois; that he has seen letter dated McConnellsville, O., May 17, 1853; that it was written by Joseph A. McConnell's witness; that the land described in said letter is the same described in former answer; that said letter was an answer to one written by witness to defendant: that complainant replied to McConnell's letter; that defendat came to Freeport near first of August, 1853; that witness, as agent for complainant, tendered the defendant the sum of one thousand dollars for the land mentioned; that defendant told witness he had brought his farther's deed along; that Joseph A. McConnell told witness that the deed in his hands from his father to complainant, was for one of the quarters composing east half of section twenty-five, township twenty-six, range seven; that witness saw no other tender of money by complainant or his agent to defendant, except as before stated; that at the time of the correspondence with McConnell, witness owned land contiguous to land above described.

James Michener, a witness called on the part of complainant, testified: that he was acquainted with complainant and defendant; that defendant showed him deed of south-east quarter of section twenty-five, township twenty-six, range seven east, made by Robert McConnell to complainant, and stated that Robert McConnell gave the same to him, and instructed him to deliver said deed to complainant, upon his paying five hundred dollars for the same.

The appellant assigns for error, that: 1st, the court erred in rendering decree for complainant, necessary parties to said suit being omitted; 2nd, the court erred in rendering decree for a specific performance of part of the contract; 3rd, the evidence does not sustain the bill; 4th, the statute of frauds is a complete answer, as no written contract was proved; 5th, the pretended contract was not *mutual* nor certain, either as to terms or description of property; 6th, such decree of said court was contrary to evidence; 7th, such decree was contrary to law.

HIGGINS, BECKWITH and STROTHER, for Appellant.

U. D. MEACHAM, for Appellee.

SCATES, C. J. The leading principle that governs the case is one requiring contracts, or notes of memorandums of the contract to be in writting, and signed by the party to be charged therewith, or by some one by him thereunto lawfully authorized, under our statute of frauds and perjuries, which is a copy of the English statute.

Cases have been excepted out of the statute, where parol contracts have been in part performed by payments, possession and improvements, but I do not propose to examine or discuss this class.

Of cases within the statute, courts have been called upon to discuss every clause of it, and apply it to every variety of circumstances and facts; in ascertaining what sort of writing is sufficient, what it shall express and show upon its face, as to parties, description of the property, terms, conditions and price, who shall sign it—principal and agent—what will constitute an agency, what is a sufficient signing, &c., &c.

And 1st. There is no form of language necessary; anything from which the intention may be gathered, as in other contracts, will be sufficient.

2. Any kind of a *writing* from a solemn deed, down to mere hasty notes or memoranda in books, papers or letters, will suffice. Doty v. Wilder, 15 Ill. R. 407; Johnson v. Dodge, 17 Ill. R., post; Buckmaster v. Harrop, 7 Ves. Jr. R. 341, note 3; Clark v. Wright, 1 Atk. R. 12; 1 Humph. R. 326; 10 Ohio R. 402; 2 Bibb R. 98; 4 Bibb R. 466; 15 Vermt. R. 685; 1 John. Ch. R. 273; 13 Wend. R. 53; 1 Paige Ch. R. 434; 5 Wend. R. 103; 15 Pick. R. 159; 10 Conn. R. 192.

3. The writings, note or menoranda shall contain on their face, or by reference to others that is traceable, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest or property, as will be capable

of identification, and separation from other of like kind, together with the terms, conditions and price to be paid, or other consideration to be given. Barry *v.* Coombe, 1 Pet. R. 647, 650 ; Doty *v.* Wilder, 15 Ill. R. 407 ; Blagden *v.* Bradbear, 12 Ves. Jr. R. 466 ; 1 Atk. R. 12 ; Clinan *v.* Cooke, 1 Sch. and Leff. R. 31 ; Champion et al. *v* Plummer, 4 Bos. and Pull. R. 252 ; Dock *v.* Hart, 7 Watts and Serg. R. 172 ; Pipkin *v.* James, 1 Humph. R. 326 ; Anderson *v.* Harold, 10 Ohio R. 399 ; 5 N. Hamp. R. 540 ; 1 N. Hamp. R. 158 ; Allen *v.* Roberts, 2 Bibb R. 98 ; 4 Bibb R. 466 ; 3 A. K. Marsh. R. 443 ; 6 B. Monroe R. 100 ; 6 Gill Md. R. 66 ; 9 Gill Md. R, 205 ; 15 Vermt. R. 685 ; 1 John. Ch. R. 273 ; 13 John. R. 296 ; 5 Cow. R. 162 ; 1 Paige Ch. R. 434 ; 6 Wend. R. 103 ; 15 Pick. R. 159 ; 16 Maine R. 458 ; 10 Conn. R. 192 ; 4 Watts and Serg. R. 221.

4. The party to be charged, or vendor of lands, &c., or his lawfully authorized agent, shall sign it.

5. A verbal or parol agency is sufficient for this purpose. Doty *v.* Wilder, 15 Ill. R. 407 ; Johnson *v.* Dodge, 17 Ill. R., post ; Clinan *v.* Cooke, 1 Sch. and Leff. R. 31.(*a*)

6. The signing will be sufficient in the caption, or body of the memorandum, or by a subscription to it. 10 Ohio R. 402 ; 1 Pet. R. 647, 650.

7. The contract or obligation must be signed with intent to enter into it, must be mutual, reciprocal and upon good or valid consideration. Dorsey *v.* Packwood, 12 How. U. S. R. 134 ; Anderson *v.* Harold, 10 Ohio R. 402 : 1 Paige Ch. R. 434 ; 6 Wend. R. 103 ; 21 Wend. R. 139 ; 1 Barb. Ch. R. 499 ; Getman et al. *v.* Getman, 4 Paige Ch. R. 305; 16 Maine R. 458 ; 4 Watts and Serg. R. 221.

Contracts within the statute of fauds, are no more subject to change or alteration, or proof of their contents, &c., than other written contracts. Yet mistakes may be corrected. 11 Ohio R. 109. And the same degree of certainty, required in other written contracts, will be sufficient in contracts under the statute of frauds ; *id certain est, quod certum reddi potest*, is a maxim equally applicable to both.

So a return on an attachment of a levy on " all the right, title and interest in and to a certain piece or parcel of land, with the buildings thereon, situate in Columbia street, at the southerly part of Boston, and on one piece of land and the buildings thereon standing, being situate in Pleasant street in said Boston, which the within named Benjamin Huntington has to the estates before mentioned," was held sufficiently certain, and parol evidence might identify it, by showing that Huntington had but one piece on either street. Whitaker *v.* Sumner, 9 Pick. R. 311.

The same exceptions to the general rule of the inadmissibility

(*a*) See act of 1869, p. 3

of parol to explain written contracts, will apply here. The intention is to govern, and latent ambiguities may be explained, if any exist. The court may, therefore, inquire into the circumstances surrounding the parties, to gather every material fact relating to the person, who claims to be interested, and to the property which is claimed as the subject of disposition, for the purpose of identifying the person or thing intended or the quantity of interest, where a kowledge of extrinsic facts, can in any way be made ancillary to the right interpretation of the words used. 1 Greenl. Ev., Secs. 287, 288, note 3, p. 364. As a description," one half of the farm on which he, said Moses, then dwelt," parol admitted to show the land he lived on. Doolittle *v.* Blakesly, 4 Day R. 365; Venable *v.* McDonald, 4 Dana R. 336.

Testing the contract presented in these letters, by the principles laid down, and we find nothing wanting to show a valid contract within the statute of frauds.

Dr. Michener swears he wrote to plaintiff, as agent for defendant, to know whether he would dispose of (or they, as is insisted,) some land lying contiguous to his, and on what terms. The answer was a general offer to sell—" if any person sees fit to give one thousand dollars for the half section, and informs us accordingly, one of us, will go out immeditately, with full power to convey the same to the *purchaser*. Terms, cash in hand. Should this seem too steep for the *buyer*, we will hold on; and if too low on our part, we will abide the consequences. And this proposition will hold good until the first of July."

In his letter of July 2nd, plaintiff acknowledges the receipt, on the day previous, of defendant's acceptance of his offer and terms by letter. Their subsequent letters fully show the same, and that the 1st of August was fixed upon for the day of payment and conveyance.

Two objections are urged against these letters, for want of certainty in vendors, and in the description of the land.

These objections are more specious than solid. There is no uncertainty as to the other vendor, if there were two, as plaintiff expressly refers to his father as the other, when he remarks, "perhaps you are aware, my father has not received his patent for his part, but no donbt it is at Dixon by this time." But as his father never signed the letters, he did not become a party to the contract. The plaintiff stands alone, as vendor of both tracts; and accordingly brought a conveyance with him, from his father, to enable him to perform his agreement. He did sign, and is bound, and may not plead the statute for another, to avoid his own valid agreement. Having title to half only, defendant might, at his own election, rescind, or treat it as void,

and a fraud on him, in selling him land, to which plaintiff had no title. But he may, at his election, compel a conveyance of that part to which plaintiff has title, and resort to him for damages for the remainder. McConnell's heirs v. Dunlap's devisees, Hardin R. 41.

Lastly, the description of the land as a half section contiguous to Dr. Michener's, is susceptible of identification by parol, by showing that the half section, described in the bill, had been entered by McConnells, father and son ; that it lay adjoining the only land owned by witness, or was the only lands owned by them adjoining any land of witness, as was shown in the cases in 4 Day R. 265. and 4 Dana R. 336. This has been done, and we think the bill fully sustained by the proof.

Decree affirmed.

NELSON ALVORD, Plaintiff in Error, v. LAUREN N. ASHLEY, Defendent in Error.

ERROR TO LASALLE.

A highway may be established and proved by prescription, by dedication, and by laying out the same as directed by statute. (a)

The public is an ever existing body, capable of taking as grantee for public uses ; and its intersts are a sufficient consideration to support the grant, which may be manifested by express or implied consent, from acquiescence in the user ; and the user does not depend upon any fixed period of time.

The dedication is a mixed question of law and facts, as also the quantity of land included by it, to be submitted to the jury.

The actual use and repairing of a highway by the public, is evidence of its acceptance for such purpose.

A party will be estopped from denying a dedication by the acquiescence in it of his grantors.

The jury may infer and find the width of a road, or a dedication of so much of it as was actually used.

THIS was an action of trespass, *quare clausam.*

First plea, general issue. Second plea, public highway and supposed trespass within its limits. First replication to second plea, no highway. Second replication to second plea, trespass not in the highway. Issue found for plaintiff. Motion for new trial overruled, and judgment.

Plaintiff's title to the close, and that the defendant took down the fence and drove across it from north-east to south-west, was proved.

The plaintiff requested the courtu to instrct the jury as follows:

1st. If the jury believe from the evidence that the defendant

(a) Ante. 249 & notes & post 421

broke and entered the quarter section mentioned in the declaration, and that the said quarter section was owned by or in possession of the plaintiff at the time of such breaking or entry, then the jury should find the defendant guilty, unless the defendant has shown by proof that there was a public highway legally established and laid out across said quarter section, and that the defendant, in entering and passing across said quarter section, was all the time within the said road.

2nd. The burden of proving a highway, rests upon the defendant, after it is shown that he broke and entered the close; and it is also necessary to show by proof that the defendant in such case did not depart from the limits of said road while in said close.

3rd. A right of way across lands can only be acquired in three ways: 1st, by prescription; 2nd, by dedication; and 3rd, by laying out in the manner prescribed by law.

4th. In order to create a right of way by prescription, it must be shown by proof that the road claimed by prescription has been used for twenty years uninterruptedly, adversely and continuously under color of right, and that the owner of the land for twenty years has acquiesced in such use; such owner being in a position to object if he saw proper.

5th. Before the jury can find that the supposed roads, or any of them. exist, by dedication, they must believe from the evidence that the United States, while they owned the land through which the supposed roads passed, or the plaintiff since he has owned the land, intended to set apart and did set apart the ground over which said supposed roads run, for the use of the public for a highway; and that the public accepted the same for a highway by some public authority authorized to accept it.

6th. The mere act of making a fence along one side of the traveled track, by the plaintiff, when he owned the land on both sides of the traveled track, is not alone evidence of an intention to dedicate the land to the public for a road.

7th. If it is proved in the case that the plaintiff, soon after he purchased the land in question, notified the supervisor of roads that he did not acquiesce in the road running through said land, and forbid said supervisor from doing work on said road, and fenced up a part or the whole of the said road, and ploughed up the traveled track, these are circumstances tending to rebut any presumption of an intentioa to dedicate the road to the public.

8th. It is not competent for other persons along the line of travel to except the road for the public, even if it was dedicated by the plaintiff; the only way in which an acceptance can be made binding upon the plaintiff, is, that such acceptance

should be made by the County Commissioners' Court, or the County Court, or the commissioners of highways, of the town in which the road lies.

9th. A mere permission of the owner of the land for the public to pass across the land, will never ripen into a prescriptive right of way; but such permission is only a *license*, and may be revoked at any time by the owner of the land.

10th. The facts, that a public road has been used, traveled upon, worked upon, and recognized by, the public authorities, do never of themselves, establish a legal public highway. Proof of these facts merely furnish a presumption, that such is a regular highway, but these circumstances only furnish a legal presumption, which may be rebutted by the records, showing that such public road was not laid out in pursuance of the law.

11th. Although it is not necessary, in the first instance, for the defendant, in order to prove the existence of a public highway, to prove it by the records of the County Commissioners' Court, but the defendant may prove that the road was used and traveled upon by the public, and was recognized by the public authorities as a public road, and was worked by the supervisor, and this would be sufficient, *prima facie*, to establish a public road; yet when the records of the County Commissioners' Court are introduced by the plaintiff, which show a failure on the part of said court to comply with the provisions and requirements of the statute, then the presumption of the regularity of the proceedings, arising from such use, travel and work by the public, is rebutted, and the defendant is then bound to show that the statute has been complied with, in every essential particular necessary to make it a valid road, under the law.

12th. A public highway laid out under the law in force in 1845, whose width is not defined and named on the record, is void. In 1845, the law required the County Commissioners' Court to establish the width of the road *upon the record*; and if the jury believe from the evidence, that in 1845, the County Commissioners' Court, upon the report of Alvoid and Elliot, failed or omitted to fix the width on the record, of the road said viewers recommended, this omission is fatal to the legal existence of that road.

13th. Unless it is shown by proof that the road viewed and staked by Hawes, Roberts and Easterbrook, had a fixed, a determined width, such road is void.

14th. The commissioners of highways of the town of Eden had a right by law to ascertain, describe and enter of record the location of the road viewed and staked by Hawes, Roberts and Easterbrook, in 1830, if said road was not sufficiently described; and unless the proof shows that the place where

defendant broke and entered was within the limits of said road, as actually established, *that* road affords no justification to defendant for such breaking and entry.

15th. Under the law that was in force in 1845, when the County Commissioners Court had full power to vacate, upon petition in conformity to law, any State or county road in the county ; and if the jury believe from the evidence that said court in pursuance of a legal petition made an order vacating the roads across the land in controversy in the suit, then the roads so vacated would constitute no justification to defendant for entering upon the land.

16th. Private property cannot be taken for public purposes without just compensation, or a waiver of such compensation.

17th. No acts of other persons along the same line of travel, in fencing or building, can make such an acceptance of the roads as would bind Ashley ; nor can such acts prove a dedication on the part of Ashley.

18th. In order to create a right of way either by prescription or dedication, the proof must show a continuous and uninterrupted use of the same traveled track ; and evidence of travel sometimes in one track and sometimes in another track, such tracks being several rods apart, and sometimes one being used, sometimes another, such evidence does not show either prescription or dedication.

19th. A right of way cannot be acquired by prescription as against the United States, over land owned by them.

20th. A right of way by dedication cannot be created without some act or acts and declarations by the owner of the land avowing an intention to dedicate the ground for a public highway, *and* an *acceptance* thereof by public authority empowered by law to accept of such dedication.

The court gave all but the 8th, 13th and 19th, which were refused. To the giving said instructions and each of them, defendant objected. Objection overruled.

At the request of the defendant the court gave the following instructions :

1st. If the trespass alleged in the declaration consisted only in the defendant's driving his wagon and horses across the land described in the declaration in a highway or public road, and in taking down fences which had been erected across the said highway or road, they should find for the defendant.

2nd. If the jury believe from the evidence that there was a road used by the public generally for the purpose of public travel across the land of the plaintiff, and if said plaintiff permitted the public to use said road for such a length of time

that the public accommodation and private rights would be materially affected by an interruption of the enjoyment, he could not legally fence the same up, and prevent the further use of it by the public.

3rd. That if the minutes of survey do not show a road to be located in the place where it was actually staked and laid out, still, the staking and laying out must control in determining its location.

4th. It is not necessary to prove the location of a public road by the minutes of survey or other written evidence, but the same may be proved by persons who were along and assisted in the location of the road, and saw the stakes, if any, set, and the place where the road was actually staked out, is the place of the road.

5th. The owner of land through which a road is about to be located, must in the first instance and as soon as the fact comes to his knowledge, object to its location across his land. If he acquiesces in the location, opening and using it by the public, he thereby waives his claim for damages, and cannot afterwards shut up the road because his damages were not paid.

6th. That if two of the viewers appointed by the County Commissioners' Court actually located and staked the center line of a public highway across the land of the plaintiff described in declaration, and if said road so located was accepted, actually worked by the public authorities, and used by the public (with the assent of the plaintiff) for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment thereof, then such assent and acceptance amounted to a dedication to the public of the use of said road, and said plaintiff, after such dedication, had no right to fence the same up and prevent the further use of it by the public. And although the county commissioners may not have established any width, yet, in determining the location and width of the road dedicated, the jury may consider all the facts proved in the case, the ranging of the line of fences on the road, the distance of said roads apart, the acts of the plaintiff in fencing along the north line of the road, if these things are proved and all other facts which tend to show an intention on the part of the plaintiff to give the public the road through his land.

7th. If the centre line of a road was surveyed and located as mentioned in the last instruction, and if the plaintiff intending to dedicate to the public for a road a strip across said quarter section in the declaration mentioned, of the width of two rods on each side of the centre line, and if while intending to inclose a field on the north side of the road so that the south

line of the fence of the inclosure should be north of, parallel to, and two rods distance from, the said centre line of said road, he did inclose said field, and by mistake or inaccuracy extended his fences on the east and west so far south, that said south line of fence either diagnally crossed the surveyed and located road or was a little south of the surveyed and located road, then the facts which would amount to a dedication of a strip four rods wide south of the fence, if it had been placed where plaintiff intended to place it, would amount to a dedication of a strip four rods wide south of the fence as it actually was, as long as the plaintiff permitted his fence to remain where he had thus by mistake or inaccuracy placed it, and while said fence so remained, the public would have the right to travel along the south line of said fence and within four rods of it, although travelers might thereby pass over the land of the plaintiff which was south of the limits of the road.

Each of said instructions for the defendant were given by the court.

Verdict for plaintiff. Motion for a new trial overruled, and exception taken. The cause was tried by Hollister, Judge, and a jury.

GLOVER and COOK, and LELAND and LELAND, for Plaintiff in Error.

W. H. L. WALLACE, for Defendant in Error.

SCATES, C. J. We propose only to examine the instructions given for defendant, as errors apparent therein are sufficient to reverse this judgment.

The court very properly instructed the jury that a highway could be established and proven by prescription, by dedication, and by laying out the same in the manner provided by the statutes. 2. Greenl. Ev., Sec. 662.

Prescription for private rights and easements in the lands of others were, by the earlier decisions upon the old common law, made, times whereof the memory runneth not to the contrary. But gradually they began to conform to a fixed period of years which would bar a writ or action for the assertion of title, (see Angell on Lim. 2, 3, and notes,) in analogy to the statutes of limitation, and which was subsequently adopted as the rule in England by statute 2 and 3 William IV, Cap. 21. Prescription on twenty years' possession had become a fixed principle under the statute of limitations. 21 Jas. I, id., p. 3 and note 2. For though not so in name, it was so in effect, as a bar of any action for the assertion and maintenance of the right.

The date for legal memory was first fixed from remarkable periods, and then by statute, West 1, (3 Ew. I,) Cap. 39, from 6th July, 1189, the first day of Edward I's reign; by 32 Henry VIII, Cap. 2, it was shortened to sixty years, and to twenty years by 21 James I, Cap. 16; and distinctly recognized as a prescriptive right by 2 and 3 William IV, CC. 71, and 100 Best on Presump. 87 to 100, (22 Law Lib. 68, &c.;) Mathews on Presump. Ev. 309, 310; 2 Greenleaf Ev. Sec. 662; Ang. on Lim., pp. 11 to 14. So we make prescription in effect correlative with the bar of a real action to recover the land, or of a right of entry upon it. I will not here discuss what effect the shorter periods of limitation may have in reducing this period of prescriptive right by analogy.

We come to the question of dedication.

We have said in Warren *v.* Trustees of Jacksonville, 15 Ill. R. 240, that dedictations that may be made without writing, are not within the statute of frauds; that the public community is an ever existing body, capable of becoming and taking as grantee for public uses, and its interests are a sufficient consideration to support the grant. The mode is immaterial; the real thing is the grant or dedication which may be manifested by express or implied consent, from acquiescence in the user. And these positions are, we think, abundantly sustained by the authorities referred to; and it does not depend upon any fixed period of time,—2 Greenleaf Ev., Sec, 662, and notes,—but is a mixed question of law and fact, and the particular circumstances of each case will be submitted to the jury, not only of the dedication, but of the extent or quantity of land embraced in it. The voluntary use of a way by the public with the assent of the owner of the soil, may not of itself be sufficient to make it a public highway, and impose upon the proper public authorities the duty of repair; but when these are connected with proof of its actual recognition and repair by the proper public authorities, the whole facts should go to the jury, from which they might be warranted in finding from such use, by the public, acquiescence of the owner, and recognition and repair by the proper authorities, that the way is a public highway in the full sense of that term. The fifth instruction is not in conformity to these principle. It contemplates an affirmative act or declaration of a more formal and solemn character than is essential; for mere acquiescence in its known and avowed use and repair as a highway by the publi and public authorities, may justify the inference under circumstances, and its actual use and repair will be evidence of its acceptance for such purposes.

The sixth instruction would exclude an act of the owner as

evidence when taken alone, which we think is a proper fact to go to the jury.

The seventh instruction is too broad. Had it been confined to the defendant alone in its conclusion of rebuttal, and excluded any other acts or declarations of his than those recited, it might be correct. But he must be estopped by the acquiescence of his grantors, (even though it be the government, Diman *v.* The People, 17 Ill. R., post,) in which case the act recited could only repel the presumption from his own act.

Whether " mere permission of the owner of the land for the public to pass across it," amounts only to a " license, and may be revoked," is not a question of law in itself, but a fact, which, with the accompanying circumstances in this case of a recognition and repairing it by public authorities, should have been left to the jury.

The ninth instruction is erroneous.

The eighteenth is contrary to the principles laid down in Sprague *v.* Waite, 17 Pick. R. 315, 316, and Hannum et al. *v.* The Inhab. of Belchertown, 19 Pick. R. 313.

The twentieth is obnoxions to the same remarks and principles laid down in respect to the fifth.

The twelfth instruction would make the fixing of a width to the road an essential element of the validity of their order establishing it. And so I should treat it upon direct appeal from that order, as I have shown in Morgan *v.* Green, 17 Ill. R. post, 395. But these proceedings are here collaterally attacked, and after a use and repair by the public of some twenty-three years. The viewing and laying this road is cumulative, as is also that of a township road. The jury may infer and find a width ; they may infer and find a dedication of so much as was actually used, even extending to double tracks, as in 17 and 19 Pickering, and the conrt will intend that it was of the usual width fixed by law. Lawton *v.* Commissioners of Cambridge, 2 Caine R. 183.

By act of 1827, Rev. Law 1833, p. 542, Sec. 12, roads were to be not less than thirty nor more than fifty feet wide, and this was the law in 1830, when this road was viewed.

The act of 1845, Rev. Stat. p. 487, Sec. 33, fixed a maximum and minimum width for roads at sixty-six and thirty feet, within which the County Court was authorized to vary different roads. I should not declare the location and establishment of the road void for an omission to enter for it a width when collaterally assailed, but would intend it to be not less than thirty feet. (*a*)

Proof by plaintiff that he entered the close, and left it on and within the limits of the highway, might warrant the jury

(*a*) post 397.

in inferences that he had not departed from it in crossing the close.

The first and second instruction would restrain and forbid the jury from drawing legitimate conclusions as inferences from facts in evidence.

We need not comment upon the evidence ; the cause should be submitted to another trial.

Judgment reversed and cause remanded.

Judgment reversed.

NEHEMIAH SIMONS, Plaintiff in Error, *v.* JOHN S. WATERMAN, Defendant in Error.

ERROR TO DEKALB.

It is erroneous to exclude from the jury, evidence which tends to show that a plaintiff, by whatever name he sues, is not the person holding the legal interest in the notes sued on.

THIS suit was originally commenced before a justice of the peace in Kane county, by the defendant in error against the plaintiff in error, and judgment entered in favor of the defendant in error for $88.46, from which an appeal was taken to the Circuit court of said Kane county. The venue was changed to DeKalb county.

At the October term of the DeKalb Circuit Court, a jury was waived and the cause submitted to the court for trial, and the issue found for defendant in error, and his damages assessed at $97.66, and judgment rendered thereon. J. G. WILSON, Judge, presided.

The bill of exceptions shows that on the trial the defendant in error offered in evidence two promissory notes, to wit :

"$42.72. *Sycamore, November* 3, 1852.

One day after date,—promise to pay the order of J. S. & J. C. Waterman, forty-two and 72-100 dollars, value received, with interest at ten per cent.

NEHEMIAH SIMONS."

Indorsed on back thereof,

"Pay J. S. Waterman,

J. S. & J. C. WATERMAN."

"$33.00.

Sixty days after date, for value received I promise to pay J. S. Waterman, or order, thirty-three dollars, with interest at ten per cent.

"*Sycamore, Nov.* 23, 1852. NEHEMIAH SIMONS."

To which evidence the plaintiff in error objected, which objection was overruled, and the opinion of the court excepted to.

The plaintiff in error offered to prove that the name of the plaintiff was John C. Waterman, and that J. S. Waterman, to whom the notes were delivered, was James S. Waterman, which was objected to by defendant in error, and the objection sustained, and the opinion of the court excepted to. This was all the evidence given.

A. C. ALLEN, for Plaintiff in Error.

A. M. HERRINGTON, for Defendant in Error.

SKINNER, J. This action was commenced before a justice of the peace and appealed to the circuit court, where judgment was rendered for the plaintiff.

On the trial the plaintiff read in evidence two promissory notes executed by the defendant—one payable to " J. S. and J. C. Waterman, " and assigned by them to " J. S. Waterman ; " the other payable to " J. S. Waterman. "

The defendant offered to prove that the name of the plaintiff was " John C. Waterman, " and that " J. S. Waterman, " to whom one of the notes was made and the other assigned, was " James S. Waterman. " The plaintiff objected, and the court sustained the objection.

If the evidence tended to prove that the plaintiff, by whatever name he sued, was not the real person holding the legal interest in the notes sued on, then the evidence was improperly excluded. And if the plaintiff, who sued by the name of John S. Waterman, was in fact John C. Waterman, and that James S. Waterman, who of necessity was somebody else, was the person holding the legal title to the notes, then it would follow that the plaintiff had no right of action.

The evidence, as we understand the record, tended to prove that the plaintiff was not the person having the right of action upon the notes, and therefore improperly excluded.

Judgment reversed and cause remanded.

Judgment reversed.

ELIJAH BOWERS, Plaintiff in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO RECORDER'S COURT.

To constitue the offence of resisting an officr, he must be authorized to execute the process, which must be a legal one; and it must be so alleged and proved,
The averment that the officer was in the due execution of his duty, as constable attempting to serve a legal process, will sufficiently declare the validity of the process, and the official authority to serve it
A sentence to imprisonment in the Bridewell of the city of Chicago, is legal.

At the January term of the Recorder's Court, of the city of Chicago, 1856, R. S. WILSON presiding, the following indictment was found:

The grand jurors chosen, selected and sworn in and for the city of Chicago, of the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oath, present, that Elijah Bowers, late of said city, on the twenty-first day of December, in the year of our Lord one thousand eight hundred and fifty-five, in said city of Chicago, in the county and State aforesaid, in and upon one Michael Hickey, in the peace of the said people then and there being, and being then and there a public officer, to wit, a constable, and being then and there in the due execution of his duty as such constable, and being then and there attempting to serve a lawful process, did then and there unlawfully, knowingly and willfully resist, obstruct and oppose, and him, the said Hickey, acting as such officer, he the said Elijah Bowers, did then and there beat, wound and ill-treat, contrary to the statute and against the peace and dignity of the same people of the State of Illinois.

D. McILROY, *State Attorney.*

The said Elijah Bowers was arraigned and plead not guilty; and a jury having been impanneled, such proceedings were thereupon had, that said jury rendered a verdict against said Elijah Bowers. And thereupon a motion was made by defendant's counsel in arrest of judgment. And the court overruled said motion in arrest, &c., to which decision of the court, overruling the motion in arrest, the counsel for defendant then and there excepted. And the court ordered that the said defendant, Elijah Bowers, be fined in the sum of one hundred dollars, and that he be taken from the bar of the court by the sheriff of Cook county, to the Bridewell of the city, and be delivered to the keeper of said Bridewell, who was required and commanded to take the body of said Elijah Bowers and confine him in said Bridewell in safe and secure custody of labor, for the term of six months; and that the said defendant pay all the costs of these proceedings, and stand committed to the custody of the said keeper until said fine and costs are paid.

The defendant, by his counsel, alleges the following grounds of error in said record:

1st. The indictment attempts to charge two supposed, separate and distinct offences, and fails legally to charge either.

2nd. There is no sufficient and legal allegation of the official capacity of the supposed officer within the meaning of the laws.

3rd. There is no legal or sufficient description of the supposed legal process attempted to be served.

4th. The supposed process is not set out in the indictment, nor from what court it is issued.

5th. The judgment and sentence are illegal and unconstitutional.

6th. The indictment is, in other respects, illegal and insufficient.

7th. The overruling of the motion in arrest was illegal and erroneous.

ANDREW HARVIE, for Plaintiff in Error.

W. H. L. WALLACE, District Attorney, for The People.

SKINNER, J. This was an indictment against Bowers for resisting an officer. The indictment charges that Bowers, on the twenty-first day of December, 1855, at Cook county, Illinois, in and upon one Michael Hickey, the said Michael Hickey then and there being a public officer, to wit, a constable, and being then and there in the due execution of his duty as constable, and being then and there attempting to serve a lawful process, did then and there unlawfully, knowingly and willfully resist, obstruct and oppose, and him the said Hickey, acting as such officer, beat, wound, ill treat, and so forth.

The defendant below contends that the indictment is insufficient for want of an averment that Hickey was an officer of Cook county, and because it does not set forth or describe the process which he was attempting to execute when resisted. To constitute the offence of resisting an officer, the officer or person resisted must be authorized to execute the process, in the execution of which he is resisted, the process must be a legal process, and this, to justify a conviction, must be alleged in the indictment, and proved on the trial. The offence consists in resisting or opposing the officer while acting in his official capacity. The writ or process which he is attempting to execute when resisted must have emanated from a court, or person having jurisdiction and authority to issue it; and the officer must, at the time and place, be authorized in law to serve or execute the same. The averment that Hickey was in the "due execution of his duty as

such constable,"and "attempting to serve a lawful process" at the time and place resisted, includes the validity of the process; and the averment that he was "then and there a public officer, to wit, a constable," and " then and there in the due execution of his duty as such constable," is an averment of his official capacity and jurisdiction to serve the process. A general averment that the process was a *lawful process*, and the person resisted, a *public officer*, *authorized* to execute the same, in the execution of which he was resisted or opposed, is sufficient allegation, both of the validity of the process, and the jurisdiction of the officer. To prove the accused guilty, the process must appear, on its face, to be a *lawful process*, which might be lawfully executed at the time and place; and it must appear that the officer resisted was authorized to execute it, and that the accused obstructed, resisted or opposed, the officer in executing, or attempting to execute the same. Mc Quoid *v.* The People, 3 Gil. 76. The indictment being sufficient, the court below property overruled the motion in arrest of judgment. The court sentenced the defendant to pay a fine of one hundred dollars, and to imprisonment in the Bridewell of the city of Chicage for six months. The defendant questions the legality of the sentence as to imprisonment in the Bridewell. This question has been settled by this court. Private Laws of 1851, 146, Sec. 50; Laws 1853, 147; Perry et al, *v.* The People, 14 Ill. 496.

Judgment affirmed.

CHARLES MCDONNELL, Plaintiff in Error, *v.* JAMES OLWELL *et al.*, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

An affidavit to a plea, in which the party states that he has a defence to the merits of the action, omitting the word " good," is'sufficient, under the act regulating the practice in the Circuit and Common Pleas Courts of Cook County,and perjury may be assigned upon it,if the plea were wholly frivolous.
The said act of 12th February,1853,was clearly within the consiitutional power of the Legislature to inact.

THIS was an action of assumpsit brought to the Cook county Court of Common Pleas; to which the defendant pleaded non-assumpsit, supported by affidavit of merits, stating that the party who made it, was defendant in the suit, "and that he has a defence therein on the merits."

On motion of counsel for plaintiff, the plea and affidavit were struck from the files, because of the insufficiency of the affidavit

to the defence on the merits. To which the defendant excepted. On motion of counsel for plaintiffs, default was thereupon entered and judgment was taken for the plaintiffs.

J. M. WILSON, Judge, presided. The judgment was entered at the vacation term, in April, 1855. The defendant, below, brought error.

BLACKWELL, BALLINGALL and UNDERWOOD, for Plaintiff in Error.

HARVIE and TULEY, for Defendants in Error.

SCATES, C. J. There are but two questions presented in this case—1st, the sufficiency of the affidavit of merits, and, 2nd, the constitutionality of the act of 12th Feb., 1853, regulating the practice of the Circuit and Common Pleas Courts of Cook county.

The plaintiff pleaded the general issue, and made affidavit that he had "a defence therein on the merits," omitting the word "good" as contained in the phraseology of the act.

We are not able to read the statute in a sense requiring defendant to swear to the goodness of his defence in the view, light or sense of making it successful, by sustaining it at all events upon the trial—but in the sense that he has really, truly, *bona fide* a defence to the merits, and which, under a plea to the merits, he ought to be allowed to present, and have investigated, and judgment passed upon its goodness in the sense of sufficiency as an answer to the action in bar, or partial bar of a recovery.

If defendants are required to swear to the goodness of their defences upon the merits, in the sense of sustainable sufficiency, few could, with a conscience void of offence, make defence at all, although circumstances of real controversy might exist, which would demand and justify an investigation on a defence to the merits. The act never contemplated that defendants should form such solid convictions and firm judgments in their own minds, of the sufficiency and goodness of the defence, as to swear to the legality and justice of its grounds. Many controversies involve counter explanatory facts, and principles of law, that can only be clearly known, understood and judged of, upon full investigation, and the final result. Where controversies of this character exist, in matters of contract, involving the legal sufficiency of the merits of the defence in doubt, and yet the party genuinely, truly, in good faith, believes the contract ought not to be enforced against him, and that the facts showing the grounds of his defence ought to be investigated, and adjudged according to law, surely the statute was not intended to cut him off without a hearing, because he does not, or cannot, conscientiously

swear that the defence will prove "good" upon the trial. Where a plea or notice is put in, which is good in substance to present a defence upon the merits—accompanied by an affidavit of merits in the defence, it necessarily includes "good" in the sense of a real, genuine, *bona fide* defence, such as would be admissible under the pleading, and, in contradistinction to its being frivolously or groundlessly done. It must be in this sense, and this alone, that we can understand a party when he swears he has a defence upon the merits. And, if knowingly false in this sense, we cannot doubt that perjury could be assigned upon it under the statute, without the word "good" being in it. The language imports the full sense without that word—and we are unable to conceive any explanatory subterfuge, admissible as a legal answer to perjury under the general statement, which would be excluded by the additional "good defence" in the affidavit. We are, therefore, of opinion that the affidavit in this case is sufficient.

We have no reason to doubt the power of the legislature, under the constitution, to regulate the remedies, and practice in a part of the courts of general jurisdiction, to suit the exigencies of the public interest, by expediting the disposition of causes therein. The proposition implies a want of power in the legislature to adapt the forms of action, process, and practice in courts of certain localities, to the forms and modes best suited to the dispatch of business accumulating in them. This would seem to be more technically strict than might be required in the construction of the clause authorizing the organiztion of inferior courts in cities—which only restricts the power to an uniform organization and jurisdiction," and which latter, peradventure, might be administered through forms of action, processes, and practice, differing from other superior courts of the State.

The constitution has delegated the whole judicial power of the State to "one Supreme Court," (Art. 5, Sec. 1,) with "original jurisdiction in cases relative to the revenue, in case of *mandamus*, *habeas corpus*, and in such cases of impeachment, as nay be by law, directed to be tried before it," with "appellate jurisdiction in all other cases," (Art. 5, Sec. 5); to "circuit courts," with "jurisdiction in all cases at law and equity, and in all cases of appeals from all inferior courts," (Art. 5, Sec 8); "in County courts" whose "jurisdiction shall extend to all probate, and such other jurisdiction as the General Assembly may confer in civil cases and such criminal cases as may be prescribed by law, where the punishment is by fine only, not exceeding one hundred dollars," (Art. 5, Sec. 18); and in "Justices of the Peace," who shall "exercise such jurisdiction as may be prescribed by law," (Art. 5, Sec. 27). The constitution has thus

conferred, defined and divided out this judicial jurisdiction—but has not prescribed the forms and modes in which it is to be exercised—and, consequently, uniformity is not, and cannot be made one of the requirements of the constitution; unless jurisdiction is made to include it, and this would extend alike to each and all the courts. A construction of the constitution which would require the forms of action, processes and practice of all the courts to be the same, is wholly inadmissible. The constitutional power to regulate remedies, has, I believe, been universally and uniformly admitted, and supported by the courts.

The case before us has been a mere regulation of the practice in the courts of one county, and clearly within the constitutional powers of the legislature to make.

In Vanzant *v.* Waddel, 2 Yerg. R. 260, new and additional remedies, confined to creditors of two banks, were sustained as constitutional. But that case, and the one before us, are very unlike the other cases cited in argument.

In Wally's Heirs *v.* Kennedy, 2 Yerg. R. 554, the act provided for dismissing Indian reservation cases, where prosecuted for the use of another—and was, therefore, a particular, private, partial law, and not a general public law—and in its operation disvested private right by denying all remedy.

So a special act authorizing the guardians of the minor heirs of Jones to sell the real estate descended to them, and to apply the proceeds to the payment of the debts of decedent, was held to be unconstitutional on the same ground, and for the additional reason that it was the exercise of judical power. Jones' Heirs *v.* Perry et al., 10 Yerg. R. 59. See also, 4 Yerg. R. 202; 5 Yerg. R. 350.

Yet a grant of power to a father to sell the land of his children and put the proceeds at interest for the benefit of the infant owners, was constitutional. It is not the exercise of a judicial power—but ministerial and beneficial to those interested, by enlarging the power of others to do for their benefit what they lacked power and capacity to do for themselves. Rice et al *v.* Parkman, 16 Mass. R. 326. This may not, however, authorize the suspension of the Statute of Limitations in favor of a particular individual or case, as decided in Holden *v.* James' Adm'r, 11 Mass. R. 397. Nor does the creation of a special court for the determination of suits by a bank against her officers and other defaulters to it fall within legislative powers. Bank of the State *v.* Cooper et al., Appendix 2 Yerg. R. 599. So is a partial discrimination between citizens, by making an embezzlement of funds of a particular bank, or false entries by its officers, agents or servants, felony in them, and not in others; or in like cases of all banks and all persons, Budd *v.* The State,

3 Humph. R. 483, not within the constitutional power of legislation.

But we see no analogy between such cases and the case at bar, regulating the practice in the courts of one county, applicable to all suitors in those courts.

Judgment reversed and cause remanded for replication to the plea.

Judgment reversed.

THOMAS NEWLAN, Appellant, *v.* THE PRESIDENT AND TRUSTEES OF THE TOWN OF AURORA, Appellees.

APPEAL FROM KENDALL.

In an action of debt for violating of a town ordiance, against selling liquor, in order to justify a recovery, it should be shown that the liquor had been sold, after the ordinance took effect.

THIS was a suit brought by the appellees against the appellant, on 17th day of December, 1853, before a justice of the peace, to recover certain penalties for the alleged violation of alleged ordinances of the town of Aurora—for selling liquor—and brought by appeal and change of venue to the Circuit Court of Kendall county, and tried at September term, 1855, before HOLLSTER, Judge, and a jury. Judgment of $100 against appellant.

Plaintiffs below proved " the sale by defendant, within the limits of the town Aurora, of whisky and beer, at various times,"(the proof does not show *when.*)

DAY and PARKS, for Appellant.

R. G. MORTON, for Appellees.

SKINNER, J. This was an action of debt, brought by the Trustees of the town of Aurora, against Newlan, to recover penalties for alleged violations of an ordinance of said town, passed June 30th, 1853, and providing: " that any person who shall sell within the limits of the corporation of the town of Aurora, any whisky or beer, or any other alcoholic or intoxicating drinks, in any quanity, shall be fined for every offence twenty-five dollars."

The bill of exceptions states, that on the trial, "the plaintiffs

proved the sale by the defendant, within the limits of the corporation of the town of Aurora, of whisky and beer, at various times."

It does not appear *when* the sales were made, and without some evidence tending to show a sale after the ordinance took effect, the plaintiffs in no view of the case could recover. The circuit court should therefore have granted a new trial, the finding of the jury against the defendant being without evidence to justify it. (*a*)

No opinion is expressed as to the validity of the ordinance.

Judgment reversed and cause remanded.

Judgment reversed.

WILLIAM JONES, the younger, Appellant, *v.* WILLIAM GOODRICH, Appellee.

APPEAL FROM COOK.

Where the proof taken in a case, shows that the action accrued to a person, who was doing business in the name of Goodrich & Co., and that the defendant knows that the business was for the benefit of Goodrich alone, proof of the account in the name of Goodrich & Co., will sustain an action in the name of Goodrich.

A person has a right to adopt the style of a firm, for business purposes.

THE opinion of the court gives a statement of the facts.

Judgment by MANNIERE, Judge, upon the verdict of a jury, at November term, 1855.

WILKINSON, DOW and PEARSON, for Appellant.

CORNELL, JAMISON and BASS, for Appellee.

SKINNER, J. This was an action of assumpsit, by Goodrich, against Jones. Verdict for plaintiff, and motion for a new trial overruled. The appellant assigns for error, that the circuit court refused a new trial, and admitted in evidence the deposition of Birney, taken on the part of the plaintiff. The evidence shows, that Jones was in the employ of Goodrich, who was doing business under the style of "Goodrich & Co.;" that Goodrich advanced to him while so employed, moneys beyond what he was entitled to for his services; that the items of the moneys so advanced, were charged to Jones in the books of Goodrich, kept in the name of "Goodrich & Co.;" that Jones was familiar with

[*a*] Barnett vs. Newkirk, 28 Ill. R. 62; Teft vs. Size, 5 Gil. R. 432 & notes.

the books, examined the account, and made no objection to its correctness. The proofs seem to us sufficient, to justify the jury in finding that Goodrich had no partner, and that the money was due from Jones to him alone. The deposition of Birney, is accompanied by a copy of the account against Jones, taken from the books of Goodrich, with which Jones was conversant, and which were kept in the name of "Goodrich & Co."

The deposition proves this account and it is objected that the same is irrelevant to the issue, because the account is between "Goodrich & Co.," and Jones, and because the proof of it establishes an indebtedness to a firm doing business under the style of "Goodrich & Co." and not a debt to the plaintiff.

This would be a good objection, were it not proved that the plaintiff had no partner, and adopted for business purposes, the style of "Goodrich & Co." This he had a right to do, and was not estopped thereby from proving that he alone was the real party legally interested, and the only representative of "Goodrich & Co." Moller *v.* Lambert, 2 Campb. 548; Teed *v.* Elworthy, 14 East. 210; 2 Greenleaf Ev. 278.

Judgment affirmed.

EDWARD CASTLE *et al.*, Plaintiffs in Error, *v.* WILLIAM D. JUDSON *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

To entitle a party to a default at a vacation term, under the practice act of 1853, service of the declaration and rule to plead must be made ten days before the term.

If a party shall plead, demur, or enter a motion in a cause, though filed after the rule to plead had expired, if not placed in default by order of the court, he will be in time; and the plea or motion will stand for answer or hearing.

An affidavit of merits filed with a plea need not be in the express words used in the practice act.

The four days' notice required to be given for the hearing of a motion, if the motion is not reached for hearing, will stand good for the particular matter without a renewal of it. Pleadings will also stand for hearing from term to term in like manner.

THIS was an action of assumpsit, brought by the defendants in error, and returned to the Cook County Court of Common Pleas, at vacation term for June, 1854. The declaration was filed on the 17th of May preceding. On the sixth of June the plaintiffs in error, (defendants below,) filed a plea of the general issue, also a plea of partial failure of consideration; and, third, a like plea, alleging that the indorsees of the notes sued on the plain-

tiffs in the action below, had notice before assignment to them. To which one of the defendants below made affidavit that he had a just and legal defence to the action, to the amount of two hundred and thirty-one dollars and ninety-nine cents, which should be deducted from the said claim mentioned in said plaintiffs' declaration. On the eighth day of June, at said vacation term, on motion of the plaintiffs, the Court of Common Pleas, J. M. WILSON, Judge, presiding, ordered, that the pleas be stricken from the files for want of a sufficient affidavit of merits, and that a default be taken and entered for want of a plea; and proceeded to render judgment for the amount claimed, and for costs. The defendants below sue out this writ of error.

DEWOLF and DANIELS, for Plaintiffs in Error.

G. GOODRICH, for Defendants in Error.

SCATES, C. J. The defendants instituted this action in assumpit, to the June vacation term of the Cook County Court of Common Pleas, and counted on a promissory note, made by plaintiffs, payable to their own order, and indorsed by them to defendants, and also upon the common counts. Plaintiffs filed three pleas: First, general issue; second, a partial failure of consideration in this, that note was given for goods bought of defendants, which they failed to deliver; and, third, a partial failure, in the non- delivery of goods bought of third persons, for which the note was given, and of which defendants had due notice.

With these pleas plaintiffs filed an affidavit of Castle, in which he states that he has "just and legal defence to the said plaintiffs' (defendants') action, to the amount of two hundred and thirty-one dollars and ninety-nine cents, (the amount set forth in the two pleas of partial failure,) and which said sum of two hundred and thirty-one dollars and ninety-nine cents should be deducted from the said claim mentioned in said plaintiffs' (defendants') declaration."

These pleas were "stricken from the files of the cause, for want of an affidavit of merits to their defence herein;" and, upon this state of facts questions are presented, involving a construction of the several provisions of the act of 12th Feb., 1853, regulating the practice in the Circuit and County Courts of Common Pleas of Cook County.

There are four other causes now before us, involving constructions of different provisions of this act. Although this record does not call for adjudication upon these several questions, yet we may find it conducive to a full and clear interpretation of

the true intention and meaning of the legislature, to notice all the objections in one connected view.

The constitutionality of the act has been challenged upon grounds, and sustained for reasons set forth more at large in McDonnell *v.* Olwell et al., ante, p. 375. The evils intended to be remedied were the great delays in reaching and trying causes in the several courts of Cook county, having general civil jurisdiction, occasioned by the great number of collection and other suits brought in those courts, accumulating upon the dockets there under the common practice and pleading, and without vacation terms with power to enter defaults, and render judgments thereon.

The object of the act seems to be to facilitate and expedite the disposition and trial of causes brought there, so as to prevent unnecessary delay to suitors from the great accumulation of causes, upon frivolous defences, as is very manifest from the provisions of the fourth section, which authorizes "judgment, as in case of default," when the court shall adjudge a demurrer, plea or motion, to be frivolous. Acts 1853, p. 173.

We should keep this object in view in interpreting the provisions of this act, and give it a liberal interpretation to accomplish that end.

The act partially restores the common law practice, by authorizing vacation terms in which defaults may be taken, and judgments be entered. But it is modified by limiting the rights of a party to a default and judgment, to a hearing for that purpose, before the judge or court in vacation. In addition to the power to hear motions for defaults and enter judgments thereon, and to hear demurrers and other preliminary questions, to bring causes to issue, and to render judgments, as in case of default, when these are deemed frivolous, it is authorized by agreement of the parties, (Sec. 5,) to try causes and enter judgments. And for this purpose it may summon a special jury from the bystanders, (Sec. 4,) and assess damages on defaults without a jury, (Sec. 6). Yet the judge has power, by order, to cause both grand and petit juries to be summoned to such terms, (Sec. 16). There are various other provisions providing for judgment liens —chancery causes, writs of error and appeals, continuances of issues at trial terms, creditors' bills and attachments —and all seem to point to one object, and that is the disposition of all business at vacation terms, except issues at law, which are clearly designed to be made up for trial; and, if not tried by agreement, sent to the trial terms, with a preference over all other business, (Sec. 1).

Having presented this general outline of the provisions of the act, tending to establish and carry out the object assumed, we feel assured that an easy solution will be found for all the diffi-

culties raised upon the construction of the 2nd, 3rd and 14th sections, and every apparent discrepancy reconciled.

The third section has exclusive reference to vacation terms, and although any kind of action may be brought to such terms, and defaults taken at them, yet plaintiffs must serve a copy of the declaration and rule to plead as at common law, to entitle them to ask a default. The service of the declaration and rule must be made ten days before the term, like a summons.

When the party has complied with these provisions, he stands in a position to ask a default; and this would be his right, unless, before it is asked, the defendant should have taken some step to prevent it. What may that be? It is contended—and seems to have been adopted in practice—that a plea, demurrer, or motion must be filed before the expiration of the day named in the rule to plead; and will not be allowed or received afterwards, although filed before any motion is made for a default, or other step taken. This seems to be one step towards a literal interpretation of the statute. There is nothing in the statute to prevent the giving a rule to plead, which may expire at a subsequent day of the term, although the service of it with the declaration must be made ten days before the term. If so,—reading the statute literally,—the defendant must, "before the expiration of said ten days,"—the ten days' service before the term —plead. This would in all cases require a plea before the commencement of the term, and before the expiration of the rule, where it fixed a day subsequent. And this literal strictness would be as applicable to all other kinds of actions as to those "founded on a contract." A strictness of interpretation and practice which may prevent delay and cut off frivolous defences, should be sustained, and is promotive of public justice. But beyond such ends, I find no reason in its support, and can foresee that much injustice and oppression may grow out of it.

Under general or special rule days, by the common practice, I have never known a plea rejected or sticken from the files, though filed after the rule expired, if done before any further step or motion in the cause.(*a*) So I understand the special rule authorized by this section to be entered with service of it ten days. The defendant does not stand in default, simply by the expiration of the rule, but may at any time be put in default by order of the court, if so ordered before plea filed. This will accomplish all that is designed, as I think, and all that is desirable to prevent delay. Such are the mutual rights of the parties under this act, up to the time of moving for default.

What then, will answer the motion and prevent a default? First, I answer, pleas of a dilatory character. It may be by plea in abatement, demurrer, or motion to quash, as enumerated in the act, or I might add, for a continuance for want of copy

(*a*) But see Flanders vs. Whitaker, 13 Ill.R. 707; Cook vs. Forest, 18 Id. 581.

of instrument or account sued on, &c.; and secondly, it may be by plea to the merits. If these are not adjudged frivolous, they must be answered, and a default cannot be entered. All kinds of actions, as I have said, may be brought to vacation terms, defaults entered, damages assessed by a jury, (see Sec. 4) or by the court, (see Sec. 6) and judgments rendered, unless arrested by plea, demurrer, motion, &c., not adjudged frivolous. But in passing upon this characteristic of a plea in bar to the merits, I cannot admit an unlimited or discretionary judgment of it, as mere matter of fact or opinion. So far as the act authorizes, the court may go. To facilitate and expedite the collection of debts, the act has introduced a distinction between actions arising or founded upon contracts, and other causes of action. In the former, the plea must be supported by an affidavit "that he believes he has a good defence to said suit upon the merits." For want of this, a plea in bar may be treated as frivolous; while at the same time, a plea in abatement, demurrer, or motion to quash, will be heard and examined upon their merits before they be so adjudged. All pleas in bar, import merits in the defence; yet some, like the general issue, disclose no particular fact or ground to enable us to judge of the character of their merits. The affidavit is therefore intended to inform and satisfy the court of the existence, in truth, in fact, in good faith, of a real defence existing according to such facts as would be admissible under such a plea. Do we subserve the ends of public justice, and carry the legislative intent into effect, by adhering literally to the phraseology of the act? The legislative phrase has its equivalents in other language, and the affidavit before us is more than equivalent. I do not deem the exact language of the act indispensable. No reason exists, as in actions of slander, for holding the party to the exact words and phrases. Here the party swears he has a "just and legal defence," to the amount of $231.99, and that that sum should be deducted, for a failure of the consideration to that extent. Such a defence is equal, and, it seems to me, stronger, than the assertion merely of a "good defence" "upon the merits." This affidavit is full and sufficient under the third section, and the pleas should not have been stricken from the files. The legislature characterizes, in the 14th section, this affidavit as an "affidavit of merits" merely, "as hereinbefore provided." The supposition that the affidavit in the third section was an essential prescribed form, and not to be understood as a general provision for one of merits in any appropriate phraseology, has led to a supposed conflict of the provisions of that and the 14th section. I see no apparent conflict or discrepancy between them.

The 14th section has simply extended that provision of the third section, which requires an affidavit of merits, to the plea in all suits arising on contracts, brought to *any* term,—trial as well as vacation terms ; and it may be, also, without any service of a copy of the declaration and rule to plead, as is required at vacation terms.

It amounts, in effect, simply to an emendation of the old practice at the regular terms, by requiring an affidavit of merits to a plea to the merits in suits on contracts. And doubtless with the same object—to facilitate and expedite collections, by putting all suits on contracts upon the same footing by cutting off pleas to the merits, which were without foundation in truth and fact, but wholly frivolous, and for delay merely.

Indeed, this is the most essential change in the pleadings extending to the regular trial terms. The practice is a little changed by the action of the vacation terms, disposing of most matters of form, and preparing and sending a docket of issues to the regular terms, and giving preference to jury trials. (Sec. 1.)

There is another provision of this act which I think has no reference to regular or trial terms, and that is the four days' notice to be served on a party, to enable him to take up a motion, plea, or other matter, cognizable at a vacation term. This provision has not altered the rights of parties, changed the power of the courts, or the practice at regular terms. But parties may proceed as heretofore, yet so as not to interfere with preferences given in the disposition of jury trials.

These notices are to be served four days before the term, regularly docketed and disposed of. But in case they are not reached at their return term, there is no provision requiring a repetition of a new notice for the same matter at a snbsequent term. One notice, like a summons, will stand good for the particular matter. Such seems to be the sense of the proviso to the third section. If defendant file a plea in abatement, demurrer, or motion to quash, in vacation term, it shall be in order at that term, to dispose of it ; if filed in vacation, it shall be so in order at the next vacation term without service of notice.

I have presented in one connected view these several provisions of the statute, because the meaning of the statute is more apparent and intelligible, taken all together. They may not be treated as *obitur dicta*, in being presented here, as they are before us in the several cases of Iglehart *v.* Pitcher, ante, 307 ; McDonnell *v.* Olwell et al., ante, 375 ; and Cook *v.* Forrest, and Greenleaf *v.* Roe, post.

Judgment reversed and cause remanded.

Judgment reversed.

JOSEPH S. HANNA *et al.*, Plaintiffs in Error, *v.* CHARLES YOCUM, Adm'r, &c., Defendant in Error.

ERROR TO PEORIA.

A plaintiff cannot crave oyer of a judgment pleaded. He admits the recovery by his demurrer to the plea; the plea should be traversed.

Profer can only be made of contracts, &c., in the power of a party to produce; not of records.

The judgments of county courts, are final and conclusive, as to all matters within their jurisdiction. And these courts have all the judicial powers, formerly vested in the probate courts, or probate justices of the peace.

THIS was a suit brought on account for damages as laid in declaration, for $5,000. Declaration contained the common counts, by said plaintiffs in error against defendant in error.

Defendant pleaded former judgment in bar, in this, that plaintiffs filed their account December 13th, 1851, in the County Court of Peoria county, upon which account a trial was had in said court in October, 1854, upon which trial the said court decided that said account and claim was not due from said defendant to plaintiffs, and that the same should be disallowed and rejected, and judgment was given in favor of defendant, and that said County Court had jurisdiction.

Plaintiffs crave oyer of the record and proceedings in said County Court, which is as follows: Gibson, Stockwell & Co. *v.* Estate of Therrygood Smith. Claim filed December 13th, 1851, being an account. This day came the parties by their attorney, and also the administrator in person, and by his attorney, whereupon testimony was introduced, upon the hearing of which, the court said that the sum of $3,292.81, claimed as due from said estate, being a balance due upon said account, is not due to said claimants. It is therefore ordered by the court, that such claim be disallowed, and is therefore rejected;" and upon such oyer, demur to said plea, which demurrer was overruled by said court, and which is the cause assigned for error on the record.

This cause was heard before PETERS, Judge, at November term, 1855, of the Peoria Circuit Court.

MANNING and MERRIMAN, for Plaintiffs in Error.

N. H. PURPLE, for Defendant in Error.

SCATES, C. J. The plaintiff could not legally crave oyer of a judgment pleaded. He admits, by his demurrer, such recovery

as is set forth in the plea. If that be not true, as stated, he should have traversed the plea, by denying the existence of such record. *Prout patet per recordum*, I apprehend is not a profert in pleading, especially of a judgment of another court. Profert can only be made of contracts, &c., in the power of the party, to produce, and I apprehend, upon principle, could not, of records, for want of such power and control. If profert is not made when it ought to be, oyer cannot be given, but profert must be compelled by demurrer, and when unnecessarily made, does not still entitle the party to oyer. 1 Chit. Pl. 430 to 436, and references and notes.

Not seeing the record through the oyer, there is nothing in the plea, showing a want of jurisdiction, but on the contrary, an express averment of jurisdiction, which is as matter of fact, admitted by the demurrer.

County courts, though not of inferior, are of limited, jurisdiction in many respects, but their judgments are final and conclusive in all matters within them. Propst. *v.* Meadows, 13 Ill. R. 167 ; Stone et al. *v.* Wood, 16 Ill. R. 177 ; Ralston et al. *v.* Wood, 15 Ill. R. 159. See Obert *v.* Hammul, 3 Harrison R. 79 ; Crigdon's Lessee *v.* Astor, 2 How. U. S. R. 319.

But I apprehend, the party is mistaken as to a want of jurisdiction, in this case, on account of the amount of the demand. It is more than the probate justice of the peace had jurisdiction of, as a justice of the peace, under the Revised Statutes of 1845, p. 427, Sec. 5, from which doubtless this idea is derived. But the 10th section of the same act, gave them, as probate justices, "all the judicial powers usually exercised by former judges of probate."

The Act of 1849, p. 65, Sec. 13, for the organization of the present courts, vested them "with all the powers and jurisdiction of the probate court, as now established by law," together with concurrent jurisdiction to decree sales of land for payment of debts. These provisions are general, and made in general language ; and we must look further back into legislation for a more particular investment of jurisdiction. This we find in the Act of 1831, amending the act relative to Wills of 1829, which provides concurrent jurisdiction to any amount, in suits against administrators as such. Rev. Laws 1853, p. 656, Sec. 1 ; Acts 1831, p. 191, Sec. 1. These are enumerated and repealed in Cap. 90, pp. 461—465, but the jurisdiction is rebestowed in the meaning, and by the language of the 10th Sec. of Cap. 85, p. 427, as part of the "judicial powers usually exercised by former judges of probate," and so recognized and adopted in the language of the Act of 1849, as part of "the powers and juris-

diction of the probate court ,as now established by law." When the administrator is plaintiff, the jurisdiction depends on other provisions.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, *v.* AUGUSTUS CASSELL *et al.*, Appellees.

APPEAL FROM LASALLE.

A contract for wood "now delivered and being hauled and piled," "to be piled eight feet high,and delivered when called for," will be understood as identifying the wood, but not as then delivering it,so as to change the property and possession, without some further act.

The meaning of the contract must be gathered from itself: and is not to be explained by parol.

Juries find the fact that a contract was made : but the intent and obligation of it they find under the instructions of the court; and any mistake in such instructions is error.

Where a contract is for a certain quantity,it cannot be changed by any ulterior understandings of one of the parties

THIS was an action of assumpsit brought by the appellees against appellant upon the common counts. The appellant pleaded, that it never promised as alleged, and payment. There was a trial by jury, and verdict and judgment for appellees for $226, before HOLLISTER, Judge, at November term, 1855, of the LaSalle Circuit Court. The appellees introduced Henry Cassell as a witness, who testified that he hauled two hundred and ninety-two cords of wood for them, and piled it on the bank of the Illinois river ; did not measure the wood, but took the word of another man for the quantity ; did not know what became of the wood. Saw a person about the wood on one occasion, whom he supposed to be an agent of appellant. They proved by another witness that he hauled two hundred and twenty-eight cords of wood for them, which was also piled on the bank of the river ; witness did not know what became of the wood. Another witness proved the hauling of fifteen cords of wood to the same place, and that he saw there one Porter, who was the agent of appellant, and that Porter took away some of the wood. It was also proved that two other persons had hauled wood—one, eight cords, and another, twelve cords—to the same place. The appellees also read in evidence the following agreement, which was produced by appellant upon notice from appellees :

Illinois Central Railroad, bought of Cassell & McClung, three hundred cords of wood, now delivered and being hauled and piled on, the bank of the Illinois river, at $2 per cord. Tho above wood is to be piled eight feet high, and delivered to the company when called for.

Signed, AUGUSTUS CASSELL,
W. McCLUNG.

The appellant then read in evidence receipts for money paid, for two hundred and eighty-six cords of wood, delivered on the Illinois river, at $2 per cord, $572, dated March 31, 1854, and for fifty-eight cords of wood delivered at same place at $3 the cord, $174, dated the 24th June, 1854.

The appellant proved by Porter, that he bought the wood mentioned in the agreement; that there was one hundred cords of wood on the bank of the river when he took the contract from appellees, upon which he advanced to appellees one dollar on the cord at the time he took the contract; which one hundred was included in the receipt taken for the $572; that he measured the wood in the spring and that there was then two hundred and sixty-eight cords in all; that he took this away in boats; that Cassell, one of the appellees, made no complaint that appellant had taken away more wood than was paid for, but that McClung sometime afterwards made some complaint, that ten or twelve cords more had been taken than was paid for; that the wood on the bank was only a part of it piled eight feet high. The appellant also proved by another witness, who took away sixty cords of the wood, that it was not piled eight feet high that; McClung admitted that he had been paid for the wood, except that he claimed there had been a mistake made in the measurement of about ten cords.

The plaintiffs below then asked the following instructions:

1st. If the jury believe from the evidence that the plaintiffs delivered wood to defendant on the bank of the Illinois river, then the defendant is liable to plaintiffs for the wood so delivered at the contract price; and the jury should render a verdict for whatever was not paid for.

2nd. If at the time of the execution of the contract by the plaintiffs, the surrounding circumstances were that part of the wood was on the bank the river, and the remainder yet at a distance, either uncut or cut, the construction of the contract is, that the wood then on the bank was to become the property of the railroad company when piled up eight feet high, or if then piled up, that it was then the property of the company, and the remainder was to be delivered on the bank of the river when called for and as fast as called for; and if, after a call for it, it was delivered on the bank of the river, it then became the property of the company. That is, if it was the understanding of

the parties that the plaintiffs were not to be paid before the wood was taken away from the bank of the river, but trusted the defendant to take it first and pay for it afterwards.

3rd. If the wood was not to become the property of the railroad company until it was called for, after a delivery on the bank of the river, yet if, after it was placed upon the bank of the river, the company, by its agents, did call for it, and it was turned out on the bank and delivered on the bank to be taken away on boats by the company, upon this state of facts, and upon this construction of the contract, it would be the property of the company during the time between the time it was turned out and the time of the company coming with boats to get it, and if taken away between these times by others than the plaintiffs, or defendant, the loss would be that of the defendant.

Which instructions were given by the court; to the giving of each of which instructions the defendant excepted.

The defendant asked the following instructions, which were given by the court:

1st. That under the contract in evidence in this case, the wood was to be delivered to the railroad company on the bank of the Illinois river when called for, and was at the risk of the plaintiffs until that time, if called for in a reasonable time.

2nd. The contract in this case calls for only three hundred cords, and the railroad company was not bound under this contract to take more, nor was any amount over three hundred cords at the risk of the defendant at any time under this contract.

3rd. The defendant in this cause is not bound to pay for any wood, except the amount which it contracted to buy of the plaintiffs, or the amount which was actually delivered to the defendant.

4th. If wood was taken by any person claiming to act for the railroad company, which was not purchased or bargained for, and such wood was taken without the knowledge of plaintiffs, such taking would be a trespass and would not entitle the plaintiffs to recover in this suit, unless the wood was sold or traded off by the railroad company.

5th. The railroad company is not bound to prove, in the first instance, that it did not take the wood piled on the bank; the plaintiffs must prove that defendant either did take the wood, or contract to take it.

6th. The property in the wood was not changed so as to be at the risk of the railroad company, as long as anything remained to be done to determine the amount, such as measuring the wood.

7th. The written contract in this case is to govern as to the time of delivery of the wood mentioned therein, and an understanding outside of the contract of the agent of the railroad com-

pany, or any body else at the time or before the signing of the contract, ought to be considered by the jury to vary the written contract.

To which the plaintiffs asked the following qualifications, which were given by the court:

Qualification to defendant's second instruction. If, however, it was the understanding of the parties that the wood over and above three hundred cords was to become the property of the railroad company when delivered on the bank of the river, then the wood over and above the three hundred cords so delivered, was at the risk of the company after it was delivered on the bank of the river.

Qualification of the above qualification. The jury ought not to presume that there was any such understanding as is mentioned above, unless it is proven, and the burthen of proof is on the plaintiffs.

Qualification to defendant's fifth instruction. The measurement could be made as well by plaintiffs as defendant.

Qualifications of the above. The railroad company was not bound to take the measurement of plaintiffs; and until it is proven that a measurement was made by some one, the wood was at the risk of plaintiffs, and if defendant measured the wood and plaintiffs did not object to the measurement when notified of it, this circumstance is to be considered by the jury in determining whether the measurement of defendant was not acquiesced in by plaintiffs.

If the wood was measured in the woods or while being hauled, that is sufficient on the question of measurement, if such measurement was correct.

To the giving of which qualification and each of them, the defendant excepted.

GLOVER and COOK, for Appellant.

T. L. DICKEY, W. H. L. WALLACE, and E. S. LELAND, for Appellees.

SCATES C. J. The suit was not brought upon a written, or special verbal contract; but upon trial, the plaintiffs produced, upon notice of defendant, and defendant read in evidence, a written contract for three hundred cords of wood, at two dollars per cord.

All the instructions which have reference to a contract, a contract price, or to delivery of the wood under and according to contract, must be understood as referring to this contract read in evidence; for, there was no proof in the case of any other.

It becomes important, therefore, to construe this as the contract, and ascertain the true intent, meaning, and obligation of the parties, before we can pass upon the correctness of the instructions, and the sufficiency of the evidence, under them, to sustain the verdict for $226.

Counsel on both sides have been at fault and the court can throw no light upon the manner of making that sum from the evidence. If teamsters' *estimates*, (for there were but sixty cords sworn to have been measured by any of them,) are supposed to be unreliable, upon what basis can we stop short of a reduction down to the sworn measurements delivered and paid for?

We understand the contract phraseology, " now delivered and being hauled and piled on the bank of the Illinois River, " as identifying the particular wood contracted for, which, with one hundred dollars paid at the time, as earnest money, to bind the bargain, might give plaintiffs a lein, a prior claim, and superior right to other purchasers or incumbrancers.

But we do not perceive the intent of the parties, from this language, to treat the delivery of the wood there as a delivery in the sense of changing the property, by change of possession, risk and complete ownership—as by actual delivery. This sense and meaning is inconsistent with, and wholly excluded by, the very next stipulation of the contract : " The above wood is to be piled eight feet high, and delivered to said company when called for. " This delivery was unquestionably used in the sense of a change of possession, and complete ownership. The former in the sense of identifying and including, as within the contract that already brought and delivered upon the bank, that so being brought and delivered, and as much more as would fill the amount. Any other construction would involve the contradiction of two deliveries in the sense of a change of possession and ownership. If the first delivery mentioned in the contract was used in this sense, many modes of expression would have secured the object of the following clause, without involving the apparent and obvious sense of a final change of possession and ownership. Such as, " The wood shall be piled eight feet high." " The wood so delivered shall be piled, " &c. The first delivery used could not have been complete, because an additional act—" piled eight feet high "—was to be done ; yet in stipulating for this act of preparation of the wood for measurement and security, the plaintiffs also stipulated for a delivery when " called for, " which must have reference to the whole contract for 300 cords " delivered and being hauled and piled on the bank." The intention and true meaning of the parties to this contract, must be gathered from the contract itself, like all other written contracts, and cannot be altered, changed, modified or explained

by parol, unless an ambiguity brings it within the exception to the general rule on that subject. Nothing so appears. Juries exclusively find upon the fact of making of contracts, and when so found written, they find the true intent and obligations, under the instruction of the court. Any material mistake in an instruction, in the true intent and obligations imported by the language used, is error, and subject to correction.

In examining instructions, courts should not indulge in critical astuteness, to find error. We must, therefore, understand the court, in the first instruction, as referring to a final delivery, and not a deposit, in the sense of the contract and under it . If the jury wrested the sense, the fault is in the verdict, not the instruction.

The second is clearly wrong, and it shows that the defendants, in drawing it, discovered a difficulty into which it led them, and from which they sought to escape by " the understanding of the parties, " supposed to exist. When no time of payment, on sale and delivery of personal property, is fixed, the law fixes the time of delivery as that of the payment. The parties being silent here, there could, under this contract, be no " understanding " about taking away the wood on trust, without payment. The vendors had the right to make a complete delivery in fulfillment of their contract, but subject to a lien and detention until payment, which was due on delivery. They might deliver without, it is true, but the law fixes the " understanding " and meaning of parties to be for cash, not trust, or credit. But the instruction evidently construes the delivery, or deposit on the bank, and piling, as a change of possession or ownership.

The third instruction is correct.

The qualifications to the plaintiffs' second instruction is erroneous in allowing the jury to engraft another contract upon the written one,as part of it, by an "understanding of the parties."

The contract was explicitly for three hundred cords—no more, no less—and parties are not at liberty, by " understandings of the parties," to make it cover five hundred and fifty-five cords, or any other diffierent amount. It would change by adding largely to the contract.

If there were another agreement, written or verbal, for wood, embracing the same or similar terms, this should have been proven, and the instruction applied to *it*. The qualifications of the qualificatiou will not cure the error, for it assumes that it might be so proven,though it could not be *presumed*, and this is not a correct presentation of the rule.

We see nothing objectionable in the sixth instruction, and its several qualifications. The measurement is there put as an *illustration* of further acts to complete a delivery, and we under-

stand the qualifications as further illustrations. In this view, all are correct. Measurements may become essential to delivery, when required to seperate a less from a greater quantity. It may be done, also as a safe and convenient mode of proving the quantity, in some instances, and not essential to delivery.

The verdict is clearly unsustained by evidence, and the jury were misinstructed, as shown.

Had there been evidence, and the verdict rested upon the weight or preponderance, we should not interfere upon any slight differences with them.

But the delivery of five hundred and fifty-five cords on the bank, by teamsters' estimates, even were it shown by actual measurement, with the delivery to plaintiffs of two hundred and eighty-six cords, under a contract for three hundred, at two dollars per cord, and payment therefor at that price, and the payment of three dollars per cord, upon delivery of fifty-eight cords more at a subsequent time, we are unable to torture into an agreement for all that may be brought and piled on the bank, at the risk of plaintiffs, at any price. Much less would the law allow such facts to make it a part of the written agreement, upon any understandings.

We are unable to sustain this judgment, upon the reccord before us.

Judgment reversed, and cause remanded for new trial.

Judgment reversed.

Rees Morgan, Plaintiff in Error, *v.* David Green, Defendant in Error.

ERROR TO LASALLE COUNTY COURT.

Where an inferior court has full jurisdiction over highways the superior court will persume in favor of the judgment of the inferior that a road was of the proper width.

And if the proceeding of an inferior court is collaterally attacked, a like presumption will be indulged, and the proof will be thrown upon the attacking party.

This was an action of trespass *quare clausum fregit*, brought to the LaSalle County Court.

Pleas: not guilty; public highway.

Replications: similiter to first plea, and a traverse of the second plea.

Jury waived, and cause submitted to court on agreed statement of facts substantially as follows:

It is admitted as proof by the plaintiff, that by an act of the legislature of the State of Illinois, approved January 16, 1837, R. M. Sweet, of Cook county, Issac P. Hallock, of LaSalle county, and Benjamin F. Fridley, of Kane county, were appointed commissioners to view, survey, mark and locate a road from the court house in Ottawa, by Green's mill, &c., to Naperville, on the nearest and best route, and that a map of said road so located from the court house in Ottawa to Green's mill, and from Ottawa to Naperville, was filed in the clerk's office of the County Commissioners' Court of the county of LaSalle, on the 6th day of March, 1838.

It is also admitted by the plaintiff, that the close mentioned in declaration was canal land, known as land donated by the general government to the State of Illinois for the construction of the Illinois and Michigan canal, and was held under the laws of the State up to the 15th day of September, 1848, when the plaintiff purchased said close, and has since owned the fee in the same.

That the road or highway was opened by the supervisor during the years 1832, 1833 and 1834, and between the years 1833 and 1846 there were two bridges erected across two ravines which crossed the line of said road, within less than a fourth of a mile of the point of the trespass complained of It is also admitted, that the opening of the road through the timber near the plaintiff's close was by cutting out, for about three-fourths of a mile, the underbrush to about the width of fifty feet, but the greater portion of the line of said road from Ottawa to Green's mill passed over open prairie ; and also that road labor was performed by the supervisors appointed by the public authorities on the line of said road up to the year 1846, when the line of said road was fenced across at a distance of about one-half mile south-west of the plaintiff's said close, by one R. Thorne, which diverted the travel some forty rods to the north of the line of said road at the point so fenced ; and that during the spring of the year 1849, one James Clark fenced across the road on the west line of said plaintiff's close, and within ten rods of the fence thrown down as complained of in the declaration, which diverted the travel to the north and off the line of said road.

It is admitted that neither R. Thorne nor James Clark were acting as supervisors or under any agency of public authority when so obstructing or fenciug across the line of said road. It is also admitted that, since the fencing by Thorne and Clark across the line of road, especially for the last three years, there has been a continual strife between the citizens of the village of

Dayton and those persons fencing across the line of said road between Ottawa and Green's mill.

It is also admitted by the plaintiff, that the line of said road is over the close of the plaintiff, as described in his declaration.

It is also admitted by the plaintiff, that there never has been any other road laid out or established from Ottawa to Green's mill except the one above referred to.

On the part of the defendant, it is admitted as proof, that on about the 8th day of June,1856 ; the defendant traveled through the plaintiff's close on the line of said road and threw down the plaintiff's fence, but did not direct his travel or remove the fence to a greater distance from the center line of said road than fifteen feet on either side.

It is also admitted by the defendant, that there was a steep bluff near the point where the alleged trespass was committed, and on the line of said road, to wit: about fifteen rods east, which was impassable until during the month of December, 1854, when the same was graded down for a safe passage for loaded and other teams, and travel. Previous to that time the travel at that point was diverted to the south about fifteen rods.

It is also admitted by the defendant, that, from the date of laying out the county road in 1832 up to 1846 and 1849, and before the prairie was fenced between Green's mill and Ottawa only a portion of the travel was exactly on the line of said road, but varied as the choice of travelers directed them, sometimes on one side and sometimes on the other, and sometimes within fifteen feet of the center of the line of said road.

The County Court found the issues for the defendant. Plaintiff moved for a new trial ; motion overruled.

Errors assigned. The finding of court below should have been for plaintiff instead of for defendant.

The court erred in overruling motion for a new trial.

The judgment was against the evidence in the cause.

STADDEN and CAVARLY, for Plaintiff in Error.

LELAND and LELAND, for Defendant in Error.

SCATES, C. J. The agreed facts in this case fully sustain the finding and judgment of the court.

I shall not again here discuss any of the principles applicable, as they have been presented in the case of Alvord *v.* Ashley, ante, 363, and authorities there referred to.

The cases referred to in 3 Whart. R. 105, 4 Watts and Serg. R. 40, 1 Penn. State R. 356, 5 Penn. State R. 101 and 515, and 4 Penn. State R. 337, were cases on appeal direct from the

proceedings in laying out public highways, in which the court very properly required the provisions of the law to be complied with, in relation to fixing the width of the road, before it would sanction an order for its establishment and opening. These cases differ widely from the case presented in this record.

Small *v.* Eason, 11 Iredell R. 94, was an unauthorized attenpt of a supervisor to widen a highway which had a fixed legal width.

The case of White *v.* Conover, 5 Blackf. R. 462, must be put upon the same principle as the Pennsylvania cases, because the third was a special plea, alleging the establishment of the *locus in quo*, as a highway under the statute, aud should consequently show the same that would be necessary upon appeal from the original proceedings, when brought before the court with power to try it, as an original case.

But when the superior court sits merely as an appellate court, and the inferior court had full jurisdiction, the superior court will presume in favor of the judgment of the inferior, that the road was of the proper width. Lawton et al. *v.* The Commissioners of Highways, 2 Caines R. 179.

Where the proceeding is collaterally attacked, a like presumption must be indulged, and the proof thrown upon the plaintiff.

Judgment affirmed.

CHRISTOPHER SAMMIS, Appellant, *v.* RALPH CLARK *et al.*, Appellees ; and

SAME *v.* SAME.

APPEAL FROM PEORIA.

To proceed to trial on other issues, without noticing a plea of payment, is error. A default cannot be taken while there is a plea or demurrer unanswered.

THESE were actions in debt, in which the defendants below filed to each the general issue and four special pleas. There were four replications to the second plea, but no notice appears to have been taken of any of the others. The parties submitted the cases to the court, KELLOGG, Judge, presiding, without the intervention of a jury. There was a finding and judgment in both cases for the plaintiffs below. The defendant below appealed.

O. PETERS, for Appellant.

MANNING and MERRIMAN, for Appellees.

SCATES, C. J. The defendants here proceeded to trial upon issues on *nil debet* and the special pleas, without joining issue, or in any manner noticing or disposing of the plea of payment. This has been repeatedly held to be error by this court. Peare *v.* Wellman et al., 3 Gil. R. 326. And it has been applied as well to the rendition of final judgment on demurrer—Bell et al. *v.* Sheldon et al., 12 Ill. R. 372; Dow *v.* Rattle. id. 373; Clark *v.* The People ex rel. Crane, 15 Ill. R. 217; Hereford *v.* Crow, 3 Scam. R. 426; Merriweather *v.* Gregory, 2 Scam. R. 52—as to issues of fact. Upon the same principle it has been held that a default cannot be taken while there is a demurrer or plea unanswered. Covell et al. *v.* Marks, 1 Scam. R. 391; Manlove et al. *v.* Gallipot, id. 390; McKinney *v.* May, id. 534; Nye *v.* Wright, 2 Scam. R. 222; Bradshaw *v.* Hoblett, 4 Scam. R. 53; Steelman *v.* Watson, 5 Gil. R. 249; Moore *v.* Little et al., 11 Ill. R. 550; Jones et al. *v.* Wight et al., 4 Scam. R.328. Where there is nothing in the record to raise the presumption of a waiver of the demurrer by subsequent pleadings or proceedings, or of a plea by other issues, and such as must necessarily involve the merits of the unanswered pleading, we see no reason to doubt the soundness of the rules laid down. Even upon the assumption that it is overlooked through inattention, it might, when discovered too late, work as great hardship upon the other side, if cut off, from making a defence in a different rule. The law demands vigilance in suitors. It is consistent with general principles to throw the burthen of such difficulties as these upon the party guilty of negligence.(*a*)

Judgment reversed and cause remanded.

Judgment reversed.

MATTHEW LAFLIN, Plaintiff in Error, *v.* AUGUSTUS M. HERRINGTON *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A second new trial in ejectment will not be granted because the defendant alleges he can make further proof, which proof was accessible to him on the other trial, and is merely cumulative, when he does not show any satitsactory reason for not having produced it.

The judgment of the court below, in refusing such new trial, unless it is clearly shows that error was committed, will not be disturbed.

THIS was a motion for a new trial, made by Laflin, on the 22nd day of March, 1856, which was overruled and denied. The

(*a*) Parker vs. Palmer, 22 Ill. R. 489; Mc'Allister vs. Ball, 24 Id. 151.

application for the new trial was by petition of Laflin, setting forth that on the 13th day of Feb., 1854, Augutus M. Herrington, Nathan Herrington, James Herrington, Alfred Herrington, Jane Herrington, Thaddeus Herrington, Mary Herrington, Margarette Herrington, and Charles Herrington, commenced their action of ejectment in that court, against Laflin, for recovery of all but the undivided two-eleventh of one-tenth of that part of the N. W. fr. qr. Sec. 22, T. 39. N., R. 14 E., bounded on the north by that part of the quarter section conveyed by James Herrington and Charity, his wife, to John S. Wright, by deed dated Dec. 3, 1854; west, by the west line of the quarter section; south, by land conveyed by James Herrington and Charity, his wife, to Truman G. Wright, by deed dated June 3, 1835; and on the east by Lake Michigan. That Laflin filed the usual plea of not guilty in the cause, and such proceedings were had therein, that, on the 16th day of Nov., 1854, judgment was rendered for the plaintiffs without argument, and the petitioner took a new trial under the statute; that, on the 29th day of March, 1855, the cause was tried by the court, and judgment rendered for the plaintiffs, from which judgment the petitioner took an appeal to the Supreme Court, to be held on the second Monday of June, 1855, and such proceedings were had in the Supreme Court that the judgment of the court below was affirmed; that, upon the trial of the cause, such evidence was introduced as was set forth in the bill of exceptions, signed by the judge therein, which was referred to and made a part of the petition.

The petition then sets forth, that the Supreme Court decided that said evidence established that the petitioner and his grantor had been in actual possession of the premises, excepting one acre sold Best, under claim and color of title, made in good faith for seven successive years, and had paid all taxes legally assessed upon the premises during six years of the same, to wit, for the years 1848, 1849, 1850, 1851, 1852, and 1853, and the city taxes of 1847, assessed by city of Chicago.

And also setting forth that the premises were assessed by the assessor of Cook county, for the year 1847, as thirteen acres, at the rate of $200 per acre, and that the Supreme Court decided against the petitioner upon the sole ground that the county and State taxes for the year 1847, which were paid on the twelve acres, as shown by the evidence, detailed in the bill of exceptions, were not paid upon any specified twelve acres out of said thirteen acres.

And also setting forth, that the ground upon which the case was decided in the Supreme Court was not taken by the plaintiff's counsel in the court below, nor was the same discussed either in the court below, or in the Supreme Court, by counsel of

either party; that, on the 3rd day of August, 1847, Brown, under whom the petitioner claimed title by his deed of that date, conveyed to Matthias Best one acre of the land described in plaintiff's declaration, bounded as follows: commencing 19 chains 50 links east of the west line of the quarter section, at a point 23 chains 70 links from the north-west corner of said quarter section; running thence east 7 chains 80 links to Lake Michigan; thence north 1 chain and 30.07 links; thence west 7 chains and 50 links; and thence south 1 chain 30.07 links, to the place of beginning.

And further setting forth, that it is true, and he believes that he can establish the fact, that Brown, on the 27th day of Nov., 1847, paid the county and State taxes of 1847, on the twelve acres of the thirteen acres described in the plaintiff's declaration, which he had not then sold; and that the reason why said Brown did not pay the taxes on the other remaining acre was, that he had sold and conveyed the same to Best; that, at the time Brown paid the said taxes for the year 1847, on said twelve acres, he stated to Mr. Fitzsimmons, who acted for the collector, that he had sold one acre of the thirteen assessed to Mr. Best, and he wished to pay, and did pay, on the remaining twelve acres, and would leave the taxes on the said one acre, thus sold to Best, unpaid, for Best to pay; that the point upon which the case was decided was one upon which neither he nor his evidence had been heard; and believing that justice would be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, he prayed the court to vacate said judgment and grant him a new trial. The petition was verified by the affidavit of the petitioner.

In support of the petition was offered the affidavits of William H. Brown and James Fitzsimmons.

This motion for a new trial was denied by J. M. WILSON, Judge, at February term, 1856, of the Common Pleas Court.

HIGGINS, BECKWITH and STROTHER, for Plaintiff in Error.

A. M. HERRINGTON, for himself and the others, Defendants in Error.

SKINNER, J. This was a motion under the 30th Section of chapter 36 of the Revised Statutes, for a second new trial. The action of ejectment was commenced in February, 1854, which resulted in a judgment for the plaintiffs in that suit, and the defendant took a new trial under the statute. In March, 1855, another trial was had, which also resulted in a judgment for the plaintiffs; the defendant appealed to this court, and the judg-

ment of the court below was affirmed. Laflin *v.* Herrington et al., 16 Ill. 301. This motion was made by the defendant after the affirmance of the judgment in this court and before the expiration of one year after the judgment, upon the first new trial.

The judgment was affirmed in this court on the ground that the evidence did not show payment, by defendant and those under whom he claimed, of the taxes assessed on the premises in controversy, for seven consecutive years, within the meaning of the first section of the limitation law of 1839. The evidence showing payment of taxes for the year 1847, one of the seven years, on twelve acres of the tract in controversy, without any location or certain description thereof, and that one acre of the tract without any further description of the same, was sold for the taxes of that year. The motion was accompanied by affidavits, setting forth, that one Brown, under whom defendant claimed, paid the taxes of 1847, on the *twelve acres*, and that defendant could prove by said Brown, that he intended to pay on twelve acres, part of the entire tract, and being all of the tract, except one acre, described by metes and bounds ; and that he could prove by one Fitzsimmons that Brown so declared and expressed his intention to be, at the time of the payment and the taking of the collector's receipt. The affidavits also contain a certificate of sale to said Brown for taxes of 1847, on the one acre, and described as " 1 acre of 13 S. adj. N. pt. of N. W. qr. of Sec. 22," &c.; a tax receipt to said Brown, for taxes of 1847, on the twelve acres, described as " 12 acres in fr. Sec. 22," &c.; the collector's warrant for taxes of 1847, showing that the tract in controversy was assessed to said Brown as thirteen acres of land, and an entry therein of " 12 a. paid" by said Brown, and shows the conveyance of one acre of the tract, by metes and bounds by Brown to one Best, before the payment of the taxes. Brown was examined as a witness for defendant on the second trial, and gave evidence tending to establish payment of the taxes of 1847, and the defendant now asks another trial, that he may have opportunity of more fully examining the same witness on the same point, and of adding thereto the cumulative evidence of Fitzsimmons.

The statute providing for new trials in ejectment causes, is evidently cumulative and independant of the causes for which new trials will be granted at common law ; and decisions of the circuit courts upon motions grounded on it, may be excepted to and assigned for error, under the law of February 10th, 1849. Laws 1849, 132. See Emmons *v.* Bishop, 14 Ill. 152 ; Vance *v.* Schuyler, 1 Gil. 160 ; Riggs *v.* Savage, 2 Gil. 400.

This being a motion for a second new trial, unless this court

can see that the court below, in view of the law and of the facts presented, should have been satisfied that justice would have been promoted, and the rights of the parties more satisfactorily ascertained, by granting another trial, the judgment should not be disturbed.

Courts must necessarily act upon rules and principles capable of general application in analogous cases, and practically subservient of justice; otherwise the administration of the law would be measured by the mere will or caprice of the courts. This court can only reverse the judgment of the court below for error in law committed by that court and no error can have intervened, unless some principle of law is violated by the decision complained of.

It is plain that the additional evidence on account of which the second new trial is sought, was accessible to the defendant and within his power to produce, if he thought proper to do so on the last trial, and no satisfactory excuse is shown for his declining or failing to produce it. The law rewards diligence, and will not excuse negligence. New trials will not be granted at common law, to enable a party to produce merely cumulative evidence, nor to produce newly discovered evidence, if the party by the use of reasonable diligence could have obtained the evidence on the trial. The law will not allow parties to withhold evidence, and then produce the same, piecemeal, by way of new trials, as they may deem the exigencies of the cause demands. Crozier *v.* Cooper, 14 Ill. 139; Schlencker et al. *v.* Risley, 3 Scam. 483.

It cannot have been the intention of the legislature to enable a party by withholding evidence within his reach, to re-litigate, on the plea that he did not regard such evidence important to the establishment of his rights, nor enable a party having had a full hearing with opportunity and ability to produce his proofs to try his cause anew, on the ground that the evidence withheld would meet the exigencies of a phase in law of his cause, which he had not before discovered. Where the proof sought to be made, as in this case, rests in the memory of witnesses, the temptation to fraud and perjury upon grounds of public policy would forbid any other construction of the statute. There is undoubtedly a class of cases where second new trials should be granted in ejectment causes, on account of surprize, accident and the like, where by the common law, a new trial would not be granted; but this in our opinion is not such a case.

Judgment affirmed.

WILLIAM A GRAY *et al.*, Plaintiffs in Error, *v.* JOHN MACLEAN *et al.*, Defendants in Error.

ERROR TO PEORIA.

The surety in a forth-coming bond, cannot plead that the property levied upon by an attachment, was not the property of the defendant thereby to discharge himself from the obligation of the bond.(a)

ON the 1st day of December, 1853, plaintiffs issued out an attachment against MacLean, from Peoria Circuit Court, which was levied on the steamboat "Kentucky," as the property of MacLean.

To release the boat from the attachment, MacLean and Merriman made the following bond:

"KNOW ALL MEN BY THESE PRESENTS, That we, John MacLean and A. L Merriman, are held and firmly bound unto Leonard B. Cornwell, Sheriff of the county of Peoria, in the penal sum of five hundred dollars, lawful money of the United States, to the payment of which, well and truly to be made, we do bind ourselves, our heirs, executors, administrators, unto said Sherff, his heirs and assigns, firmly, jointly and sevearlly, by these presents. Witness, our hands and seals, this 3rd day of December, A. D. 1853.

The condition of this obligation is such, That whereas, on the first day of December, A. D. 1853, William A. Gray, James Gray nd Bonus C. Reeves caused a writ of attachment to be issued out of the Circuit Court of the county of Peoria, in the State of Illinois, and under the seal of the said court, for the sum of two hundred and three dollars and sixty-three cents, against the property, goods and chattels, lands and tenements of John MacLean, which said writ of attachment was directed to the Sheriff of said Peoria county to execute, under and by virtue of which said writ said Sheriff of Peoria county did, on the day of the date hereof, seize and evy upon the steamboat called the "Kentucky," her apparel, engine and furniture, and now has the same in his control: Now if the said steamboat Kentucky, her engine, apparel and furniture shall be forth-coming to answer any judgment of said court in said cause, and at the proper time, then the above obligation to be void; else to be and remain in full force."

The declaration is upon this bond assigned to plaintiff, alleging the rendition of judgment against MacLean, the issuing of an execution, and that same was returned "no property," and that the steamboat was not forth-coming to answer the judgment.

The defendants pleaded *non est factum*, on which issue was joined to the country.

Defendant Merriman pleaded the following plea:

"And for a further plea in this behalf, defendant Merriman, as to the damages in said declaration claimed, says *actio non* because they say that, at the time of the making of said writing obligatory, the said steamboat Kentucky, her apparel, engines

(a) Crisman vs. Mathews, 1 Scam. R. 148.

and furniture, &c., were not, and at the present time are not, the property of said defendant, John MacLean, the defendant in said original suit in said declaration mentioned, nor, was the same liable to attachment as his property, but were the property of one Hamilton, and this he, the said defendant, Merriman, is ready to verify ; wherefore he prays judgment, &c."

Plaintiffs demurred to its plea, the court overruled the demurrer, and the plaintiffs abided by the demurrer. The court gave final judgment for the defendants.

The only question in the case is, whether this decision was correct.

N. H. Purple, for Plaintiffs in Error.

Manning and Merriman, for Defendants in Error.

Caton, J. The plea in this case was clearly bad, and the demurrer to it should have been sustained. By it, the surety in a forth-coming bond, attempts to show that the property levied upon by the attachment, and to produce which to answer the judgment of the court, he had undertaken by executing the bond, was not the property of the defendant in the attachment, and not liable to the attachment, but was the property of a third person. The plea does not even show that the property had been taken by the third person under his paramount title, but for aught that appears, he sets up no claim to it. It was seized as the property of MacLean, for the payment of his debt by the sheriff. It was not admissible for him or his surety, to get possession of the property by the execution of the bond and then refuse to deliver it to answer the judgment of the court, according to the exigencies of the bond, because it belonged to a third person. What business is it to them, if it did belong to a third person? He alone could complain that his property had been taken to pay the debt of MacLean. Certainly MacLean or his surety had no right to make such complaint. By the execution of the bond, they became the custodians of the property for the sheriff, and were bound to keep it in good faith, as they had stipulated. Neither the defendant nor the surety had a right to benefit himself by claiming to hold the property under the outstanding title of a third person, while they had agreed to hold it under the sheriff. Had the plea shown that the property attached had been actually taken from them by the third person, under his paramount title, while they were endeavoring to retain it in good faith to answer the judgment of the court, a very different question would have been presented.

The judgment must be reversed and the cause remanded.

Judgment reversed.

JOHN FRINK *et al.*, Appellants, *v.* CHAMPLIN R. POTTER, Appellee.

APPEAL FROM LASALLE.

The deposition of a witness may be read on a trial, although the witness is present. The other party may make the witness his own, and examine him if he chooses. The driver of a stage coach, in an action against the proprietor by a passenger for injuries sustained by upsetting of the coach, may testify as to its condition at the time of the accident.

A stage proprietor will be liable for injuries to a passenger, although it should appear that the injuries resulted from the breaking of an axle, from the effect of frost.

Carriers of passengers are held to strict care and vigilance, and are liable for the consequences of slight neglect or want of care. The law imposes upon them the duty of carrying passengers safely, so far as by human agency, in view of the particular mode adopted and all attending circumstances, is reasonably practicable.

If the carrier knew, or might have known by the exercise of extraordinary care and attention that danger would result from using a coach, in the manner and under the circumstances to which it was applied, and this danger could have been avoided, he will be liable.

A passenger in or upon a stage coach may leap from it to extricate himself from peril, occasioned by the fault of the carrier, if he does so without rashness.

In an action on the case for injuries against several, as stage proprietors, the plaintiff need not prove that all the defendants were joint owners of the stage line.

The rules applying to actions *ex delicto* determine the rights of parties, where the gist of the action is a breach of duty, not depending upon a contract, and the allegations show that the law raises the duty by reason of the calling of the defendant.

Common carriers of passengers are not insurers against all injury or damage. Nor does the law require of them unreasonable or impracticable vigilance.

THIS was an action on the case by the appellee against the appellants.

The declaration contains four counts substantially alike, in each of which appellee alleged that appellants were proprietors of a coach, and running the same from Peoria to Springfield in December, 1852, and that, at the *instance* and *request* of *appellants*, appellee became and was a passenger in said coach, to be carried from Peoria to Springfield for hire, and that, on the route, for want of proper care on the part of appellants, the coach was overturned, and thereby plaintiff was hurt.

To this declaration appellants pleaded not guilty.

The cause was tried by HOLLISTER, Judge, and a jury, at the November term, 1854, of the LaSalle Court, and a verdict and judgment against the appellants for $3,604.50 damages.

On the trial appellee was permitted by the decision of the circuit court, to read in evidence the deposition of Andrew Pennell, when the witness was personally present in court, and appellants excepted.

The eighth interrogatory and answer thereto were as follows: "What was the condition of said stage coach, and, particularly, state whether said coach was safe and in good condition for carrying passengers, and if not, what were its defects? *Ans.* The condition of the coach was bad. It was old, much out of repair, and wholly unfit to run on the road for carrying passengers. The defects are fully stated in my answer to the sixth interrogatory."

Appellants objected to the above question and answer, on the ground that it gave merely the opinion of the witness, and not mere facts. Objection was overruled, and evidence given.

At the close of the reading of Pennell's deposition, appellants claimed the right to put Pennell on the stand and cross-examine him, which the court refused.

Afterwards, before appellee closed his evidence, appellants did cross-examine Pennell, with the consent of appellee.

Pennell, in his deposition, stated in substance, that he resides at Niles, Michigan; that he knew the parties; that in the last days of December, 1852, he was driving stage for appellants, who were the proprietors; that appellee was a passenger in the coach he drove, and that the coach was broken and overturned; that the cause of the accident was, the coach was old, and defective in this—the transit plate was out of order; that plantiff was a passenger, and, at the time of the accident, was riding on the outside with the driver, and that, by the accident, plaintiff was induced to jump off and hurt his ankle or leg; that the inside passengers were not hurt.

Wyatt, a passenger in coach at the same time, testified that it occurred on the trip from Peoria to Springfield about noon on the Wednesday after the last Tuesday of December, 1852; the ground was level, pretty ground, and the coach was going at a moderate rate; that the weather was very cold—the ground frozen-hard the night before, but was thawing a little at noon when the accident occurred.

Defendant objecting, the court permitted witness to state, "It is customary for passengers to ride outside," and defendant excepted.

The axletree was broken near the middle.

Defendants' witness, Dare, testified that he was, at that time, the agent of defendants in Springfield; saw Potter immediately after Potter's arriving at Springfield; that Potter, speaking of the accident, said it was a clear, cold day; that it was an unavoidable accident; that the axletree broke, let the coach down, and that, "had he remained on the coach as he ought to have done, he would not have got hurt;" "that there was no person to blame."

Dare further testified that the coach to which the accident occurred was a strong, well made coach, and in good condition.

T. L. DICKEY and W. H. L. WALLACE, for Appellants.

E. S. LELAND and B. C. COOK, for Appellee.

SKINNER, J. This was an action on the case, against Frink, Sanger, Walker and Parmerly, as common carriers of passengers by stage for an injury to the plaintiff while a passenger in one of the defendants' coaches. The declaration, in various ways, alleges that for want of proper care on the part of the defendants, the coach in which the plaintiff was a passenger, broke and overturned, whereby the plaintiff was hurt aud wounded. Verdict and judgment for the plaintiff against all of the defendants.

On the trial the plaintiff offered to read in evidence the deposition of a witness taken in Michigan. The defendants produced the witness in court, and objected to the reading of the deposition, for the reason that the witness was in court; and the court overruled the objection. The deposition having been taken in conformity with the law, was admissible in evidence, and the plaintiff could not be deprived using it by the act of the defendants. They had had an opportunity of cross-examining the witness when the deposition was taken. If they chose they could have called the witness as their own witness, and examined him generally, as well as touching the matters to which he had testified in his deposition. Beyond this they could not go. Bradly *v.* Geiselman, decided at the present term of this court; (*a*) Phenix *v.* Baldwin, 14 Wend. 62.

The defendants objected to the eighth interrogatory of this deposition, and to the answer thereto. There is no merit in the objection. The witness was the driver employed by the defendants, and he is asked what was the condition of the coach, whether it was safe and in good condition, and if not, what were its defects? He answers that it was bad, old, out of repair, unfit to run, and refers to his answer to the sixth interrogatory for statement of the particular defects. There is nothing asked or answered, about which men of ordinary knowledge and experience would not be competent to judge, with greater or less accuracy; nor is any question of science, or skill raised, requir.ng the interposition of an expert for solution. Ward *v.* Salisbury, 12 Ill. 370. But, if it were otherwise, the defendants'employee in the business of stage driving, as against them, would be presumed to possess the requisite skill to judge of the condition of the stage coach, and of its fitness for use. The objection to proof by plaintiff, that it was customary on the line

(*a*) post 571

for passengers to ride on the outside of coaches, is equally meritless.

The court refused the following six instructions asked for by defendants."

"If the jury believe from the evidence that the cause of the accident which occasioned the plaintiff's injury was the breaking of the axletree of the defendant's coach from frost, and not from any defect in the axletree, then they shonld find for the defendants."

"If the jury believe from the evidence that the cause of the accident which occasioned the plaintiff's injury was the breaking of the axletree of the coach from frost, and not from any defect in the coach, or in the axletree, then, whether the coach was old and defective or not, they should find for the defendants."

"If the jury believe from the evidence that it is equally as probable that the axletree broke from the effect of the frost as from any defect in the coach or in the axletree, then the jury should find for the defendants."

"If the jury believe from the evidence that the plaintiff's injury resulted from sliding, or jumping, from the outside of the coach, before the same upset, and not from the upsetting of the coach, then the jury should find for the defendants."

"Whether the plaintiff would he justified, or not, in jumping or sliding from the coach, in order to avoid a greater apprehended peril that might result to him from awaiting the upsetting of the coach, yet, inasmuch as that state of facts is not alleged in the declaration, the plaintiff cannot recover, even although the above state of facts may be true."

"Unless the jury believe from the evidence that all the defendants, Frink, Sanger, Walker and Parmerly, were joint owners of the coach in which the plaintiff was a passenger, at the time of the accident, they cannot find for the plaintiff."

The court instructed the jury, on the part of plaintiff, that,

"If the coach might have been constructed in a manner that would have obviated all danger from frost, and still have been suitable for the busineess of carrying passengers; or if the defendants, by housing or taking the utmost care of their coach when it was not running, could have prevented the action of the frost, then, even if the axletree did break from frost, that would not constitute a defence."

The first, second and third of these instructions suppose the law to be, that if the injury arose from the breaking of the axle and that frost was the cause of the axle breaking, the defendents are without fault, and, therefore, not liable. It does not follow that, because the axle broke from frost, the defendants were not in fault. It is the duty of common carriers of

passengers to do all that human care, vigilance and foresight can, under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably, to guard aganst and prevent accidents, and consequent injury to passengers. They are held to strict care and vigilance in providing and operating their respective modes of conveyance, and are liable for the consequences of slight neglect or want of care. The law imposes upon them a duty safely to carry those who take passage with them, so far as by human agency, in view of the purticular mode adopted, and all attending circumstances, is reasonably practicable. 2 Kent's Com. 600; Angel on Carriers, chapter 11; Stokes *v.* Saltonstall, 13 Peters 181; McKinney *v.* Neil,1 McLean 540; Manny *v.* Talmadge, 2 McLean 157.

Frost may have been the immediate cause of the accident, and yet the accident might have been avoided by the exercise of that care and vigilance incumbent upon the defendants. If, for instance, the axle was composed of material peculiarly subject to the action of frost, and the coach was used at a time, in a manner, or under circumstances likely to produce a breaking of the axle, and without resort to such preventive measures as were practicable, and reasonably accessible ; or if the cold was severe and the coach had been unnecessarily exposed to the action of the frost, and such exposure increased the danger arising from such cause; or if the defendants knew, or might have known, by the exercise of extraordinary care and attention, the danger of using the coach in the manner and under the circumstances used, and this danger could have been, by strict vigilance, avoided the defendants would, upon the principle stated, be in fault, and liable. All the facts being admitted supposed by these instructions, yet the defendants may not have been without fault.

The fourth and fifth of these instructions assume, that under the allegations of the declaration the plaintiff cannot recover, if before the actual overturning of the coach, by sliding or jumping therefrom, although to avoid a greater apparent peril the plaintiff received the injury. The declaration alleges that the fore axle of the coach broke down, and the coach overturned while running, and that thereby the plaintiff was hurt and wounded. The evidence shows that the plaintiff was riding on the outside of the coach with the driver ; that the axle broke in the center, letting the coach down and upsetting it; that the plaintiff, at the time of the accident, or before the coach upset, jumped or slid from his seat to the ground ; and that the passengers inside the coach were not injured. It is wholly immaterial whether the plaintiff was injured by the upsetting of the coach, or whether the axle having broke and the plaintiff thereby having been put in actual peril, to avoid injury, in the

exercise of ordinary discretion, jumped to the ground, and in so jumping received the injury. Passengers have a right, the best they may, to extricate themselves from peril, the fault of the carrier; and if in obeying the dictates of their nature, and without such rashness as the circumstances would not reasonably excuse, they meet an unlooked-for injury, the carrier is still liable, for the injury is the result of his wrong. The breaking of the axle, in this case, was the direct and proximate cause of the injury, and a part of the accident out of which it arose. The fact that the plaintiff was riding on the seat with the driver, makes no difference. It is not pretended that the conduct of the plaintiff produced, or contributed to produce, the accident, of which the injury was the consequence; and unless it did, it is not a case of injury resulting from the plaintiff's wrongful act, or the concurring wrong of both parties.

He was so riding by the permission of the defendants, and although the danger of injury in case of accident was thereby increased, this would not exonerate the defendants from liability for their negligence. McKinney *v.* Neil, 1 McLean 540; Owners of Steamboat Farmer *v.* McCraw, 26 Alabama R.

The sixth of these instructions assumes that to maintain the action, the plaintiff must prove that all the defendants were joint owners of the stage line. This is not the law. The declaration is founded upon the common law regulating common carriers; and this law imposes a duty upon them by reason of their calling, from considerations of public policy, and without regard to contract. It is true, that the law presumes or implies from the fact of receiving, as common carriers, the passenger to carry for hire, a contract. But the plaintiff had his election to sue in assumpsit, declaring upon the contract, express or implied, or in case, for tort, declaring upon the breach of duty imposed by the law. He chose the latter, and was not compelled to maintain his action, to prove all guilty, or the alleged relation of all the defendants to each other.

If the defendants were joint owners of the stage line, and the accident and injury arose from the fault of either of them or their servants, each and all were guilty If but a portion of them were proprietors of the line, then such proprietors, and each of them, were guilty, if the accident and injury arose from the fault of any of them or of their servants. It is urged that, as the declaration alleges, that all of the defendants were joint proprietors; unless this be proved, the *allegata* and *prodata* do not correspond, and the plaintiff must therefore fail. This would be true were the contract declared on, or were it the substance of the cause of action; but it is not true when the action is in form *ex delicto*, and founded solely on a breach of

the common law duty of common carriers. In case, generally the plaintiff may recover against so many as he proves guilty of the alleged wrong, although he may have alleged the wrong to have been committed jointly by all of them; if, indeed, in contemplation of law the wrong can jointly be committed. There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract being the basis and gravaman of the suit, must be alleged and proved. Where, too, from the facts the duty arises, and there is also a contract which is alleged and made the substance and gist of the cause of action, although the action be case, it being substantially founded upon contract, the rights of the parties will be governed by the law of contract.

But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant—as in case of innkeepers and common carrires—and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties. 1 Chitty's Pl. 87, 88; Wright *v.* Gear, 6 Vermont, 151; Bank of Orange *v.* Brown et al., 3 Wendell 158; 6 Watts 47; Bretherton *v.* Wood, 3 B. and Bing. 54; McCall *v.* Forsyth, 4 Watts and Serg. 179; 19 Wend. 534; Angel on Carriers, Secs. 422 to 429.

The instruction given by the court for the plaintiff was doubtless intented as a qualification of instruction given for the defendants, but in any light was calculated to mislead the jury, and if held to be the law, would extend the liability of common carriers of passengers to a most unreasonable point. Common carriers of passengers are not insurers against all injury or damage.

Although the law requires the highest degree of care on the part of the defendants, and holds them liable for slight negligence, it does not require of them unreasonable or impracticable vigilance. The language of the law must be viewed in a practicable and common sense light, and so applied in the administration of justice. What is reasonable and practicable under one condition of things, may not be under another. What in one case would be accessible, and facilitate the convenience and safety of travel, in another and under different circumstances might be inaccessible, and destructive of the particular enterprise. The axle might have been constructed of wood, or other material than iron, and have been, perhaps, suitable to the business, which frost would not affect, and yet, upon the whole not have been as safe, or fit for the particular use. The housing

of the coach might, from the condition of the country, have been impracticable.

If the same acts of care and precaution practicabie in the most populous countries and under the most favorable circumstances were required to fill the measure of the law, under a condition of things entirely different existing in a new country, the effect would be to discourage enterprises of the character in question, and to lessen the facilities for public travel of the people of the newer portions of our country. The law is not designed to work such a result. The true question for inquiry was: would a person of extraordinary prudence and caution, intending to afford the greatest security to passengers, and at the same time afford reasonable facilities to travel, under all the circumstances, have acted differently? It is impossible, by the use of language to define negligence in fact, applicable alike to all circumstances and conditions of things; and all that can be done in determining in any given case whether there is or is not negligence, is, in view of all the surrounding facts, the nature of the means employed and the character of the enterprise, by the exercise of the reason to form a judgment as to whether it does or does not exist. Beers v. Housatonic Railroad Company, 19 Conn. R. 566.

Judgment reversed and cause remanded.

Judgment reversed.

ADAMSON NEWKIRK, Plaintiff in Error, *v.* JESSIE DALTON *et al.* Defendant in Error.

AGREED CASE FROM COOK.

Trover against a purchaser will lie for the recovery of stolen property, without a prosecution or conviction of the relief.

Markets overt, as known to the common law, making distinction in the sale of stolen property, are not recognized in this State.

THIS case was submitted upon the following agreed state of facts:

This was an action of trover for a horse and a cutter, stolen by a third party, and purchased by the defendants of the supposed thief.

On the evening of the fifteenth of February, 1855, the said property, and also a buffalo robe and harness, were stolen from the plaintiff, in the city of Chicago, and two or three days afterwards the supposed thief sold the same to the defendants,

who were copartners, at their place of business in Valparaiso, in the State of Indiana.

There was evidence at the time, tending to show that the conduct of the person who offered said property for sale, at the time of the sale, was such as to excite suspicions in the minds of the defendants, that he had not honestly come into the possession of said property, and that he had bought it with bogus money, or stolen it.

On the nineteenth day of February, 1855, the plaintiff made a demand of his said property, of the defendants, at their said place of business, and the defendants delivered up the buffalo robe and the harness, but did not deliver the horse and cutter, alleging that the horse and cutter were not then in their possession.

At the trial the plaintiff introduced evidence tending to show that the defendants had sent said horse away by one of their workmen, or some person in their employ, to get him out of the way of the owner, with directions to sell; but there was no evidence whether or not the horse had been sold at the time the plaintiff made the demand.

There was alse evidence at the trial, that the plaintiff suspected that the thief was, after the plaintiff made his demand aforesaid, in the city of Chicago, and that the plaintiff had his suspicions excited from the description which the defendants gave to the plaintiff of the supposed thief; and thereupon the plaintiff notified the defendants of his said suspicions, and requested them to come to Chicago to indentify him, and offering to pay the expenses of their journey. One of the defendants came to Chicago, and a police officer was employed to arrest the supposed thief; but the person suspected by the plaintiff was not identified by the defendant, as the person of whom he had purchased said property, and no further proceedings were had. The thief has never been discovered or prosecuted.

Upon this state of facts, the question of law submitted is, can this action be maintained?

This case was tried before MANIERRE, Judge, and a jury; but after the evidence was all in, the case was, by consent of the parties, taken from the jury and submitted to the judge reserving all rights.

The court sustained the plaintiff's case, and gave judgment for the plaintiff; which decision of the court the defendants assign for error.

WILKINSON, DOW and PEARSON, for Plaintiff.

WIGGINS, MEECH and COVENTRY, for Defendants.

Scates, C J. It is difficult to discover upon what ground a defence can be placed by the purchaser of stolen property, under the 64th section of the criminal code, (Rev. Stat. 1845, p. 161,) which provides that" all property obtained by larceny, robbery or burglary, shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of the right to such property. Such owner may maintain his action, not only against the felon, but against any person in whose possession he may find the same." The objection urged is, that before defendant can sue, he must prosecute and convict the thief, or do all in his power for his discovery, apprehension and conviction. This has been so held in some cases in England, and may have some application to cases where the stolen property had been sold in market overt, as known to the laws of England. But that kind of markets is unknown with us, and the general rule is otherwise in England. 1 Yeates R. 478 ; 5 Serg. and Rawle R. 130 ; 8 Cow. R. 241. Trover will lie against the purchaser of the property, without a prosecution or conviction of the thief. White *v.* Spettigue, 13 Mees. and Welsb. R. 606 ; (S. C. 1 Carr and Kirwan, 673 ; 47 Eng. C. L. R. 674.) Peer *v.* Humphrey, 4 Nevill and Mann. 430, (S. C. 2. Adol. and Ellis R. 495,) was overruled in the above case of White *v.* Spettigue ; and the doctrine will only apply, as I have said, to sales in markets overt. 2 Black. Com. 449. This was by Statute 21 Hen. VIII, C. 11, and which was also adopted in Virginia. See 2 Kent Com. 324, and note *a* ; Harwood *v.* Smith, 2 Tenn. R. 750. This would seem to be so in Kentucky. 1 Dana R. 195. But for the contrary doctrine, see 2 Kent Com. 324-5, and notes, with authorities referred to. Marsh *v.* Keating, 1 Bingh. N. C. 198 ; Stone et al. *v.* Marsh et al., 6 Barn. and Cress. R. 55 ; Danee *v.* Baldwin, 8 Mass. R. 518 ; Hoffman et al. *v.* Carow, 22 Wend. R. 285 ; Pettingill *v.* Rideout, 6 N. Hamp. R. 454. And this doctrine would seem to be applicable to some cases of gross frauds, as was held in Salters et al. *v.* Everett, 20 Wend. R. 267 ; Tamplin & Co. *v.* Addy, Sheriff, in C. P., 1826, in note to Mowry et al. *v.* Walsh, 8 Cow. R. 239. The two cases deny the right of a bona fide creditor of the fraudulent purchaser to levy on and retain the goods against the vendor.

So may the bailor recover of the purchaser of his bailee. Roland *v.* Grundy, 5 Ohio R. 202 ; Doty *v.* Hawkins, 6 N. Hamp. R. 247 ; Hyde *v.* Noble et al., 13 N. Hamp. R. 494. In Foster *v.* Tucker et al., 3 Maine R. 458, the supposed thief was sued in assumpsit, and the statute of limitations was pleaded. A conviction of the thief was held to be necessary to sustain trover, and that assumpsit would not lie. The same was held in

Boody v. Keating, 4 Maine R. 164, in trover, though there the defendant had been convicted.

But we do not conceive there can be any doubt about the general rule establishing the right to sue without prosecution or conviction, where the goods were sold out of a market overt, which we have not here, as known to the common law; and if there were such markets, the statute would repeal the common law in this respect.

Judgment affirmed.

SAMUEL DIMON, Plaintiff in Error, v. THE PEOPLE, Defendant in Error.

ERROR TO PEORIA.

On trial of an indictment for obstructing a highway, the existence of the highway may be proved by prescription from user. And unless it is assumed by the pleadings, documentary proof of the location of the highway, is not indispensable

A highway may be legally laid out and established by public use, and recognition of it by the proper authorities, and by acquiescence; and this, without regard to governmental or individual ownership of the land across which the road runs.

COPY of indictment:

"Of the September term of the Peoria County Circuit Court in the year of ou Lord 1853.

"The grand jurors chosen, selected and sworn, in and for the county of Peoria aforesaid in the name and by the authority of the people of the State of Illinois, on their oaths, present, that Samuel Dimon, late of the county of Peoria aforesaid, on the tirteenth day of June, in the year of our Lord one thousand eight hundred and fifty-three, at and within the county of Peoria aforesaid, in and across a public road leading from the city of Peoria and county of Peoria aforesaid, to the city of Knoxville, in the county of Knox, and State of Illinois, on the north-west quarter of section ten, in township nine north of the base line, and range seven east of the fourth principalmeridian, then and there did unlawfully, with force and arms erect and build a fence, thereby then and there obstructing the said public road, and then and there by said fence and obstruction, rendering the said public road inconvenient to pass, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Illinois.

E. G. JOHNSON, *State's Attorney.*"

Plea, not guilty.

The following evidence was offered on the trial:

Elias Vickory, called by People, stated that for the last nine years he had known a road to be traveled across the N. W. qr. Sec. 10, 9 N. 7 E., 4 P. M. Said road continued on west to Brimfield and Knoxville, and east to Peoria; that there were

several traveled tracks across the quarter section, but one was more traveled than the others and was the main traveled track; that there is now a fence across said main track. It was put there sometime in April or May last. Dimon told him he was going to build a fence there, but he did not know who put it there; Dimon lived on the land enclosed by the fence; that as supervisor he had worked on the road about two miles east, and —miles west of this land, near ten years since. No work had been done on this quarter; it was prairie land, it needed none.

Henry McFadden stated that he surveyed a road across the quarter section on which defendant lives,)N. W.10, 9 N., 7 E.,) in 1850. There was, at that time, a main traveled track there; the road I surveyed run diagonally across this main traveled track, at east side of the land; the traveled track was eight to twelve rods north of the road I surveyed; that there was several traveled tracks on the quarter section, one more traveled than the others.

Matthew Craig testified that he had known a traveled road over said land seventeen years, running rather east and west; that there was one main track, and others not so much traveled; that a fence had been built across said main track which, at the east line of the quarter, diverts the travel from two to four rods from said main track. (To all the evidence offered to prove the existence of a public highway, by testimony, that it had been used and traveled as such, the defendant objected when the same was offered.) The court overruled the objection and admitted the evidence.

Here the people rested, and stated that they had closed their evidence in chief.

The defendant then called Charles Kettelle, who testified that he was clerk of the county court; that he had made thorough examination of the records and files in his office, where the records and files relating to roads are kept, and that upon such examination, he could not find the record of any road leading from the city of Peoria to the city of Knoxville, and that he believed no road of that description, or title, had ever been laid out and established.

Thomas N. Wells, defendant's witness, testified, he had known land on which defendant lived several years; there hab been several traveled tracks across the same, extending over fourteen or fifteen rods in width; some traveled more, some less, depending much on the season of the year, weather, &c. Fence is from two to four rods from one of the traveled tracks. Road, as now traveled, is a better road and on better groud than the old track.

Levi Williamson, defendant's witness, testified that there were

a good many tracks traveled across the land—could not say how many; that at the east end or side of the quarter, the fence stands nearly in the middle of one of the main traveled tracks.

Defendant then offered to prove that the N. W qr. Sec. 10, 9 N.,7 E., in Peoria county, was patented by the United States to Zera King on the 10th of January,1818 ; that on the 27th November, 1818, Zera King conveyed the same to Norman Nicholson ; that on the 15th July, 1824, Nicholson conveyed the same to Jacob B. Farr, and that on the 30th July, 1849, Jacob B. Farr conveyed the same to Nancy Dimon, who was then and still is the wife of the defendant, and that during all the time said road was used and traveled as a road or highway, said King, Nicholson and Farr were non-residents of the State of Illinois, and that they, nor either of them, had ever received any compensation, or damages, for the using, occupying said land for the purposes of a road or highway. Evidence excluded, and exception taken.

The people then offered in evidence for the purpose of rebutting the evidence of the defendant, a petition which, among others, was signed by defendant, for the appointment of viewers, report plat and survey, and order the County Commissioner's Court of Peoria county, establishing a regular legal surveyed highway " from the foot of the bluff opposite the head of Main street, in the town of Peoria, by way of Kickpoo town to the town of Charleston, in said county," which said road, as surveyed and established, passed nearly east and west across said quarter section before described. Established April 15, 1842.

For the same purpose of rebutting the defendant's evidence, the people called George C. Mc Fadden, who testified that on the 10th of April, 1842, he surveyed said last mentioned road over said land ; that the west line of the surveyed and traveled track was nearly the same place, but he did not know certain; that the residue of the surveyed road and traveled track, were not the same ; that the traveled track was generally south of the surveyed road.

Henry Mc Fadden, called for the same purpose, testified that the road he surveyed over the said land, crossed the traveled track over the same, nearer to the east than the west line ; that the fence built on the land crossed both the surveyed road and traveled track, whether at the same place he could not state.

Jeremiah Brown, called for same purpose, rebutting stated, he was present when Henry McFadden surveyed said road, and that the fence on said land crossed the traveled track, and also the line of the surveyed road, whether at one and the same place he could not distinctly state.

Jacob Wells, called for same purpose, rebutting, testified that

the fence on said land crossed both the traveled track and the surveyed road at the same place.

This evidence was objected to, but it was admitted as rebutting evidence only.

People again closed their testimony.

Defendant then offered to prove that at the time said surveyed road was laid out and established over said quarter section of land, the land was owned by Jacob B. Farr, who was a citizen and resident of the State of New York, and had no notice of any proceedings in relatior to the location or establishment of said road, and that no damages whatever were ever assessed or paid, upon, or before or after the location or establishment of the said road over said land, nor no compensation whatever was ever paid for locating or establishing said road over the same; also, that on the 30th July, 1849, said Jacob Farr by deed conveyed the said land to Nancy Dimon, the wife of the defendant, and that she is still the owner of the said land under said conveyance.

The evidence was excluded, and defendant excepted.

The following instuctions given at the request of the people are objected to:

"If the jury believe from the evidence, that defendant did fence up and obstruct a public road at the place alleged in the indictment, so as to prevent passing on the same, and that said road so obstructed at any place or part of the obstruction, was a legal public road, they will find the defendant guilty, whether there may be another track in the vicinity equally as good and convenient to be traveled."

"That in considering this case it is proper for the jury to examine the reasons and papers offered in evidence; and if the jury find from such evidence, and the testimony of witnesses in the case, that there was a public road running from Peoria to Knoxville, on the quarter section mentioned in the indictment, and that defendant has any where on the line of said road on said quarter, fenced the public travel from the same, they will be justified in finding the defendant guilty."

"That it is not necessary, for a verdict for the people in this case, to prove a legally laid out road all the way from the city of Peoria to the city of Knoxville; but only necessary to prove that the road obstructed was a legal public road on the quarter section mentioned and charged in the indictment."

"It is no justification whether the public have been put to inconvenience or not by the obstruction; provided the legal highway, at the place charged, was obstructed so as to prevent public travel on the same."

If a road is used and traveled by the public as a highway, and is recognized and kept in repair as such by the county

commissioners and supervisors, whose duty it is by law to open and repair public roads, proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway."

The following instructions by defendant were refused:

"That no legal public road or highway can be laid out in this State, and established as such, unless there has been a petition in due form of law presented to the proper court, and viewers appointed to view the same, a location of the said road by such viewers, a report by them in favor of said road, and an order of the proper court or authority establishing the same."

"That unless they believe from the evidence that a road, or highway, leading from the city of Peoria to the city of Knoxville, as described in said indictment, has been legally laid out and established, in the manner mentioned in the first instruction, they will find the defendant not guilty."

"That unless the people have proved that there was a legally laid out road from Peoria to Knoxville, as charged in the indictment, they must find the defendant not guilty."

"That unless the jury believe from the evidence that the track mentioned by the witnesses, was a legally laid out and established public high way, and that the defendant by building a fence across the same obstructed said highway, they will find him not guilty."

"That private property cannot be taken for public use without just compensation to the owner; and that if they believe from the evidence that a road has been laid out or traveled over the land described in the indictment, without the knowledge or consent of the owner of the same, and that he has had no notice of the establishment of any such road either actual or constructive, such traveling over, or laying out said road as to such owner is a nullity, and he or any other person on his behalf, may lawfully fence up the same."

"There is no evidence before the jury of any actual survey and location of a road through the land described in the indictment, upon which the defendant, in this case, can be convicted.

"That the record evidence introduced in this case is not to be considered, by the jury, for the purpose of establishing the fact of the survey and location of a road, but only to rebut the evidence given by the defendant."

There was a verdict of guilty by the jury. Motion for a new trial denied. The cause was tried at November term, 1853, of the Peoria Circuit Court.

N. H. Purple, for Plaintiff in Error.

W. H. L. Wallace, District Attorney, for the People.

SCATES, C. J. The indictment charges specifically, that the *locus in quo*, the obstruction, was put, was across the highway, on a specified quarter section, and the name given to the highway, as one leading from Peoria to Knoxville, is no essential part of the. description, either of the highway, or of the place obstructed.(*a*) It might be stricken from this indictment without surprise to the plaintiff, or vitiating the pleading for want of certainty. The proof, however, sustained the allegation as it is, for one witness testified to the fact, that the highway mentioned, does lead from the one city to the other. But the defence, very erroneously, was predicated in part, upon the supposed necessity of the people providing, under the allegation, the laying out and establishment of one and the same continuous line of road, from the one to the other city, and known by that description. It was for this purpose we understand the county records and clerk were offered to disprove the fact of the existence of any such road.

We are not able to sympathize with, or encourage the numer ous efforts that are making to overturn and destroy the public used highways, through the various counties of the State, by exceptions to the loose and imperfect minutes, records and files, kept by the Commissioners' Courts, in the early locations of roads through a new and sparsely settled country. We shall indulge no nice, stringent or technical criticisms upon these, when in evidence, to aid in closing up used highways, nor shall we confine the evidence to this mode of proving a highway, unless it is assumed by the pleadings, but will allow resort to the ususl modes of proof, by prescription from user, and dedication, in addition to documentary proof. The allegations here do not call for documentary proof.

Documentary and parol proof were offered, from which the jury might have found the establishment of a highway at the place obstructed, or might have drawn inferences of a dedication by the owners of this tract, knowing and acquiescing in its use by the public, as such. Alvord *v.* Ashley, 17 Ill. R. 363. The road was petitioned for by plaintiff. It was opened in 1842, and openly and notoriously used and worked on as such, and as far as could be, was in the actual occupation and possession of the public, for that purpose, and claimed as such. We can make no distinction between governmental and individual ownership, nor between non-resident and resident proprietors, as to the operation and effect of such occupancy, claim and user upon their respective rights. They are presumed to have, and must alike take notice at their peril. The power of the government to establish highways, and acquire easements on the land for that purpose, is paramount to the public or private own-

(*a*) Town of Lewiston vs. Procter, 27 Ill. R. 419,

ership of the soil, without respect to the character of the proprietor.

The patentee and his vendees made no objection, and asked no damage. In 1849 the land was conveyed to plaintiff's wife, and still we hear no complaint, until April or May, 1853, when instead of asking an assessment of damages he closed up the highway by a fence. If upon the settling of the country, and the inclosure of the wild lands, it be found, that the early laid highways are injuriously and inconveniently laid, the proper remedy is by application to the country courts or townshi, boards, who may have the authority, not only to open, and vacate, but to relocate the whole, or particular portions.

The evidence of non-resident proprietorship, was therefore properly excluded. That offered as rebutting by the prosecution was properly admitted, and the jury were justified in giving to it its due weight not only as rebutting, but in establishing the prosecution. This is not of that class and character that would confine its application to rebutting alone, because the court might refuse to open the case for it in chief. The instructions given for the prosecution are correct, and those refused to the plaintiff should not have been given. We might presume that their true intent was in accordance with the positions assumed in the others refused, and this was doubtless the view taken of them by the court below, and in that sense their rejection was proper.

A highway may be legally laid out and established by public use, and recognition of it by the proper authorities, which is sufficiently evidenced by ordering it to be, and having it worked on and repaired, when so laid out and established with the express or implied assent of the owner of the land, or the assessment and payment of damages. And juries may infer a dedication from length of user, and from acquiescence by the owner. But while no presumptions or inferences can be made against those who have neither actual or constructive notice of such user, every one is presumed to know of and notice such use of a way over his land. Warren v. Trustees of Jacksonville, 15 Ill. R. 240–242; Greenleaf Ev., Sec. 662, and notes.

Judgment affirmed.

JOSIAH B. WILLIAMS, Appellant, *v.* WILLIAM CHAPMAN *et al.*, Appellees.

APPEAL FROM OGLE.

In enforcing a mechanic's lien, all persons interested in the land should be made parties to the suit, or the rights of those not made parties will not be affected by the decree.

Where two parties have acquired title to land, one under proceedings for a mechanic's lien, the other under proceedings to foreclose a mortgage, if the mortgagee or others interested were not made party to the suit enforcing the lien, and were ignorant of it, the title to the land derived through the mortgage will be superior.

The mechanic's lien will attach from the delivery of the materials upon the premises, and the use of them by connecting them to the freehold, not from the date of a contract.

THIS was an action in ejectment, brought by Williams against the defendant, Chapman. On the trial, Williams declared his title through the grantee from the government in 1843, by virtue of the foreclosure of a mortgage and sale under it, by deed dated March 27th, 1854. The mortgage under which he derived title was dated September 21st, 1844, filed for record for the 25th of November following. Judgment of foreclosure of mortgage was on September 11th, 1852.

The evidence for defendant was the record of a petition, proceedings thereon, and decree in a case for a mechanic's lien, in which Stephen Chapman was complainant, and Milo Kelly, Harvey Colburn and Moses Nettleton, were defendants.

It charges that a contract was made about the first of August, 1844, between the petitioner on the one part, and Milo Kelly and Harvey Colburn on the other, the latter being owners of the land (N. W. qr. of N. E. qr. of Sec. 27, T. 53, R. 11) for labor to be performed by the former for the latter, on the mill on the land, and that they finished the work about the 29th of May, 1845.

On the 19th of August, 1847, a jury tried the issues, found for the plaintiff, and assessed his damages at $391.61.

Upon the rendition of the verdict, the court "ordered and considered that the lien as prayed for by the petitioner, attach, and that a special execution issue for the sale of the premises." [The prayer was, that the petitioner might have the benefit of a mechanic's lien, and that the same may attach on said land and on the mill.]

Execution on this order of judgment. Sheriff's deed to S. G. Patrick. Conveyance from Patrick to Stephen Chapman. Con-

veyance from S. Chapman to William Chapman, one of the defendants. Colburn's evidence that Stephen Chapman commenced work on the mill in August, 1854, and worked till the following May.

The cause was heard before DRURY, Judge, and a jury, at May term, 1856, of the Ogle Circuit Court. There was a verdict and judgment for the defendants. The plaintiff thereupon brought the case to this court.

E. S. LELAND, for Plaintiff in Error.

W. W. HEATON, for Defendants in Error.

SCATES, C. J. The conflicting titles here—each of which alone would appear sufficient—must depend upon the priority of lien. The one being by mortgage filed for record 25th November, 1844, susequently foreclosed by *sci. fa.* against mortgagor, and a sale and deed; the other, on decree on petition for mechanic's lien, on a general contract for day labor as a millwright, at their value, commeneed on a mill about 1st August, 1844, and completed about 29th May, 1845, with suit within six months, against mortgagor and others, not this plaintiff, a decree, execution, sale and deed.

As the question appears, and is presented in the record, the priority and title is very clearly in the plaintiff, by our own adjudications.

A short statement and review of the cases and principles governing this question will sustain our conclusion, and show the principles and reasons by which we are brought to this result. I need not cite authorities to show that none but parties, served with notice, and privies in estate, can be bound or concluded by judgments or decrees from asserting their rights.

In construing this act, the court has laid down the rule that all persons in interest may and should be made parties; Kimball et al. *v.* Cook, 1 Gil. R. 427; and the rights of those not made parties are not affected by the decree, or any proceedings under it, as was said by this court, in reference to this plaintiff, in this lien case. Kelley et al. *v.* Chapman, 13 Ill. R. 534.(*a*)

He must stand therefore before us, as if no decree had ever been rendered in the case; even had the lien been prior in date to the mortgage. For otherwise if effect is given it to overreach the mortgage, it can only be by concluding plaintiff's rights and interests in a cause to which he was no party or privy, and without opportunity of being heard or of defending his interests. He claims under, or rather, through Kelley, the mortga-

(*a*) N. P. C. of Chicago vs. Jevne, 32 Ill. R. 214. Radcliff vs. Noyes, 48 Ill. R. 319

gor, but not in privity and subordination in this sense, of parties to actions ; and is not, therefore, respresented by Kelly.

But independent of this right of objection to the decree as evidence against plaintiff of paramount title, the date of the commencement of defendants' lien could not have been before the 29th day of May, 1845. In McLagan *v.* Brown et al., 11 Ill. R. 526, it was held that the lien under this statute will attach and commence upon the performance of the work or delivery of the materials. The same principle is in effect asserted, and the reason for alluded to in the case of Gaty et al. *v.* Casey et al., 15 Ill. R. 192, where in answer to an objection to a contract made in St. Louis, having an extra-territorial effect, to create a real estate lien in Illinois, the court said : " it is not the contract which creates the lien under the statute, but it is the use of the material, furnished upon the premises, the putting them into the building, and attaching them to the freehold, which entitles the party furnishing the materials to a lien upon the premises to the extent of their value."

The same construction is put upon a statute similar to ours in McCullough *v.* Caldwell's Executors et al., 3 Eng. Ark. R. 232, fixing the delivery of materials, or the completion of the work, for the commencement of the lien.

This is the most equitable construction, if the rights of others are to be regarded. Whilt we will give the act a liberal interpretation to preserve the rights of mechan cs and material men, we are not called upon to destroy all other rights, in order to foster and give efficiency to every claim and assertion of this secret incumbrance. By the delivery of material, or the bestowel of labor upon the land, means are offered others to know something of such claims for the eighteen months that may follow, within which the right must be asserted.(*a*)

Were the promise or contract for the material or labor that ground of lien, or even the bare commencement to deliver the one, or bestow the other, no one could possibly have any means of knowledge and the time for completion and payment might prolong this uncertainty for years We think the lien put upon the right and reasonable ground, the existence of a debt ; for the one or the other by performance of the benefit contracted for the land, and it is immaterial, whether that dedt be due or not. Rev. Stat. p. 346, Sec. 15.

A like cautiousness to prevent injury to innocent third persons is manifested in sustaining the secret lien of vendors for the purchase money. See case of Bailey *v.* Greenleaf, 6 Wheat. R. 46, S. C. 5 Pet. Cond. R. 235, and notes.

This will work no injustice or injury to mechanics or material

(*a*) Phillips vs. Stone, 25 Ill. R. 80

men, as they may, even against prior incumbrances, follow the specific value of their materials and labor. Rev. Stat. p. 347, Sec. 20 ; Gaty et al. *v.* Casey et al., 15 Ill. R. 192.

Judgment reversed and cause remanded for new trial.

Judgment reversed.

JOHN BERGEN, Plaintiff in Error, *v.* THE PEOPLE, Defendant in Error.

ERROR TO WILL.

An indictment for incest which charges that the acts were upon the person of A. B., the said A. B. then and there being the daughter of him, the said C. D., sufficiently avers the relationship between the parties.

The admission of the father, that the person with whom he had sexual intercourse, was his daugter, by a former wife, was competent evidence.

It is not proper to permit proof of what a living but absent witness testified to on a former trial of the same cause.

The confession of a party accused of crime, which is uncorroborated by any circumstance inspiring belief in its truth, arising out of the conduct of the accused, or otherwise, is insufficient to convict.

THIS cause was tried before RANDALL, Judge, and a jury, at December term, 1855, of the Will Circuit Court. The plaintiff in error was found guilty, and his punishment fixed at four years in the penitentiary.

ANDERSON and MCALLISTER, for Plaintiff in Error.

W. H. L. WALLACE, for The People.

SKINNER, J. This was an indictment for incest. The indictment charges that the defendant committed the incestuous acts "upon the person of Phebe R. Bergen, the said Phebe R. Bergen then and there being the daughter of him, the said John Bergen," &c. A motion to quash the indictment was made and overruled. It is contended that the indictment does not, with sufficient certainty, aver that the relation of parent and child existed between the defendant and Phebe R. Bergen. The language is plain, as broad as the language of the statute defining incest, and means that the natural relation of parent and child existed between the parties, and is incapable of any other fair construction We are of opinion, therefore, that the indictment is sufficient.

On the trial the People offered to prove admissions of defend-

ant, that said Phebe was his daughter, by a former wife, who died when she was an infant, and that he married his present wife when said Phebe was an infant. The defendant objected, and the court admitted the evidence. It is urged in argument that the effect of this evidence was to prove the defendant's several marriages by his admissions; that the law requires proof of marriage in fact, and that defendant's admissions are not competent for that purpose. It is said, that on trial of indictments for bigamy, and in actions for criminal conversation, proof of marriage, in fact, is essential. It is unnecessary, however, to examine the law upon this subject.

Marriage was not the gist of the inquiry. The question was, did the defendant have sexual intercourse with his daughter, as charged in the indictment? The object of the evidence was, to prove that Phebe was the daughter of the defendant; and, for that purpose, it was unobjectionable. And if it was material, under the pleadings, to prove that the defendant, at the time of the alleged criminal act, was a married man, his admission of the fact, upon general principles, was admissible; and it is difficult to comprehend why an admission by the defendant of the facts of his marriage would not be sufficient proof of actual marriage, as contradistinguished from such evidence of marriage as cohabitation may afford. 2 Greeleaf's Ev., Secs. 49, 50; Forney *v.* Hollocher, 8 Serg. and Rawle, 159. The court permitted the People to prove what Phebe swore to, on the examination of the defendant before the magistrate, for the same offence, the defendant objecting. The record shows, that there was evidence tending to prove that the defendant had taken the witness out of the State, to deprive the People of her testimony; and it was proved that she had been for some months beyond the limit of this State. Where a witness has testified on a former trial of the same cause, or where the same matter was in issue, between the same parties, and the witness has since died, what such witness swore to on the former occasion may be given in evidence.

Here the witness was not dead, but beyond the jurisdiction of the court, by the procurement of the defendant; and we think the rules of evidence do not permit, in such case, the admission of the testimony given on the former occasion.(*a*) State *v.* Atkins, 1 Tenn. [Overton] 229; The People *v.* Newman, 5 Hill, 295; Finn *v.* Commonwealth, 5 Randolph, 701, 708; Wilbur *v.* Selden, 6 Cow. 162; Hobson *v.* Doe, 2 Blackf. 308; Chess *v.* Chess, 17 Serg. and Rawle, 409; 4 Yates, 512; La Baron *v.* Crombie, 14 Mass. 234; 5 Starkie's Ev. 894. Some of the authorities hold that, in a criminal proceeding, this kind of evidence is not admissible, although the witness be dead; but it is not necessary

(*a*) Letcher vs. Norton, 4 Scam R. 578 & notes.

for us here is to decide this question. It is true, if a party in any case spirits away his adversary's witness, he ought not to profit thereby ; or, at least, suitable penalties should be provided against such conduct, but it is for the legislature to correct the evil.

The court refused to instruct the jury on the part of the defendant, that he could not be convictd upon his mere confessions, made out of court, uncorroborated by facts or circumstances. The elementary books generally state the law to be, that confessions alone are sufficient to convict ; yet it is believed no court would permit a conviction for felony upon mere confessions, made out of court, without some proof that a crime had in fact been committed, or of circumstances corroborating and fortifying the confession. The criminal law requires proof sufficient to satisfy the reason and judgment beyond a reasonable doubt of the guilt of the accused ; and anything short of this will not justify a conviction. Mr. Justice Blackstone, in speaking of confessions not made upon due caution and deliberation, and to unathriozed persons, says : " they are the weakest and most suspicious of all testimony ; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces ; seldom remembered accurately, or repeated with due precision ; and incapable in their nature of being disproved by negative evidence. " And the same author approves the rules laid down by Sir Mathew Hale : never to convict of larceny till the goods are proved to have been stolen ; nor to convict of murder or manslaughter unless the body be found dead. 4 Black. Com. 357, 358 and 359. Experience has shown that confessions have sometimes turned out unfouded ; that the weak, to avoid apparent impending peril, and under the force of surroundings, exciting apprehensionhs, and imaginary dangers, have been induced to state untruths which have produced their conviction of supposed crimes.(*a*)

The humanity of the law will not tolerate a general rule which, in its operation, endangers the security of innocence, and is unsafe to life or liberty, in the administrati on of the law, Confessions proved are necessarily weak or strong evidence, according to the circumstances attending the making and the proving of them ; and we think the only safe general rule is to require some other evidence corroborative of their truth.

Proof that the crime has been committed by some one is necessarily corroborative of a confession by the defendant that he committed the crime ; for it establishes a fact essential to the guilt of the accused, and which would be included in the crime confessed. A great variety of facts usually attend, or are incidentally connected with, the commission of every crime. Proof

(*a*) Ray vs. Bell, 24 Ill. R. 451, 452; Frizzell vs. Cole, 29 Id. 466. Miller vs. People, 39 Id. 457.

of any number of these facts and circumstances, consistent with the truth of the confession, or which the confession has led to the discovery of, and which would not probably have existed had the crime not been committed, necessarily corroborate it, and increase the probability of its truth. In this case, from the nature of the crime, proof of the *corpus delicti*, independently of the confession, except by the guilty participant, and, in fact, without proving also the defendant guilty of the crime charged, would be impossible. There is necessarily no victim—nothing visible or tangible, the subject or consequence of the wrong, capable of ascertainment and of proof. To require it would be to require, independently of the confession, proof of defendant's guilt. The corroborative evidence, therefore, must consist of facts or circumstances, appearing in evidence, independent of the confession, and consistent therewith, tending to confirm and strengthen the confession. Without proof, *aliunde*, mere confessions that the crime charged has been committed by some one, or of some fact or circumstance confirmatory of the confession, a party accused of crime cannot be found guilty, unless such confession be judicial or in open court. The instruction should therefore have been given.

It is the mere naked confession, uncorroborated by any circumstance inspiring belief in the truth of the confession, arising out of the conduct of the accused, or otherwise, we hold insufficient to convict, and the corroborating fact or facts in proof need not necessarily, independent of the confession, tend to prove the *corpus delecti*. 1 Greenleaf's Ev., Sec. 217 ; State *v.* Guild, 5 Halstead, 163, 185 ; State *v.* Long, 1 Haywood, 455 ; The People *v.* Hennessey, 15 Wend. 147 ; The People *v.* Badgley, 16 Wend. 53.

Judgment reversed and cause remanded.

Judgment reversed.

PEORIA AND OQUAWKA RAILROAD COMPANY, Plaintiff in Error, *v.* JOHN ELTING, Defendant in Error.

ERROR TO TAZEWELL.

A subscription to stock may be collected, although amendatory acts have been subsequently passed, affecting the original charter, by extending its powers. Remedy by action to recover subscriptions is not impaired by the fact that the Company has the power to declare a forfeiture of stock.

This is an action of assumpsit, brought by plaintiff against

defendant upon a subscription of said defendant to said plaintiff for stock in said conpany.

Declaration recites:

1st. The act of the Illinois legislature, approved 12th February, 1849, entitled "An act to incorporate the Peoria and Oquawka Railroad Company," and the amendatory act passed and approved February 10th, 1851.

2nd. The subscription signed by defendant, as follows: "We the subscribers, severally agree to become stockholders in the Peoria and Oquawka Railroad Company, to the number of shares placed opposite our names respectively, and to pay the amount thereof in such installments as may be called for by order of the president and directors of said company. Peoria, fourth day of February, 1850;" to which agreement defendant signed his name and placed opposite his name so subscribed, the number of ten shares, being in amount $1,000.

3rd. Said company was organized under said act Jan. 20, 1850.

4th. Defendant paid on his stock 5 per cent., being $50.

5th. Declaration alleges usual promises and undertakings, and subsequent assessmeuts by the president and directors of said company, to the whole amount of said stock subscribed, notice to defendant, and refusal of defendant to pay.

Defendant interposed demurrer to declaration, and assigned special causes:

1st. That said declaration is inconsistent in this, to wit: that the laws of 12th February, 1849, and 10th February, 1851, became laws before the organization of the company and subscriptions of stock by defendant, which it is averred took place on the 4th Feburary, 1850.

2nd. Because it is not averred what amount of stock was subscribed, nor what per cent., or that any per cent. of said stock was paid in at or before the time of the organization of said company.

3rd. Because it is not shown that the company, on calling for payments or installments of stock, gave 30 days, notice in three newspapers.

4th. Because plaintiff has shown no promise by defendant, and that their only remedy is in chancery.

5th. Because, after defendant's subscription, the act of 10th February, 1851, authorized the company to proceed with the road when $100,000 should be subscribed, thus changing the character of the contract; and because said act of Feb., 1851, authorized the construction of a branch road from Monmouth to the Mississippi at or above Shohocton, not contemplated by the original act under which the subscription was made.

6th. Because the General Assembly, by an act of June 22, 1852, without the consent of defendant, increased the capital stock of said company to 3,500,000.

7th. Because said General Assembly, by said act, without consent of defendant changed the route of said road, and also the branch to the Mississippi.

8th. Because, by said act, said company was authorized to construct ferries across the Mississippi and Illinois, enterprises to which defendant did not subscribe.

9th. Because by said act said company was authorized to extend said road to the eastward to the state line of Indiana.

10th. Because by said act said company was authorized to borrow money on the credit of the company, and pledge the capital stock, mortgage the road, &c.

Upon the hearing, the demurrer was sustained and the plaintiffs abided by their declaration, and assigned, as cause for error in the circuit court, the sustaining of said demurrer.

This cause was heard at April term, 1855, of the Tazewell Circuit Court, before DAVIS, Judge. The cause was taken by change of venue from Peoria to Tazewell county.

MANNING and MERRIMAN, for Plaintiff in Error.

N. H. PURPLE, for Defendant in Error.

SCATES, C. J. The case, upon special demurrer to the declaration, presents only the substantial and technical sufficiency of the averments on it, to maintain this action. Of these we can entertain no doubt, upon the authority of adjudged cases in England and the United States, as well as our own courts.

The first objection is to the inconsistency in the averments, that acts of Feb. 1849 and Feb. 1851, were passed and had became laws before the subscription of defendant, and the organization of the company in 1850. If the averment is to be literally taken in its three dates, it will be rejected as absurd, and surplusage as to the priority of 1851, to 1850. It can work no prejudice to defendant, as it shows on its face, that all objections he has any right to make to the payment of his subscripiton, by reasen of the amendatory act, are still open to him, notwithstanding the averment in this particular.

I need not pursue the special causes, nor the order of their assignment. The important ones will be noticed in substance and answered.

A subscribe.'s agreement for the formation of a company with the view of applying for charter to build a railroad, was held to be enforcible, by the company, after organization under

the charter; Midland Great Western Railway Company *v.* Gordon. 16 Mees. Welsb. R. 804; and this too, where the agreement was for a railway only, and the charter authorized a railroad for part of the line, and the purchase of a canal for the remainder. The same principle had, in effect, been laid down, in the refusal to allow additional pleas to be filed, in London and Brighton Railway Company *v.* Wilson, 6 Bingh. N. C. 135, in respect to changes and deviations from the line adopted, but essentially changing the character of the company or enterprise, in which they proposed to, and had embarked. It has been so laid down, and these authorities approved, in Barret *v.* The Alton and Sangamon Railroad Company. 13 Ill. R. 506.

The principle is sanctioned in The Pennsylvania and Ohio Canal Company *v.* Webb, 9. Ohio R. 139; Clark *v.* Monongahela Navigation Company, 10 Watts R. 364; Gray *v.* Monongahela Navigation Company, 2 Watts and Serg. R. 159. And they show also, that subsequent amendatory acts may remedy omission to comply strictly with the provisions of the charter, and that additional powers and privileges, conferred by subsequent amendatory acts, do not nullify the contracts and obligations of the stockholders to the company, or among themselves. Subsequent amendatory acts in this case, simply confer additional powers and privileges, if accepted by the company, by enlarging their capital, the borrowing money, mortgaging their road and property to secure it, extending the main line of the road, the building of branches, altering the line, and in adding facilities for crossing the Illinois and Mississippi rivers by ferries, &c., and is in no sense a change of the character of this enterprise, which still remains that for building and operating a railroad, with enlarged capacities and privileges, which may be highly promotive of its welfare and success, for anything apparent on this record. Nor does it appear that the company have accepted these powers and privileges, or propose to exercise them.

This subscription is enforcible at the common law, and the remedy is not in the least impaired by the power of forfeiture, conferred in the 6th section of the charter, for non-payment. (Acts 1849, p. 101.)

This is fully settled in Klien *v.* The Alton and Sangamon Railroad Company, 13 Ill. R. 514; Ryder *v.* Same, id. 516; Hartford and New Haven Railroad Company *v.* Kennedy, 12 Conn. R. 507, in which last this subject is fully and ably discussed, and shown that as a general proposition, the principle is not sustainable as laid down in Andover and Medford Turnpike Corporation *v.* Gould, 6 Mass. R. 40, and followed in 7 Mass. R. 102; 8 id. 138; 10 id. 384; 14 id. 286; 16 id. 94; 6 Pick R.

23—45 ; 10 id. 371 ; 14 id. 483 ; in Maine, 3 Fairfield R. 588 ; and in New Hampshire, 2 New Hamp. R. 380. And this was re-affirmed in Danbury and Norwalk Railroad Company *v.* Wilson, 22 Conn. R. 447, and we think sustained by reason, as well the decision of this court, in the above case as in the recent case of Cross *v.* The Pinckneyville Mill Company, 17 Ill. R. 54.

Due notice of the assessments is averred ; the character of the notice, or time and mode of giving it, need not be averred, but will become the subjeet of proof, when put in issue by plea.

The power to organize upon a subscription of $100,000, is expressly authorized by an amendment to the charter, and that is sufficient, for all the purposes of this trial, as if contained in the original charter. 2 Watts and Serg. R. 159 ; 10 Watts R. 364.

The declaration shows good cause of action against defendant, and the demurrer should have been overruled.

Judgment reversed and cause remanded.

Judgment reversed.

WILLIAM F. JOHNSON, Plaintiff in Error, *v.* JOHN. C. DODGE, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS

Equity will decree a specific performance of a contract for the sale of land, if the proof supports a transaction which is fair.

The authority to the agent to sell land need not be in writing to take it out of the statute of frauds ; and the agent may execute a contract to bind his principal, if his authority was ample, and this conduct was correct.

The power to convey land need notbe in writing, and of equal dignity with the act to be exceuted.

THIS case is a suit in chancery, brought by Johnson against Dodge, for the specific performance of a contract for the sale of forty acres of land, more or less.

John C. Dodge, being then the owner of said land, on the 4th September, 1852, by and through his agent, N. P. Iglehart, of Chicago, entered into a written agreement, signed with the name of said Dodge, by said Iglehart, as his agent, whereby it was agreed that said Dodge sold the said land to a certain Thomas C. Walters, at $30 per acre, " one-fourth in cash on the making of the deed, one-fourth in one, one-fourth in two and one-fourth in three years, with interest on the deferred payments, and to be secured by mortgage ; that the deed should be made to Wal-

ters or his assigns, and the sale should be closed by both parties within five days from the said 4th September, 1852, and that the sum of $50 was paid down by said Walters to Iglehart.'' The bill futher states, that Walters in all things complied with the terms of said agreement, by offering to pay to Dodge the balance of the first payment, and demanded from him a deed according to said agreement, and offered, on receipt of the deed, to make the mortgage agreed upon, but that Dodge refused to accept the money or to convey the premises alleging, as an excuse, that the land was worth more than $30 an acre ; that on the 13th September, 1852, Walters sold and transferred said agreement to William F. Johnson, the complainant; that about the 6th of September, 1852, Dodge left Chicago, and was absent till about 14th ; that on that day, the complainant tendered and offered to pay said Dodge, at his office in Chicago, the said balance of the first payment, demanded of him a deed, and offered to execute the mortgage as aforesaid, on receipt of the deed, but that Dodge refused, stating that the land was worth more than $30, though that was a fair price for it at the time. The complainant states, he is ready to comply with his portion of said agreement, in all respects, and that after Iglehart had made the sale and entered into the written agreement, he reported the fact of the sale to Dodge, by sending a memorandum in writing to him by his, Iglehart's clerk, on or about the 6th of September, aforesaid, and that Dodge told the clerk the sale was all right, and he would attend to it. And further, that Iglehart, as agent for Dodge, since said 4th of September, has sold large quantities of other lands, in a similar manner, for said Dodge, reported them to him, and that Dodge recognized and carried out all said contracts, except the one in question. The bill then prays for a specific performance, &c.

The defendant denies that on the 4th day of September, 1852, he entered into the aforesaid agreement, by his duly authorized agent, N. P. Iglehart; says that he never appointed said Iglehart his agent, to sell or dispose of said land, as his agent, and that the contract was made without his authority ; denies that he received the sum of $50, as part of first payment through said Iglement, and that he ever receiyed any money whatever, on account of said sale, and that if said Iglehart received it and receipted for it, it was done without his anthority. Defendant denies that Walters, at any time offered to pay the balance of first payment, and demanded a deed, and offered to execute a mortgage, or that he, the defendant, refused to accept the said balance of first payment, and convey said premises to Walters, or receive a mortgage from him ; denies that he alleged as an excuse he thought the land was worth more

than $30, the amount it was sold for, and says he is unacquainted with Walters, and never has seen him. Defendant says he is wholly ignorant of the transfer of said agreement by Walters, to Johnson; denies that he left Chicago on the 6th September, 1852, and was absent until 14th, and says that he was in the city of Chicago from the 13th August till 17th September, and was, during business hours, in his office, and could have been seen by Walters; denies that the complainant, on 14th September, offered to pay him at his office, the balance of the first payment, or that he demanded of him a deed, and offered to execute a mortgage, or that he alleged as an excuse for his refusal to comply with said offer, that the land was worth more than $30 per acre. Defendant denies that the price of $30 was a fair price at the time of the pretended sale. As to that part of the bill alleging an offer to pay the balance of the first payment, defendant says, he admits that about 14th day of said September, a person, who was a stranger to him, called upon him at his office in Chicago, and presented or offered to him a sum of money, how much he is unable to say, saying that said money was for land sold by him, the defendant, without specifying what land, or to whom the same had been sold, or for whom and by whose authority said money was offered, and desired him, the defendant, to fulfill his contract for the sale of said land, without speciying what contract or in what manner a performance thereof was requred; and the defendant told the person he had sold no lands, and if any lands belonging to him had been sold, they had been sold without his authority. Defendant admits, that about 6th September, 1852, he found at his office a note or memorandum, in writing, left by whom, he does not know, purporting to be written by Iglehart, to the effect that the land described in the bill, had been sold, but denies he received it from Iglehart's clerk, and that he told said clerk, or any other person, that said sale was all right, and he would attend to it, but says, that immediately on receiving said note, he returned it to Iglehart with a statement indorsed thereon, in substance that if any sale of said land had been made, it was improperly, and without his authority. Defendant says, that about 8th September, he received a letter from Iglehart, by a person he supposed to be a clerk of Iglehart's, stating that said land had been sold to one Thomas C. Walters, and requesting him, defendant, to execute a deed, pursuant to such sale; that he was indignant the sale should be persisted in, and said to the bearer of said letter, that he should like to know by what authority Mr. Iglehart had been selling his land, and that he would see to it, or some words to that effect. Defendant says, on same day he called on Iglehart.

at his office, and does not remember whether he found him there or not, but on the same or succeeding day, as soon as he could find Iglehart, he again reminded him that no authority had been given him for any such sale, and desired Iglehart, not to cause him any further trouble about it. That said Iglehart admitted said sale was unauthorized, expressed much regret it had taken place, and promised defendant he would see Walters and have the sale rescinded; that defendant asked where he might see said Walters, so that he, defendant, might personally communicate to him the fact that said sale was unauthorized, and have it abandoned ; that said Iglehart stated, Walters was then absent from Chicago, and he, Iglehart, would see him in respect thereto. Defendant says, about 14th September, and immediately after the offer of the sum of money before referred to, he again called upon Iglehart, and Iglehart told him he had seen him, Walters, offered to pay $150 from his own pocket, to abandon the sale, and that Iglehart assured the defendant that the sale should be abandoned by Walters. Defendant denies that Iglehart, as his agent, has, since the 4th of September, 1852, sold large quantities of other lands for him, or that he recognized or carried out such sales, and says, that in all the transactions and sales referred to, Iglehart had authority to receive propositions and offers for said lands, and report the same to the defendant to receive and give effect to such propositions and offers, by making and perfecting a sale of said lands in pursuance thereof, or to reject the same as he might think proper ; that Iglehart never, as defendant's agent, or with his knowledge or consent, signed any agreement for the sale of such other lands, but in all things left defendant free to act in the premises as he might think proper : that all the agreements or instruments in writing, respecting such sales, were signed by defendant with his own proper hand. In answer to interrogatory in the bill, "whether the defendant did not leave a description of said land in said agreement specified, with said N. P. Iglehart, and authorize and request him to sell the same at the price and on the terms specified in said agreement," defendant says, he did not leave a description of said land with said Iglehart, or authorize or request him to sell the same on said terms, or any other, nor for the price of $30 per acre, as specified in the writing to Walters. For further answer to interrogatories put in the bill, defendant says, in substance, that about 11th August, 1852, he was called on by Iglehart, till that time a stranger to defendant, and asked by him if certain lands, including that in question, were for sale, and defendant told him they were not. Defendant says, subsequently, and on the succeeding day, Iglehart called on defendant at his office, and asked him

what lands he had for sale; that defendant designated to him on a map of the city of Chicago, certain lands he might be willing to sell, but the land in qnestion was not among them, nor was any anthority then given to Iglehart to sell the lands so designated, or any portion of them. Defendant did not see Iglehart from the time of this interview, nor had he any further commnuication with him respecting said lands, until he received he note or memorandum before referred to, stating that the land in question had been sold. Defendant claims that the authority charged in the bill to have been given by him to Iglehart to sell the lands mentioned, was not in writing and signed by defendant as required by Statute of Frauds and Perjuries, and that the agreement set forth in the bill as made by said Iglehart as his agent, was not signed by said Thomas C. Walters, and could not be enforced against said Walters, and for that reason said agreement is not binding upon the defendant, and that the offers and tenders made were not made in pursuance of and according to the terms of said agreement. Defendant insists he is discharged from the contract by reason of the non-performance of the several conditions therein to be performed by said Walters, and by reason of the insufficiency of the tenders.

Iglehart deposes, that he was employed to sell the land in question; about the 12th August, 1852, he was employed to get offiers, or to see at what price he could find a buyer for the land, and to report the same to Dodge. About the 3rd of September following, he reported a bid of $25 an acre; Dodge declined that offer, and stated his price at $30 per acre, as the lowest—one-fourth cash, and the balance in one, two and three years. These limits and the terms named, he entered at once on his book. Deponent says, in communicating to Dodge the offer of $25 per acre, he told him it was for the piece of land in question; and that it was in his hands at that time, for a given price. The piece of land was placed in his hands by Dodge about the 12th of August, to get bids for. He says the offer of $25 per acre was not made by him to Dodge for himself, but carrying out his agency for Dodge. On the 12th August, at the time the piece of land in question was placed in his hands, another piece was placed there, like the other, to get bids for. About 3rd September, 1852, in reporting the offer of $25 per acre, previously named, and at that time Mr. Dodge placed a limit on the other lot, of $140 per acre, and of $30 per acre on this one now in question, and authorized him to sell these respective pieces at those prices. Deponent says, he sold the land in question on the 4th September, 1852, to Thomas C. Walters, at $30 per acre—one-fourth to be paid in cash on the execution of

the deed, the balance in equal annual payments, in one, two and three years, secured by mortgage for the deferred payments, and received from said Walters $50 on account of the first payment, which $50 he placed to the credit of said Dodge on his books, charged him with $30, being two and one-half per cent. commission on $1,200, the amount of the sale. Deponent says, he gave Walters a contract of sale, dated September 4th, 1852 ; says the contract with Walters is in his, the deponent's, hand-writing ; is signed by him in the name of N. P. Iglehart & Co., as agent for Mr. John C. Dodge for the sale of the piece of land described in the contract ; said contract was assigned some few days after the 4th of September, the exact date not remembered, to William F. Johnson, by said Walters. Deponent thinks it was on a separate piece of paper, and that he wrote the assignment himself. Deponent communciated the sale of the land in question to Mr. Dodge on the day it was made, viz. : the 4th September. This communication was verbal, but deponent made another communication of said sale on the 8th September, 1852, in writing. At the time of making the communication on the 4th September, deponent asked Mr. Dodge for his papers of title, so that he could draw the proper papers, and have the sale closed. Mr. Dodge was very busy, it being Saturday, and asked deponent to let it remain until Monday, the 6th September, that is, the furnishing of the title papers. After the receipt of the letter of 8th September, Mr. Dodge called at deponent's office on the 9th of September, or perhaps on the evening of the 8th. He called to complain somewhat of deponent's letter to him, acknowledging its receipt. Deponent explained it to him, telling him, that his not furnishing his title papers on Monday, the 6th September, 1852, had caused Mr. Walters to feel angry, and disposd to give deponent as much trouble as he could, unless the papers were immediately executed by Dodge to him, and to close the matter, if possible, was the reason deponent had written to him on the 8th. Dodge still appeared angry, principally on account of the remarks in deponent's letter, which he deemed harsh towards him, and declined rather at that interview, to execute the papers or furnish them to deponent, by which to draw the proper papers. Deponent remonstrated with him in a general conversation, and stated that he had had the property in charge, since about the 12th August, 1852 ; that on the 3rd of September, he, Dodge, had placed it with him, deponent, specifically for sale, at thirty dollars an acre, and authorized him to sell it that price, and no less. Deponent referred also in the conversation to his, Dodge's, confirming the sale on Saturday, the 4th September, when he reported it to him, and of his promise to furnish him

the title papers on the following Monday; and also to the fact that he, deponent, had issued a contract for this property, as his agent, and had received $50 on the same. Deponent urged Dodge to close it up and settle. He declined, and went off rather angry. About the 17th of September, 1852, he, deponent, reported another sale of Mr. Dodge's property left by him with deponent, which Mr. Dodge confirmed and signed the contract, and then referred to the land in question, in a milder tone than before, stating he wished deponent to settle it in some way for him; that somebody had made him a tender in gold, some pert young man, he said, and wanted deponent to tell him who it was. He also said he thought the property ought to bring more, and if deponent would get him out of this scrape, he would still let him have the selling of this and of some other property he had for sale; that he wished to purchase some good property, and wished deponent to attend to all his land matters as he would report them to him. Deponent does not remember having any other conversation with Dodge, until about 1st October, 1852, when Dodge handed him some other pieces of property for sale; and also, at that time, he gave him for sale this same forty acres in dispute, limiting it at $50 per acre. There was some little conversation about this forty acres and the affair with Walters. Dodge wished deponent, if possible, to settle it for him. Deponent expressed a willingness to do so, if he could, and told him he had no control of it in any way, and especially referred to the fact that the matter was then placed in the hands of Morris, Hervey and Clarkson, and had been assigned to Johnson, but was willing to do any thing he could. Deponent urged Dodge to see Mr. Morris himself, as he was an old acquaintance, with whom he thought the best arrangements could be made in the matter. About the 13th October, ensuing, Dodge placed other property in said Iglehart's hands for sale, amounting to $10,000, and spoke again of this matter, but had not been able to arrange. Deponent and Dodge, from that time to about the 1st January, 1853, had brief conversations as they met from time to time, on business, deponent having sold for him during that time some $10,000 worth of property. Deponent and Dodge learned from each other, that both were unable to effect a compromise. On 13th January, 1853, deponent and Dodge had their last interview on this subject, at least in an amicable way. Dodge said he had learned that some legal process had been or was about to be instituted against him, at which he expressed himself angrily, and withdrew all property of his, on deponent's books for sale, and told deponent his agency for him had ceased, and spoke of reducing that revocation of agency to writing, which deponent told him it was not

necessary for him to do. Deponent does not remember the exact amount in gold Dodge said was tendered him. Dodge spoke of some pert young man having called on him with gold in his hand, wishing him to take it, in payment for some land sold Walters by Iglehart. Dodge said in substance, that he told the young man that he did not want his gold, and he had better put it in his pocket and go away. The time was about subsequent to the 8th of September, 1852, say from three to ten days. Dodge named it to deponent about the time it occurred. Dodge did not question Iglehart's authority on the 4th September, when he reported the sale, but fully confirmed, stating that on the following Monday, 6th September, he would furnish his title papers to draw the suitable papers to Walters. In a conversation after the reception of Iglehart's note of 8th September, Dodge expressed it as his opinion, that his, deponent's, agency or the contract he had signed, would not hold him. From that time to the 13th January, 1853, when Dodge withdrew his property from deponent's office, Dodge never disputed his authority. Deponent told Dodge, during the fall of 1852, that if he would arrange the matter some way, he, deponent, would give $100 and his commission on the sale ; giving, as a reason, that that was the only instance where sales made by deponent had not been consummated, and he would sooner give what he had made out of Dodge's subsequent business, than have a thing of the kind unclosed. A few days subsequent to the 4th September, William F. Johnson, the complainant in this case, tendered to deponent, as agent for John C. Dodge, $250 in gold, in payment for said forty acres. The tender was made after the assignment to Johnson, and deponent thinks on the same day.

The bill was dismissed by WILSON, Judge, at January term of the Common Pleas Court, and thereupon the complainant brought this writ of error.

B. S. MORRIS, and WALLER and CAULFIELD, for Plaintiff in Error.

I. N. ARNOLD and H. G. MILLER, for Defendant in Error.

SKINNER, J. This was a bill in equity, for specific performance of a contract for the sale of land.

The bill and proofs show that one Iglehart, a general land agent, executed a contract in writing in the name of Dodge, the respondent, for the sale of certain land belonging to Dodge, to one Walters, and received a portion of the purchase money : that Walters afterwards assigned the contract to Johnson, the

complainant; a tender of performance on the part of Walters and on the part of Johnson, and a refusal of Dodge to perform the contract. The answer of Dodge, not under oath, denies the contract and sets up the statute of frauds as a defence, to any contract to be proved. The evidence, to our minds, establishes a parol authority from Dodge to Iglehart to sell the land, substantially according to the term of the writing. It is urged against the relief prayed, that Iglehart, upon a parol authority to sell, could not make for Dodge a binding contract of sale under the statute of frauds; that the proofs do not show an authority to Iglehart to sign the name of Dodge to the contract, and therefore that the writing is not the contract of Dodge; that the writing not being signed by the vendee is void for want of mutuality; that no sufficient tender of performance on the part of complainant is proved, and that the proof shows that the authority conferred was not pursued by the agent. Equity will not decree specific performance of a contract founded in fraud, but where the contract is for the sale of land, and the proof shows a fair transaction and the case alleged is clearly established, it will decree such performance.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds, that the authority to the agent need not be in writing, and by this construction we feel bound.(*a*) 1 Parsons on Con. 42, and cases cited; Doty *v.* Wilder 15 Ill. 407; 2 Parsons on Con. 292, 293, and cases cited Saunders' Pl. and Ev. 541, 542 and 551; Story on Agency 50; 2 Kent's Com. 614. Authority from Dodge to Iglehart to sell the land, included the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then, the signing is deemed his personal act. Story on Agency 51. In such case the party acts without the intervention of an agent and uses the third person only as an instrument to perform the mere act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and for that purpose, authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person. Hawkins *v.* Chance, 19 Pick. 502; 2 Parsons on Con. 291; Story on

(*a*) But see act of 1869 p, As to Auctioneer Yourt vs. Hopkins, 24 Ill. R. 326.

Agency, Chap. 6 ; Hunt *v*. Gregg, 8 Blackf. 105 ; Lawrence *v*. Taylor, 5 Hill 107 ; 15 Ill. 411 ; Vanada *v*. Hopkins, 1 J. J Marsh. 283 ; Kirby *v*. Grigsby, 9 Leigh 387.

The mode here adopted was to sign the name of Dodge " by " Iglehart, " his agent, " and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, " signed by party to be charged therewith, or some other person thereto by him lawfully authorized. " If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge ; and if Iglehart had authority to sell, in any view, his signature to the contract, is a signing by " some other person thereto by him lawfully authorized, " within the statute. Truman *v*. Loder, 11 Ad. and El. 589 ; 2 Parsons on Con. 291. It is true that authority to convey must be in writing and by deed ; for land can only be conveyed by deed, and the power must be of as high dignity as the act to be performed under it. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract and payment of money under it are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could. 2 Parsons on Con. 290 ; McCrea *v*. Purmort, 16 Wend. 160 ; Shirly *v*. Shirly, 7 Blackford 452.

We cannot question the sufficiency of the tender in equity, to entitle the complainant to specific performance. Webster et al. *v*. French et al., 11 Ill. 278.(*a*) Nor do we find any substantial departure in the contract from the authority proved. While we hold that the authority to the agent who for his principal contracts for the sale of land, need not be in writing yet we should feel bound to refuse a specific performance of a contract made with an agent upon parol authority, without full and satisfactory proof of the authoriry, or where it should seem at all doubtful whether the authority was not assumed and the transaction fraudulent.

Decree reversed and cause remanded.

Decree reversed.

(*a*) Wynkoop vs. Cowing, 21 Ill. R. 570; Anderson vs. White 27 Id. 63.

JOHN G. NELSON *et al.*, Plaintiffs in Error, *v.* ISAAC COOK, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

There is no right of contribution as between tort-feasors or trespassers.

An express promise of indemnity is void, as against a trespass, crime, or wrong. But in a question of doubt as to ownership of property, and when the act to be done is not apparently wrong, or known to be so, an indemnity for an act done in relation to it may be implied, and a suit will lie.

There is no implication of indemnity to a sheriff for the execution of a process, put into his hands, without direction to execute it in a particular manner.

THIS was an action of assumpsit, commenced by Isaac Cook, late sheriff of Cook county, against the plaintiffs in error, in the Lake County Circuit Court, by attachment, and afterwards removed to the Cook County Court of Common Pleas, and tried before J. M. WILSON, Judge, at the September term, 1855.

The affidavit for the attachment sets forth, that the plaintiffs in error were indebted to the defendant in error upon an implied contract arising as follows: That while said Isaac Cook was sheriff of Cook county, in June, 1848, said Nelson and Graydon, as creditors of Augustus E. Miller and David R. Clements, a firm then doing business in Chicago, sued out an attachment from the Cook County Court of Common Pleas, in their own names, against the estate of the said Miller and Clements, directed to the sheriff of Cook county to execute, which was delivered to said Cook (the then sheriff) by the attorney and agent of said Nelson and Graydon, to be executed; and in pursuance of the instructions of said Graydon and his attorney, said Cook attached a stock or dry goods and groceries, and a store in Chicago, of the value of three thousand dollars or thereabouts, which stock and store were claimed by one Jacob Miller as his property, but which said Cook was directed by said Graydon and his attorney to sieze as the estate of Miller and Clements; and in pursuance of the instructions said Cook did sieze the property about the 12th of June, 1848.

That, at the February term of the Cook County Court of Common Pleas, held in the year 1850, the said Jacob Miller, in an action of trespass *de bonis asportatis*, commenced against said defendant in error for attaching said property as the prop erty of Miller and Clements, at the suit of Nelson and Graydon, did recover a judgment against said Cook for the sum of three thousand two hundred dollars, and upwards, which judgment was affirmed by the Supreme Court of Illinois; and that said Cook was compelled to pay the same, with costs and expenses;

and that the amount of damages sustained by him was four thousand two hundred dollars, which sum said Nelson and Graydon owed to said Cook by implied promise; and that Miller and Clements were about to leave the State wish the intention of having theif effects removed; upon which affidavit an attachment writ was issued, which was duly served upon certain garnishees therein named.

The defendant in error filed his declaration, setting forth his cause of action substantially as embodied in the attachment affidavit.

To this declaration the plaintiffs in error filed the general issue and eight special pleas.

A general demurrer to the second and fifth pleas, and a special demurrer to the third plea, were severally sustained by the court.

The fourth plea is as follows: protesting that plaintiff was not sheriff of Cook county, and that Beach was not deputy; and further protesting, that defendants did not sue out or deliver to said Beach the attachment writ, and the defendants did not direct Beach, as deputy, to levy, nor did Beach levy, in manner and form, &c.; and further protesting, that Jacob Miller did not recover the judgment for the causes mentioned in the declaration; and further protesting, that the said plaintiff was compelled to pay, and did not pay, the several sums of money in said declaration mentioned as the plaintiff hath alleged; for plea, nevertheless, defendants say that the property, before and at the time of the levy, was the property of Jacob Miller, and was before and at the time of the levy, in his possession, of all which, Beach then and there had notice; without this, that defendants did assume and promise, in manner, &c., and this the defendants are ready to verify; wherefore they pray judgment, &c.

To this plea plaintiffs replied, protesting that said goods, &c., were not Jacob Miller's property, and were not in his possession, and the plaintiff says that he had no notice that said goods, &c., were the property of said Miller; and this he prays may be inquired of by the country; upon which replication, issue was joined.

The eighth plea is as follows: plaintiff ought not to recover for any further sum than the sum of one hundred and five dollars, because, although defendants cannot deny that they did assume and promise to pay the plaintiff all such sums as he had necessarily been compelled to pay, in consequence of the levy upon said property, and the detention thereof, by virtue of said attachment; for plea, nevertheless, defendants say, that the value of said property, at the time of the levy, was the sum of $2,943, and no other or greater sum of money; and that Jacob Miller recovered, by his judgment, as for the value of said merchandise,

&c., at the time of the levy, the said sum of $2,943, and no further or greater sum of money, together with interest at the rate of six per cent. per annum on the last mentioned sum of money to the time of the rendition of the judgment, making the sum of $293.23, besides the value of said property, as and for the use of said value thereof; and said defendants further say, that said plaintiff, on the 30th December, 1848, converted and disposed of the said property to and for his own use, and the value of said property at the time of conversion was the sum of $2,943, and that Jacob Miller did not, by his judgment, recover any further or greater sum than the sum of one hundred dollars, as and for the use of the value of said property, from the time of the levy to the time of conversion of the same by the plaintiff to his own use; and as to the rest and residue of said sums of money in said declaration mentioned, except the sum of ten dollars, the said defendants say, that the said plaintiff was compelled to pay, and did pay, them and each of them, by reason of the said plaintiff attempting to justify the wrongful conversion of said merchandise, &c., to his own use as aforesaid, and not by reason of said levy; and as to the said sums of one hundred dollars and ten dollars, the said defendants cannot say aught why the plaintiff should not have judgment against them for said sums over and abovs his costs; and this the defendants are ready to verify. Wherefore the defendants pray judgment if the said plaintiff ought to have or maintain his action for any further or other sums than those confessed herein.

The plaintiff's replication to the eighth plea is as follows: That it is not true that plaintiff has not necessarily been compelled to pay, in consequence of said levy upon said property and the detention thereof, any other or greater sums of money than said sum of one hundred and ten dollars in said plea mentioned; but avers the contrary to be true, and that plaintiff did necessarily pay, in consequence of said levy, the said sum of thirty-two hundred and sixty-five dollars and thirty-one and three-fourth cents; and this he prays may be inquired of by the country.

Upon which issue was joined by the plaintiffs in error.

The sixth and seventh pleas were withdrawn by the defendants, and issue being joined upon the plea of the general issue and plea of set-of, the cause was then submitted to the court without the intervention of a jury, and, upon a hearing, the plaintiffs introduced in evidence an affidavit for an attachment in the suit of Nelson & Graydon *v.* Augustus Miller and David R. Clements, filed in the Cook County Court, for the sum o $1,120.11, upon two certain promissory notes, setting forth the indebtedness, and that Miller and Clements were about to depart

from the State of Illinois, with the intention of having their goods, chattels, and effects removed therefrom, which was sworn to by William Graydon on the 12th of June, 1848.

Also, an attachment bond in said suit of Nelson & Graydon *v.* Miller and Clements, and an attachment writ in said suit; and the indorsements and return upon said writ, showing service upon Miller and Clements and others therein named, and the levying of the same upon a large amount of personal property, and also a store "which has been occupied by Miller and Clements."

Also, the notice of publication and the declaration filed in said cause by the attorneys of Nelson and Graydon, with the copy of note sued on.

Also, the plea of Miller and Clements, traversing the facts stated in the attachment affidavit, that, at the time when the attachment was issued, they were absent from the State with the intention of having their goods, chattels and effects removed, and the affidavit attached to the same, and the replication to said plea.

Also, the verdict in said cause and the jugdment thereon.

The plaintiff then introduced the *præcipe*, writ, declaration, plea and notice, in the case of Jacob Miller *v.* Isaac Cook, in an action of trespass *de bonis asportatis*, commenced in the Cook County Court on the 15th day of August, 1848.

The first count of the declaration is for a trespass committed by defendant (Cook) on the 12th of June, 1848, in seizing certain goods and chattels, and a wooden building occupied as a store, and converting the same to the defendant's use.

The second count is for entering the store of plaintiff and damaging the same.

The third count, seizing the goods in the first count mentioned, and converting the same, and for entering plaintiff's store and ejecting him therefrom, to the damage of the plaintiff of $4,000.

The defendant filed the general issue with notices.

First. That defendant, at the time when, &c., was acting sheriff of Cook county, and from that time until the commencement of this suit continued such sheriff, and at the time and place in the declaration mentioned, he did by John Beach, his deputy, seize the goods, &c., as the property of Augustus Miller and David R. Clements, found in their store in Chicago, in their possession and control, by virture of a writ of attachment duly issued by the clerk of this court, and directed to the sheriff of Cook county, at the suit of William Graydon and John G. Nelson, commanding the sheriff to levy upon the real and personal estate of Augustus Miller and Daivid R. Clements; and said defendant, as sheriff, by virtue of said writ, by his deputy, levied

and took said goods and chattels, as the property ofMiller and Clements, found in their possession, and the same were the property of Miller and Clements, and not the property of the plaintiff.

Second. That the defendants, before and at the time of the alleged taking, was sheriff of Cook county, and that Henry Yelvertion, Robert Yelverton, and George A. Fellows, at the June term, 1846, obtained a judgment against Miller & Clements for the sum of $1,309.92, damages, and costs of suit, upon which judgment an execution was essued and placed in defendant's hands to be executed, by which writ he was directed to levy upon Miller & Clements' property, and by virtue of such execution he did levy upon the property as the property of Miller & Clements, and that the property belonged to Miller & Clements, and was not the property of plaintiff.

Third. That as sheriff of Cook county, by writs of attachment and *fieri facias* above mentioned, he levied at the time when, &c.; that he was then and there sheriff of said county. and that the goods and chattels was the property of the defendants of said writ, and not the property of the plaintiff.

The plaintiff then introduced the verdict in the case for the sum of $3,236.23; and the motion for new trial, and judgment upon the verdict.

Also, the execution in the care of Jacob Miller *v.* Isaac Cook, with the return thereon—the execution being for $3,236.23, damages, and $21.23¾ costs. The return shows the payment of the amount of the execution, interest, and costs, by Cook, the defendant.

It was admitted on the part of defendant, that Cook was, at the time of the levy of the attachment, sheriff of Cook county, and John Beach was his deputy.

The defendants to sustain the issue on their part, introduced the *præcipe*, summons, and declaration in the case of Yelverton et al. *v.* Miller & Clements.

Also, the judgement of Yelverton, Yelverton & Fellows, *v.* Miller & Clements, rendered in the Cook Circuit Court for $1,309.92 and costs.

Also, the execution issued on said judgment on the 13th of June, 1848, and the indorsement thereon.

The indorsement on the writ is as follows:

By virtue of this writ, and by the direction of the plaintiff's attorney, I levied the same upon certain goods and chattels of the defendants which had been previously taken by me on a writ of attachment issued from the Cook County Court on the 12th day of June, A. D., 1848, in favor of John G. Nelson and William Graydon against the estate, real or personal, of the said defendants, Miller & Clements, and executed on the same day, which property attached and levied upon is more fully described by scheldule hereto annexed, which levy is subject to said

attachment, and I herewith return this writ and schedule. The property not sold, for the reason that said attachment writ is not disposed of but returned into court, subject to the order of court in the premises.''

"By virtue of the within execution, I did, on the 13th day of June, 1848, levy upon the property here scheduled, and on the 30th day of December, 1848, at the store of Miller & Clements, in the city of Chicago, between the hours of 10 o'clock in the morning and sundown of the same day after advertising the same according to law the property scheduled, and, that therefore, T. O. Donahue and others, bid therefor, in separate parcels, the sum of $949.83, after deducting the clerk's costs of $5.68¾, and the sheriff's fees of $29.48, and for clerk hire in keeping said goods $134.63, in all $169.79, leaving a balance of $785.72 to be applied to the payment of this execution, and no property found to make the balance, and this execution is not satisfied. I. COOK, *Sheriff.*

December 30*th*, 1848. BY JOHN BEACH, *Dep'y.*"

"By virtue of the within execution, I have levied upon the following property, subject to attachment issued from the office of the clerk of the Cook county court dated June 12, 1848, in favor of John Nelson and William Graydon, and against Augustus Miller and David R. Clements; (to wit:) all the goods and store which has been occupied by Miller & Clements, as will appear from the within schedule.

I. COOK, *Sheriff.*

June 13*th*, 1848. BY JOHN BEACH, *Deputy.*"

The plaintiff then admitted payment of $785.72 by a sale under the execution in favor of Yelverton et al. *v.* Miller & Clements, which amount should be deducted from the plaintiff's demand.

Plaintiffs then introduced Buckner S. Morris, who stated, that he was one of the firm of Morris & Brown, who were the attorneys of Nelson & Graydon in their attachment suit against Miller & Clement; that he was not present when the affidavit for the attachment was made, or when the writ was issued; that he knew nothing of the matter until after the attachment was levied; Graydon was in town and knew that the attachment was levied; I know that Graydon was here at the time of the levy; the attachment and execution were levied within twenty-four hours of each other; Graydon afterwards corresponded with us, and directed us about the steps to sustain the attachment; the attachment suit was contested by the attorneys of Nelson & Graydon until it was quashed.

The court after hearing the evidence, found the issue for the plaintiff, and assessed his damages at $2,603.

The defendants moved for new trial, the motion was overruled, defendant excepted, and brought the suit to this court by writ of error.

C. BECKWITH, and WILLIAMS and WOODBRIDGE, for Plaintiffs in Error.

BURTON and WINSTON, for Defendant in Error.

Scates, C. J. The principles laid down in Merriweather *v.* Nixan, 8 Term R. 186, that there is no right of contribution as between tort-feasers, or trespasses, has been, and still is, recognized as unquestionable law. But this does not affect the right of indemnity where a right of indemnity exists.

There has been some little diversity of opinion, in the proper application of the rule of distinction, or exception to the general rule, in Merriweather *v.* Nixan, in agreeing upon the facts and circumstances, which raise the exception. I regard the following distinctions, however, to be well settled and supported by authority. Where a party is employed in his usual course of business, as an auctioneer, or warehouseman, to sell, or deliver goods, by one claiming to have right so to do, and the contrary is not known to the employee, he may have an action for an implied promise of indemnity, for the damages he may be compelled to pay to the true owner, for the trespass or conversion committed by such sale or delivery. Betts *v.* Gibbins, 2 Ad. and Ellis R. 57, (29 Eng. C. L. R. 37) ; Adamson *v.* Jarvis, 4 Bingh. R. 66, [13 Eng. C. L. R. 343] ; Story on Agency, Sec. 339.

But where one is employed or directed to do or commit a known crime, misdemeanor, trespass or wrong, and the employee or agent knows it to be such, an express promise of indemnity is void, being against the peace and policy of the law. Story on Agency, Sec. 339, (18 Law Lib. top 172) ; Brown's Leg. Max. 328, 329, (25 Law Lib. top 211) ; Holman *v.* Johnson et al., 1 Cowp. R. 341 ; Coventry *v.* Barton, 17 John. R. 142.

Yet where the question of title to the property is one of doubt, controversy or uncertainty, or the act to be done is not an apparent wrong, and the person or agent employed or directed to do the act, does not know that it is a wrong or trespass ; in such case, he may sue and recover indemnity from his employer, upon an implied assumption to save him harmless for the act. See authorities last above, and note to Farebrother *v.* Ansley, 1 Campb. R. 348 ; Gower *v.* Emery, 18 Maine R. 83.

This relation, however, of principal and agent, or employee, is not raised by the simple delivery of a writ of capias, attachment, sieri facias and the like, to the officer, or his deputy. There is no implication of indemnity for their trespasses and wrongs in the execution, or attempt to execute process put into their hands, without any specific direction to do particular acts, or take particular goods under it. This is illustrated as between the sheriff and his deputy, in the case of Farebrother *v.* Ansley, 1 Campb. R. 343 ; and in relation to the liability of plaintiffs in process to the sheriff, by Wilson *v.* Milner, 2 Campb. R. 452 ; England *v.* Clark, 4 Scam. R. 486 ; Coventry *v.* Barton, 17

John. R. 142 ; Averill *v.* Williams, 1 Denio R. 502 ; Humphreys *v.* Pratt, 5 Queen Bench R. 820, referred to in 6 Mees.& Welsb. Exch. R. note 387, overruling the decision S. C. in 5 Bligh. N. R. 154 ; Marshall *v.* Hosmer, 4 Mass. R. 62 ; Bond *v.* Ward, 7 Mass. R. 123 ; Avery *v.* Halsey, 14 Pick. R. 174 ; Fitler *v.* Fossard 7 Penn. State R. 540 ; Saunders et al. *v.* Harris, 4 Humph. R. 72. The facts is Gower *v.* Emery, 18 Maine R. 79, show a special direction, or will justify its interference, and what the court say, must be understood as upon the case before them.

Under these well settled principles, the defendant is not entitled to recover, upon an implied indemnity, nor without an express promise, or particular directions about the levy. Proof that plaintiffs endeavored to sustain the attachment upon the levy, is wholly insufficient for this purpose, and none other appears. Again, a recovery in trespass for taking, or in trover for converting chattels, followed by satisfaction, vests the property in the defendant: "*Solutio pretii emptionis loco habetur.*" Adams *v.* Broughton, 2 Strange R. 1078 ; Note c to 37 Eng. C. L. R. top 164 ; Note a to 46 Eng. C. L. R. top 640 ; Cooper *v.* Shepherd, 3 Mann, Grang. and Scott R. 266, [54 Eng. C. L. R. top 265.]

Thus treating the sheriff as agent, in whom the property was vested by the recovery, for the benefit of the plaintiffs, his principals, he may forfeit his title to repayment of his advances and disbursements, by his own gross negligence, fraud or misconduct, and be excluded from all remedy against his principal. Story on Agency, Sec. 348.

The defendant misapplied the property, and converted it to his own use by a sale and payment to another, of the proceeds.

Judgment reversed and cause remanded.

Judgment reversed.

Charles H. Roosa, Plaintiff in Error, *v.* Peter M. Crist, Defendant in Error.

ERROR TO WILL.

A note made payable to A. B. or bearer, cannot be transferred by mere delivery, so as to vest the legal title in the bearer.

The same rule will hold, although the note may have been transferred by delivery in a State where such transfer would carry the legal right with it.

This was an action in debt, on a promissory note, dated 3rd

January, 1844, Bethel, in the State of New York, for ninety dollars, payable to John Barlow or bearer.

Declaration alleges that said Barlow, before the note became due, transferred and delivered the same to plaintiff, and that such transfer and delivery took place within the State of New York; and avers that, by the laws of New York, in force at the time, notes of this description were transferrable by delivery, and recites particularly the statutes on that subject; and avers what was the custom of merchants to which those statutes refer, concluding in the ordinary form.

There was a plea of general issue; pleas of payment to payee of note; payment to plaintiff; plea setting forth that plaintiff purchased the note for $25, and that defendant repaid him the sum he paid for it and interest, which plaintiff received in satisfaction of his claim, and thereupon agreed to deliver up the note; plea, describing the tenor of the note and alleging that said note had not been assigned or indorsed to said plaintiff by Barlow, the payee; and plea of insolvent debtor's discharge.

Plaintiff replied to second, third, and sixth pleas, concluding to the country.

General demurrer to fourth plea.

Demurrer to fifth plea, setting forth, as grounds, that it amounted to the general issue; that it neither denied nor confessed, and avoided the declaration, and was evasive and argumentative.

The demurrer was sustained to the declaration.

PARKS and ELWOOD, for Plaintiff in Error.

U. OSGOOD, for Defendant in Error.

CATON, J. We have again considered attentively our statute concerning the transfer of promissory notes, &c., and adhere to the decision of this court made in the case of Hilborn *v.* Artis, 3 Scam. 344. The words of the statute are: "Any such note, bond, bill or other instrument in writing, made payable to any person or persons, shall be assignable by indorsement thereon under the hand or hands of any such persons, and by his, her, or their assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee or assignees successively." In that case it was held that this statute applied to a note payable to a person by name "or bearer," and that such a note could not be transferred, by mere delivery, so as to vest the legal title in the bearer, so that word *bearer*, in such a note, is surplusage. So also, in Shippington *v.* Pulliam. 3 Scam. 385, it was held that,

by the same statute, the words " or order" are rendered surplusage and need not be averred in pleading. This statute manifestly had two objects to accomplish ; one of which was to enlarge the expressed intention of the contracting parties, and to make notes, &c., negotiable, where the maker manifested no such intention, by inserting words to that effect in the body of the note ; and the other was to restrict the expressed intention of the parties, by requiring a written indorsement to pass the legal title to the note, although the maker should manifest the intention to make it transferrable without indorsement, as where the words "or bearer" are inserted. The object of this restriction was, no doubt, to protect the real owner of the paper against any one who might get possession of it improperly and without his consent. But were we at a loss to find an adequate motive for the provision, we should not feel at liberty to disregard the plain and unambigous language of the law. Here is a note payable to a person whose name is expressed in the body of the note, and it is none the less payable to a person because the words "or bearer "are inserted after the name of the payee. The statute declares how such notes shall be transferred, which necessarily excludes all other modes of transfer.

It is insisted, however, in this case, that, as the note was transferred by delivery in New York, where, by law, the legal title to the note could pass by mere delivery, the courts of Illinois should recognize such transfer. In other words, it is insisted that the law of the place where a contract is made, or an act is done, must fix and control the *status* of the parties in every other place. We cannot indorse this proposition thus broadly. The law of the forum must determine the mode in which relief will be administered. In some States no distinction is made between legal and equitable titles, in the forms of administering justice, while in others, as in this, the old forms are still adhered to. Because the forms of proceeding in New York or Pennsylvania will allow a man to enforce a given right in his own name in their courts, it does not follow that he can enforce the same right in the same way every where. The mode of proceeding and the form to be adopted in the enforcement of a right, must be governed by the *lex fori*. Because our law allows the transfer of the legal title to a note which does not, upon its face, provide for its transfer by the use of the words " or order," "or bearer," it would not follow that the assignee could enforce it in his own name in a State, by whose laws no such transfer could be made. Suppose, in New York, a book account could be sold on execution and the purchaser authorized to collect it in his own name, we could not recognize him as the legal owner of the claim, although we might afford him a substantial remedy by

allowing him to sue in the name of the original creditor. He must pursue his remedy here in the forms prescribed by our law.

It has even been held in New York, that a bond executed in Pennsylvania, the condition of which was to be there performed, was no bond in New York, and could not be there enforced as such, because only a scroll, instead of a wafer, was attached to the name of the obligor; although, by the law of Pennsylvania, a scroll is expressly declared to be a good seal. There the instrument was actually sealed according to the law of the place where it was executed, and as the parties intended; and as such, the rights of the parties were there fixed, but according to the laws of the place where those rights were sought to be enforced, it was not sealed, and the remedy had to be pursued as on an unsealed instrument. It was there an instrument of less dignity than where it was executed, and could rank only with simple contracts, which, in England and many of the States, would often make a very material difference in the subtantial rights of the parties, as in the distribution of the assets of an insolvent estate.

We are of opinion that, under our law, the plaintiff had no right in our courts to pursue his remedy in his own name, and that the declaration was substantially and fatally defective, and that the circuit court very properly arrested the judgment.

The judgment must be affirmed.

Judgment affirmed.

SKINNER, J. The note is negotiable by the laws of this State by indorsement in writing, and by the law of New York by delivery. The effect of the negotiation by delivery in New York was to transfes the legal title to the plaintiff below, and by the law of comity, in my judgment, he may sue in this State in his own name, adopting the forms of remedy afforded by the local law.

SAMUEL HOLMES, Appellant, *v.* LEMUEL STATLER, Appellee.

APPEAL FROM MARSHALL.

A party may show, where a witness resided in a particular county for several years, that his character for truth was bad; although the witness may have been roving for some years preceding trial at which his character was impeached.

THIS was an action of assumpsit, begun August 24th, 1854, by Statler against Holmes, in the Marshall Circuit Court.

Plea of non-assumpsit filed October 20, 1854.

The case was tired in October, 1855, before HOLLISTER, Judge, and a jury.

Plaintiff read the deposition of John B. Stateler, his brother, taken in Iowa, in September, 1854, in which witness testified, that about the 9th of November, 1850, at Sacramento City, plaintiff loaned to defendant, in the presence of witness, twenty-five ounces of gold dust, worth sixteen dollars per ounce; and that the customary rate of interest in California was five per cent. per month.

Holmes then, after proving that the witness, John B. Stateler, had resided in Marshall county, Illinois, from 1837 to 1848, and that since 1848 he had resided in different places in California and Iowa, offered to prove that during all the time he resided in Marshall county, Illinois, his character for truth and veracity was bad. This proof was excluded by the court, and defendant excepted.

T. L. DICKEY, for Appellant.

N. H. PURPLE, for Appellee.

CATON, J. Before proceeding to the merits of this case, we feel called upon to remark that most of this voluminous record has nothing to do with the case here, and cannot be examined by this court. It does not properly constitute a part of the record. The clerk has copied several commissions, with the interrogatories attached, and then the returns thereto, and the depositions themselves, which are not embodied in the bill of exceptions. These should be excluded in taxing the costs.

The only question which we think it necessary to examine is, the exclusion, by the court, of the testimony offered to impeach John B. Stateler, who was examined as a witness on the part of the plaintiff below. The trial took place in October, 1855, and the bill of exceptions states that the defendant proved that the witness was a resident of Marshall county, from 1836 or 1837, till the fall of the year 1847 or 1848, and that since the year 1848, the witness had resided in different places in the States of Iowa and California. He then offered to prove that the general character of the witness for truth and veracity was bad during all the time he resided in Marshall county. This, we think, the court improperly excluded. If, during the eleven years that the witness resided in that county, his character was bad, it might well have authorized the jury to presume that his testimony was not now entitled to their entire confidence. It is true that this evidence may not have been entitled to as much weight as would

evidence showing that it was bad at the time of the trial, by the testimony of witnesses who were then acquainted with his reputation among his neighbors, but still it was beyond all doubt competent to be considered by the jury. If the testimony offered was incompetent, then might the most abandoned man, by floating about from Iowa to California for six or seven years, not staying long enough in any one place to establish a character, be introduced upon the stand as a witness and set all impeachment at defiance. The witness, it is not doubted, might have reformed since he left Marshall country; but it does not necessarily follow that he did reform. If he did so reform, it was quite as easy for the plaintiff to prove that fact as for the defendant to prove that his character still continued bad. The evidence should have been admitted to the jury, to be by them considered, and allowed its proper weight, in their deliberations.

The judgment must be reversed and the cause remanded.

Judgment reversed.

SAMUEL HOLMES Appellant, *v.* WILLIAM STUMMEL, Appellee.

APPEAL FROM MARSHALL.

Where a party is bound by contract to perform certain work, it is presumed that if any part of it is to be omitted, there should be a reasonable deduction from the contract price for the work omitted, unless a different intention is shown by the evidence.

THIS suit was commenced at October term, 1853, being an action of assumpsit, damages claimed, $300.

The declaration in the first count was for grubbing and piling the brush on fifty acres of land in said county, and for cleaning done thereon by the said plaintiff for the said defendant, and at his special instance and request; and defendant promised to pay, &c.; second count, general account for work and labor. Plea general issue.

The bill of exceptions shows the following facts:

That the plaintiff, to maintain the issue on his part, produced as a witness Thomas Wier, who testified that plaintiff grubbed for defendant about fifty acres of land, in 1852 and 1853, finishing about the 15th April, A. D. 1853, being something over a year in doing it; that the work was worth ten dollars per acre; that he heard no contract about the grubbing; that the land on which it was done was taxed to Sarah Holmes, the defendant's wife; that William White, defendant's father-in-law, appeared

to have possession of, and exercise control over, the land; that Stummel worked on the land after defendant returned from California, and that Holmes knew of his doing so. (Holmes admitted that he was the owner of the land on which the grubbing was done.) That, about a year after the land was grubbed, defendant built a house on it. On cross-examination he stated, that on the land there was between one and two acres in a ravine not grubbed; that he saw a written contract in relation to the grubbing in the plaintiff's hands; [that it—the contract—was between William White or Holmes' wife and a man by the name of Ferguson.] The evidence in brackets was objected to by defendant. Having been called out by the plaintiff, it was admitted by the court, and defendant excepted to the admission of the same at the time it was given. Witness further stated that Stummel called on him, showed him the contract, and got him to go and look at the work—grubbing—to see whether it was done according to the contract.

The defendant gave notice to the plaintiff, to produce on the trial a certain contract in writing, which is as follows:

"ARTICLES OF AGREEMENT, made and entered into between William Stummel, of the one part, and, Samuel Holmes, of the other part, witnesseth: That said William Stummel has this day agreed to clear, grub and pile the brush, all to be done in good order, on all the land south of the road running from Sandy Creek bridge to John Foster's, that William White bought of Edward Evans, to be done and completed by the first day of April, A. D. 1853; and that the said Samual Holmes hath agreed to pay the said William Stummel two hundred and twenty eight dollars for the same—fifty dollars when the work is one-half completed, the balance when done and completed. In witness, we the undersigned set our hands and seals, this April the 13th, 1852.

WILLIAM STUMMEL,
SAMUEL HOLMES."

Plaintiff next called Peter Fogle, who testified that about the middle of March, 1853, Holmes came to the place where Stummel was at work grubbing, and asked him how much he got an acre for grubbing; Stummel made no reply; Holmes asked him how many acres there were in the piece he was grubbing; Holmes said there were about fifty-five acres in all; that an Irishman had grubbed five acres, and that the ravine was to go off from Stummel's grubbing. This was about the middle of March, 1853. Witness was a German, and stated that, at the time of this conversation, he had been about a year in the country, but understood English then about as well as now; that he had worked about a month for Stummel on the grubbing; [said witness gave his evidence a portion of the time in English, and a portion through three interpreters.]

Defendant then called William White, who is his father-in-

law, who testified that he knew the land on which the grubbing was done; that he knew at the time of its being done; that he lived about a mile and three-quarters from the place; that said grubbing was done under a written contract, and that the plaintiff was to have between two hundred and seventy and two hundred and eighty dollars for doing said work; that the work was not well done, by one-half its value; that before September, 1852, he paid plaintiff towards said grubbing between $15 and $20.

On cross examination, he stated that the way he knew the work was done under a written contract, was, that he wrote the said contract himself; that such contract was between Holmes, wife and a man by the name of Ferguson, and signed by them; he believed Holmes' wife's name was to it.

Defendant then called Edward McKisson, who testified that in April, 1853, he heard a conversation between plaintiff and defendant on the ground where the grubbing was done; that Stummel said that Holmes' neighbors had told him that he, Holmes, would not pay him for his work, and that he was going to quit next day; Holmes told him, Stummel, that when he had finished the grubbing according to the article, his money was ready for him; Holmes asked him to grub the ravine; he said he would not; Stummel, in this conversation, said Holmes had paid him between $90 and $100; witness stated he thought the plaintiff quit grubbing on Monday after this conversation, which was on Saturday, but of this he was not certain.

David Etinger, called by defendant, testified that at last April term of the court, Stummel said, as they, (he, Holmes, Stummel and some others,) were riding into court, that the lawsuit was costing a good deal of time and money; Holmes said he knew it was, but Stummel ought to have done his work right and finished the job according to the contract, and admitted what he, Holmes, had paid him; Stummel said he knew he ought to, but the job was to hard, or it was too hard work, or something to that effect; Holmes said he had paid him about $90, and he ought to acknowledge it; witness stated that he has seen the grubbing; that it was about half done—not well done.

Theodore Kishner, called by the defendant, testified that he saw part of the land, about fifteen acres on the east side of ravine, after it was grubbed; that it was not well done—good many stumps left in it.

John Wear, called by the defendant, stated that he had seen and examined the grubbing since it was done, and that in his opinion it was tolerably well done.

The court, at the request of the plaintiff, instructed the jury as follows:

1. If the jury believe, from the evidence, that the plaintiff grubbed fifty acres of land for the defendant, then the jury ought to allow to the plaintiff what the jury believe the grubbing was worth, unless the defendant has proved a valid contract for a less sum, or that he, defendant, has paid for said grubbing.

2. If the jury believe, from the evidence, that the plaintiff did the grubbing in a fair and workmanlike manner, and as well as such kind of grubbing is usually done, the jury ought not to allow plaintiff any less than the contract price, even if a contract price has been proved.

3. If the jury beleive, from the evidence, that under a contract between the parties the plaintiff was bound to grub the *ravine*, yet if the jury believe that the defendant released the plaintiff from grubbing out the ravine, then the jury ought not to make any deduction in consequence of said ravine not being grubbed

4. Unless the defendant has proved a valid subsisting contract between the parties under which the work sued for was done, then plaintiff is entitled to recover from the defendant the value of the work done by him as proved ; that to show such valid contract, it must be proved that it was assented and agreed to by both parties, and was for a sufficient consideration.

5. It is for the defendant to prove the existence of the written contract, and unless he has proved it, the plaintiff is entitled to recover for the amount he has proved his labor to be worth.

To the giving of which instructions the defendant's counsel then and there, at the time the same were given, objected and excepted.

The jury found a verdict for the plaintiff for $390. Plaintiff entered a *remittitur* for $99. The cause was tried before HOLLISTER, Judge.

N. H. PURPLE, for Appellant.

S. L. RICHMOND, for Appellee.

CATON, J. We are of opinion that the third instruction asked and given for the plaintiff below, was calculated to mislead the jury, and should not have been given in the terms asked. It is in these worcs ; " If the jury believe from the evidence that under a contract between the parties, the plaintiff was bound to grub the *ravine*, yet if the jury believe that the defendant released the plaintiff from grubbing out the ravine, then the jury ought not to make any deduction in consequence of said ravine not being grubbed." Assuming that, by the contract, Stummel was bound to grub the ravine, and that there is evidence from

which the jury might infer that by a subsequent arrangement between the parties, the ravine need not be grubbed, the implication is, that the parties intended that there should be a reasonable deduction from the contract price for the amount of labor which Stummel was released from performing, unless the jury should further find, that it was also the intention of the parties that there should be no deduction made by reason of the work omitted. The jury would naturally understand, from this instruction, that if Holmes agreed that Stummel need not grub the ravine, the presumption of law is that he intended that no deduction should be made on that account. We think the presumption of law is the other way, and that if he released him from performing a part of the contract, it was upon the implied consideration, that a reasonable amount should be deducted from the contract price, unless the jury should find from the evidence a different intention.

The judgment must be reversed and the cause remanded.

Judgment reversed.

JOSEPH D. WEBSTER, Appellant, v. JOHN M. COBB, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The holder of a negotiable note, indorsed in blank, may fill up the blank with such undertaking as is consistent with the nature of the instrument and the intention of the parties.

The signature of a third person in blank, on the back of a note in the hands of the payee, is presumptive evidence that it was placed there as a guaranty, at the time of the execution of the note.

A guaranty may be written over such a signature, at the trial of a suit upon it.

Upon an action upon such a guaranty, the party may show, after proving payment to the payee, that it was assigned under such circumstances as make it colorable, and defeat a recovery.

THIS judgment was rendered by J. M. WILSON, Judge, without the intervention of a jury, at February term, 1856, of the Common Pleas Court.

The plaintiff, in the first count in his declaration, declares upon a promissory note, alleged to have been made by one Henry Fowler, bearing date October 10th, 1852, and alleges that the said Henry Fowler, thereby, three years after the date of said note, for value received, promised to pay one Thomas A. Stewart, or order, ten hundred and eighty-three dollars, with interest, at bank, "and that the defendant, at the time of the making of the note and before the same was delivered to said Stewart,

and in consideration that said Stewart would accept the same, indorsed the said note in writing by the name and style of J. D. Webster, and the said Henry Fowler then and there delivered the said note, so indorsed, to said Stewart, and the said Stewart then and there accepted the said note, and afterwards and before the same became due, to wit: on the first day of September, A. D. 1855, assigned the said note by indorsement in writing and delivered the same so indorsed to the plaintiff, and thereby ordered and directed the said sum of money in said note specified to be paid to the plaintiff." The plaintiff further alleges that at the time the note became due, Fowler had left the State of Illinois, and has since continued absent from the State, so that process could not be served upon him, and that the institution and prosecution of a suit against Fowler would have been unavailing; and concludes that by reason whereof, and by form of the statute in such cases made and provided, the defendant became liable to pay, &c., and in consideration thereof promised to pay, &c.

In the second count the plaintiff alleges that on the 10th day of October aforesaid, Henry Fowler, for value received by him from said Stewart, made his certain promissory note in writing bearing date on that day, and the said defendant then and there, in consideration of such value received, did undertake and faithfully promise to said Stewart that such note should be paid by said Fowler, when the same should become due and payable according to its terms and purport, which said note is in the words and figures following, to wit:

"$1,083. *Chicago, October 10th*, 1852.

Three years after date, for value received, I promise to pay Thomas A. Stewart, or order, ten hundred and eighty-three dollars, with interest, at bank.

HENRY FOWLER."

And upon which note, at the time of the making thereof and delivery thereof to said Stewart, and to induce him to accept the same, the said defendant did make his certain promise and guarantee in writing on the back thereof, as follows: "For value received I do hereby guarantee the payment of the within note, when due." Which said note so indorsed was then and there delivered to said Stewart.

In the third count he declares against the defendant as a joint and several maker of a promissory note with one Henry Fowler.

In the fourth count the plaintiff alleges that Henry Fowler made the note to Henry Fowler or order, and that Stewart indorsed the note to defendant without recourse, and that the said defendant reindorsed and delivered the note to Stewart. and that Stewart afterwards indorsed and delivered the note to

the plaintiff, and that when the note became due, Fowler had left the State, and has since continued absent from the State, so that process could not be served upon him.

Then follows the money count, and an account stated.

The defendant filed, first, the plea of genéral issue.

Second, That after the making of the note, and before the assignment to the plaintiff, the defendant and one Timothy Wright sold a one-third interest in a newspaper establisment, known as the Chicogo Daily Tribune, to said Stewart, in full satisfaction and discharge of the note, and that the assignment of the note to the plaintiff was made after its maturity, and that at the time of the assignment and prior thereto, the plaintiff had notice of the payment and satisfaction of the note.

The third plea differs from the second only in alleging that Henry Fowler and Timothy Wright sold the one-third interest.

And the fourth plea differs from the second only in alleging that Henry Fowler sold the one-third interest.

To each of the special pleas, the plaintiff replies: First, that the assignment was not made after, but before, the maturity of the note, and that the plaintiff had not, at the time of the assignment and prior thereto, notice of the payment and satisfaction of the note. And,

Second, he claims that the note was not paid and satisfied, as alleged by the defendant.

Similiter having been filed and issues being thus joined, on the trial the plaintiff offered in evidence a note in the words and figures following:

"$1,083. *Chicago, October 10th*, 1852.
Three years after date, for value received, I promise to pay Thomas A. Stewart or order, ten hundred eighty-three dollars, with interest, at bank.
HENRY FOWLER."

With an indorsement thereon in blank, as follows: "J. D. Webster;" andthe plaintiff's counsel filled up the blank indorsement by writing over the same the words following: "For value received, I do hereby guarantee the payment of the within note, when due," and proposed to read the same with the indorsement, in evidence to the court, under the issues in said cause, to which the defendant objected; but his objection was overruled, and the note was read in evidence, to which ruling of the court the defendant excepted.

The defendant then called as a witness Thomas A. Stewart, who had been duly subpœnaed and commanded to bring with him the articles of agreement between Joseph D. Webster, Timothy Wright and T. A. Stewart, for the sale to said Stewart of a one-third interest in a newspaper establishment, known as the

Chicago Tribune, and setting forth the conditions of said sale. The witness stated that he had not had in his possession, at any time, an agreement executed by and between Timothy Wright, Joseph D. Webster and himself, for a sale to him, the witness, of a one-third interest in a newspaper establishment, known as the Chicago Daily Tribune, and for articles of copartnership between them; that he had, however, an agreement for the sale to him of such one-third interest, executed by Timothy Wright and himself, and containing articles of copartnership between them; that subsequently, and while the agreement was in the possession of Mr. Wright, and without the witness' consent, "& Co." was inserted after Mr. Wright's name in the agreement, and his signature and a clause that the company was Mr. "J. D. Webster," and that he was interested in the sale to the witness, his name for some reason not having been mentioned in the agreement, and that his (Webster's) interest continued, after the sale to the witness in the establishment, and that subsequently, in 1854, Webster was recognized as a copartner by Wright and the witness. The witness further stated that the agreement was now in the hands of Mr. Anthony, one of the attorneys for the plaintiff, and that he, the witness, had delivered the agreement to Mr. Anthony.

The defendant's counsel here read to the court a notice which had been duly served upon the atorneys for the plaintiff, desiring them to produce at the trial a certain agreement in writing, bearing date the 24th of July, A. D. 1853, or thereabouts, between Joseph D. Webster, Timothy Wright and T. A. Stewart, for the sale to said Stewart of a one-third interest in a newspaper establishment, known as the Chicago Tribune, and being articles for a copartnership between said parties.

Plaintiff's counsel declining to produce the agreement, to prove the contents of the same, the defendant called as a witness J. Medill, who staed that he was in the Tribune office, in Chicago, on the first day of September, A. D. 1855. That Mr. Timothy Wright, Joseph D. Webster and Stewart were there, trying to effect a settlement. That they had there an agreement in writing, purporting to have been executed by Timothy Wright, Joseph D. Webster and Thomas A. Stewart, as he, the witness, understood. He did not examine the signatures. That he, the witness, read a portion of the agreement—the first part of it—and that Mr. Wright read a portion of it there in the hearing of the witness, and in the presence of Mr. Stewart, and that as he read along he spoke of or called attention to particular portions of the agreement. That he, the witness, could not distinguish between what was said and what was in writing, and that there seemed to be no misunderstanding as to what the writing

contained; that the parties did not settle; that Mr. Stewart got angry, took the writing and went away with it. The agreement provided for the sale of a one-third interest in the printing establishment, known as the Chicago Daily Tribune, to Mr. Stewart, by Mr. Wright and Webster, as he, the witness, understood, and contained articles for a copartnership between the three; that Mr. Stewart, in part payment for such one third interest, was to deliver up a certain promissory note made by Henry Fowler, payable to Thomas A. Stewart, and indorsed by Webster; the note the witness thinks, was for one thousand dollars, or something over that sum—he does not recollect the amount exactly; that this was stated in the agreement. There was that note and one other small note, made by Mr. Fowler and indorsed by Mr. Wright, which was also to be delivered up in part payment for the one third interest, that the balance was to be paid in money at appointed times, and that these were the only two notes mentioned in the agreement, and that the larger note for one thousand dollars or over, the witness thinks, was then about maturing, and that it would become due, according to the terms, the next month, or the month after, and that Mr. Stewart then admitted that the note had been paid, and promised to deliver it up to Mr. Webster. The witness thinks the agreement bore date some time in July, A. D. 1853.

Mr. Stewart, being recalled, stated that the note referred to in the agreement, was the note upon which the action was brought; that he, the witness, took possession of the interest which he purchased in the Tribune Office, immediately after the execution of the agreement, and continued in the enjoyment of this interest until he sold out to Wright, Medill & Co., in June, A. D. 1854

He further testified that he was a brother-in-law of the plaintiff, and that the plaintiff had, for the past two years, been living upon and carrying on the farm of the witness, at Crystal Lake, and that the witness had agreed with the plaintiff, that for making certain repairs in the fences, he, the plaintiff, might have the use of his farm. That previous to his assigning the note to the plaintiff, the plaintiff wanted to leave his farm, and that the witness had agreed with him to purchase of him the crops on the farm, consisting of corn, about ten acres, which was then unharvested, and which the plaintiff was to harvest that fall, about twenty acres of oats, which were then in the stack, and which the plaintiff was to thrash, and some wheat, I don't know how much. I was to take the farming utensils, also. In pursuance of this agreement, I had taken possession of the farm about two or three weeks before the assignment of the note to the plaintiff. The plaintiff had never fixed upon any particular sum which the witness was to pay him for this property. No bill of sale was

ever made out, though the witness believes they had made an estimate of its value, and he forgets what the estimate was, or how much they called it worth; they had fixed upon no time when the witness was to pay for it, though the witness says he knew the plaintiff would never press him for the pay, and would give him what time he wanted, and that he gave no note, or any other written obligation, to the plaintiff.

That on the first day of September, after the interveiw of the witness with Wright and Webster, when he, the witness, found that Mr. Wright would not pay him a demand which he held against him, he assigned the note to the plaintiff; that he did not tell the plaintiff that he had any difficulty with Mr. Wright; that it was about two hours after he had this interview, on Saturday afternoon, and that the plaintiff was then in Chicago, and that he went immediately from the Tribune Office to the house of Mr. Thwing, in Chicago, and found the plaintiff there. That after the witness had written the assignment on the back of the note, he had Mr. Cobb called to his room, for he was then quite unwell and a good deal agitated, and asked the plaintiff, after he had shown him the note with the assignment he had made, if he would take the note in payment for the property. That the plaintiff replied that he would, if it would be any accommodation to him, the witness, and he did not want it. I then gave him the note, and the assignment was witnessed the next morning. That this was all that was said, and all the negotiation they had about it. That the plaintiff gave him no release, or anything of that kind; that nothing was then said about how much the witness was to pay him for the property, or when he was to pay him for it, and that this was the only consideration for the assignment of the note; that the plaintiff harvested the corn and thrashed the oats some time after.

Upon this evidence, the court found the issue for the plaintiff, and assessed the damages at the sum of $1,295. To which finding and decision of the court, the defendant excepted, entered a motion for a new trial, and the court overruling the motion for a new trial, the defendant excepted to the ruling and decision of the court, and prayed an appeal to the Supreme Court, which was allowed.

Hoyne and Miller, for Appellant.

Elliot Anthony, for Appellee.

Skinner, J. This was an action of assumpsit by Cobb against Webster, upon a guaranty of a promissory note, executed by one Fowler to one Stewart, who assigned the same to Cobb

The second count of the declaration alleges the making of the note by Fowler; that Webster, at the same time, and before the delivery thereof to Stewart, in consideration thereof, and that Stewart would accept the same, did make his promise and guaranty, in writing, on the back thereof, as follows: "For value received, I do hereby guarantee the payment of the within note when due;" the assignment of the note by Stewart to Cobb, before the same became due, and that neither Fowler nor Webster have paid the same, &c.

Webster pleaded the general issue and special pleas, alleging payment of the note before the assignment to Stewart, and impeaching the good faith of the assignment. The cause was tried by the court, and judgment rendered in favor of Cobb for the amount of the note. On the trial the plaintiff read the note and assignment in evidence, with the signature of the defendant written and in blank on the back thereof. The defendant objected to this evidence, and the plaintiff then wrote over the signature of defendant the guaranty in the declaration set forth. To the reading of this guaranty in evidence the defendant objected, and the court overruled the objection. The only questions necessary for determination are: Had the plaintiff the right to fill up the blank over the signature of the defendant with the guaranty? Can the plaintiff maintain an action on the guaranty? And was the note assigned *bona fide*, so as to cut off the defence of payment to the payee, by the maker, before the assignment?

The proof shows that the signature of defendant was on the back of the note while in the hands of the payee, and that the payee assigned the note to the plaintiff in the same condition as it came to his hands. In the case of Camden *v.* McCoy, 3 Scam. 437, this court held the law to be, that the holder of a negotiable note, indorsed in blank, may fill up the blank with such undertaking as is consistent with the nature of the instrument and the intention of the parties; and that the signature of a third person, in blank, on the back of such note, while in the hands of the payee, is presumptive evidence that it was placed there at the time of the execution of the note as a guaranty.(*a*)

The same doctrine is recognized in Cushman *v.* Dement, 3 Scam. 497; Smith *v.* Finch, 2 Scam. 321; Carroll *v.* Weld, 13 Ill. 682; and Klein *v.* Currier, 14 Ill. 237.

Where the note has been in circulation, and the name of a third person appears upon it in blank, it cannot be determined whether the name was placed there for the purposes of transfer and creating the liability of simple indorser, or for the purpose of absolute guaranty. The note, in the course of negotiation,

(*a*) Alton v. Coffel, 42 Ill. R. 293. Deitrich vs. Mitchell, 43 Ill. R. 44.

may have passed from holder to holder, by blank indorsement, and, therefore, no presumption, from the face of the instrument, can be raised, that the blank signature was placed there at the inception of note, as a guaranty. Here, the note was so indorsed as the time of its delivery to the payee, and passed, by assignment, directly from him to the plaintiff. The defendant could not, therefore, have been an intervening indorser.

The guaranty is such an one as the law, under the facts, implies, and was, therefore, rightfully written over the signature of the defendant, even at the trial. The guaranty is general, specifying no person to whom the guarantor undertakes to be liable, and is upon the back of a negotiable instrument. In such case, the guaranty runs with the instrument on which it is written, and to which it refers, partakes of its quality of negotiability, and any persons having the legal interest in the principal instrument, takes, in like manner, the incident, and may sue upon the guaranty. This view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and uses of commercial paper. Heaton *v.* Hulbert, 3 Scam. 489; Watson *v.* McLoren, 19 Wend. 557; 26 Wend. 425; Story on Bills, 535; Adams *v.* Jones, 12 Peters, 207; Walton *v.* Dodson, 3 Carr. & Payne, 163; Bradley *v.* Carey, 3 Greenleaf, 233.

The defendant proved the payment of the note to the payee, Stewart, before the assignment to the plaintiff, and called Stewart to impeach the assignment. From Stewart's testimony, it appears that he had a difficulty with Webster, and others connected with the transaction out of which the note arose, and that Stewart, upon the refusal of one of the parties to pay him a demand, wrote an assignment of the note to the plaintiff, his brother-in-law, which assignment was also witnessed; that Stewart, being somewhat excited and unwell, sent for the plaintiff, showed him the note and assignment, and asked him if he would take the note in payment of certain property plaintiff was to let Stewart have; that plaintiff replied that he would if it would be any accommodation to Stewart, and he did not want it; and, that the note, without further ceremony, was delivered to plaintiff, that plaintiff lived on a farm of Stewart's and had the use of it for repairs and fencing; that, before then, plaintiff desiring to leave the farm, Stewart had agreee to purchase plaintiff's crops on the farm, consisting of some ten acres of corn, twenty acres of oats, and some farming utensils; that no price for the property nor time of payment was agreed on; that no bill of items was made, or receipt executed, nor could Stewart state the value of the property; that nothing more was said, and that the property was the only consideration for the assignment. We are satisfied that the assignment was merely colorable, and,

if so, it is no protection against the defence of payment. No reasonable man would dispose of a note, amounting to over $1,200, and become personally responsible as assignor in this hasty and unsatisfactory manner, regarding it a real transaction. He did not know the value of the property he was to get for the note, and, in all probability, it did not amount to one-fourth the amount of the note. The making of the assignment, and having the same witnessed, on the occurrence of the difficulty with Webster and others, the sending for the plaintiff, his brother-in-law, the disposition of the note to him without any satisfactory equivalent, upon the spur of the moment, and the accommodating willingness of plaintiff to accept the same without further inquiry, seem to us to mark a colorable transaction, invented to cut off the defence.

The judgment is reversed and the cause remanded. (*a*)

Judgment reversed.

BRADFORD S. STACEY, Plaintiff in Error, *v.* MOWRY RANDALL, Defendant in Error.

ERROR TO McLEAN.

Two instruments executed as parts of the same transaction, whether at the same or a different time, will be construed together.

Obligations which are exhibited as collateral evidences of indebtedness to support a bill for foreclosure, should be established by proof; they do not come within the 14th Section of the Practice Act.

Exhibits and proofs in support of a decree should be preserved in the record.

To avoid expense and the incumbrance of a record with proofs of matters that might be admitted, the court may compel an admission or denial of all such allegations as require proof

RANDALL filed his bill in the McLean Circuit Court, stating that Stacey was indebted to him in the sum of $1,000 with interest; to secure which he gave a mortgage upon the property and estate that had been given to him by his father, Stimpson Stacey, however or wherever said property or any part of it may be found; to be discharged by the payment of $1,000, in two years from the day of the date of the mortgage, which was on the 9th of February, 1847. The bill then describes the lands, which were bequeathed, by numbers, alleges the amount of principal and interest due to be $1,757.48, and prays for an order of sale. With the bill were exhibited several promissory notes, given by Stacey to other parties than Randall, but which appeared to have been paid by him.

(*a*) See Cushman v. Dement, 3 Scam. 499 & notes.

Stacey, by his answer, admits the execution of the mortgage, but avers that the amount due was much less than $1,000, and that the mortgage was only intended to secure the amount to be found due upon a future accounting between them; that he subsequently settled with all his creditors, and among them with Randall, by compounding with them, and that Randall had been paid. He sets out an agreement, signed by Randall, that he had received the said mortgage, and that the real amount due from Stacey was not the sum of $1,000, and that when the accounts between them should be settled, and Stacey should pay what might then be found due, the mortgage was to be satisfied. This agreement bore even date with the mortgage. This answer admits the ownership of the land described in the bill.

The complainant filed an amended bill, charging that the indebtedness of $1,000 accrued by virtue of the notes filed as exhibits with his original bill, and sets them out by description, and shows the payment of taxes by him on the lands claimed to be covered by the mortgage. These tax receipts are filed as exhibits with the amended bill. Stacey, upon leave, withdrew his answer to the original bill, and filed his answer to the amended bill, averring that the several notes, etc., described in the amended bill had been paid by an assignment of all his property to Randall, which had been applied by Randall to the payment of the demands in question. This answer offers to pay all taxes advanced by Randall. With his answer Stacey files as exhibits several letters received from Randall. There was a replication to the answer to the amended bill. There are no proofs in the record, independent of the exhibits.

The court, Davis, Judge, presiding, at September term, 1854, of the McLean Circuit Court, entered a decree in favor of complainant for $1,000, interest and costs.

Holmes, Scott and Walker, for Plaintiff in Error.

B. C. Cooke and J. C. Walker, for Defendant in Error.

Scates, C. J. Where two instruments are executed as parts of the same transaction and agreement, whether at the same or different times, they will be taken and construed together. The plaintiff here inserted a condition in this mortgage, to operate as a defeasance of the deed, upon the payment of one thousand dollars, expressed to be the consideration. At the same time the defendant, mortgagee, executed to the plaintiff, mortgagor, a separate and distinct defeasance, expressing therein what we regard as the truth of the transaction—that the mortgage deed

was executed to secure whatever amount may be found due upon final settlement of accounts between them; and it expressly admits and declares that the consideration of one thousand dollars, expressed in the deed, is not the true sum. It may be more, or it may be less.

The mortgage recites on debt, but is to be void upon repayment of the consideration. The defeasance recites on debt, or indebtedness, but that the mortgage should be void if plaintiff "shall pay to me whatever amount may appear to be due on such settlement" There is a strong implication of indebtedness in the recital " that the real amount due from said Stacey to me is not the above mentioned sum of one thousand dollars." It is sufficiently manifest that the parties believed at the time that there was, upon settlement, or would be, a balance due defendant. And the account being open and unsettled, they were unable to fix upon and recite the true amount. Nor can we exclude from the contemplation of the parties, in future or subsequent transactions, additional items of debit and credit. The mortgage, and defeasance, therefore, provides only a lien and security for such amount or balance, if any, as may be found against plaintiff upon a future settlement and adjustment of accounts and dealings.

The defendant set forth and claimed in his bill sundry items of account for moneys advanced and paid to and for the use of plaintiff, one of which he seems to have paid as guarantor, or surety, and all the rest as a volunteer. I mean this: that there is no allegation of request,—there are no circumstances showing any legal obligation to advance it; and the advance does not seem to have been made in the regular course of trade by an assignment of the notes by the holders, except that to Carpenter.

The payment of taxes, as mortgagee, would fall under a different view if made upon the lands included in the mortgage, as also the redemption of the lands from tax sale. The allegation that the sixty dollar note was signed as indorser, surety, has no proof in the record, nor has that of a general promise to repay these general advances; nor will the law imply one without proof of an indebtedness arising from a proper advance of money for another's use. The 14th Section of the Practice Act, which requires a denial of the instrument sued on or set up by way of defence, upon oath, does not, I conceive, apply to these notes and receipts. The bill is not filed upon, or to enforce them as such; they are merely incident or collateral evidences of indebtedness, and not recited in, or recognized by the mortgage, the instrument sued on. Some proof of them as

exhibits should, therefore, have been made. None appears, not even their production to the court, as was done by plaintiff in relation to the defeasance and defendant's letters. These constitute the proofs set forth in the record, and the defect is unaided by the recitals of the decree, or the admissions of the answer. For, while the answer admits the execution of notes by plaintiff, it explicitly denies any indebtedness therefor to defendant; and neither admitting or denying the payment of taxes, etc., it calls for proofs. Thus the issue joined, demanded full proof of the alleged indebtedness under the mortgage. Selby *v.* Geines, 12 Ill. R. 69.

The modes of preserving evidence are enumerated in White *v.* Morrison et al., 11 Ill. R. 361; McClag, Adm'r, et al. *v.* Norris, 4 Gil. R. 370.

Its absence from the record is not supplied by presumptions in equity proceedings. Wilson et al. *v.* Kinney, 14 Ill. R. 27; Ward *v.* Owens et al., 12 Ill. R. 283; Nichols, Adm'r, *v.* Thornton, 16 Ill. R. 113. Nor by an insufficient answer, with replication. Ryan *v.* Melvin et al., 14 Ill. R. 68. Nor by want of proof of matters of discharge, if there be no admission of the allegations of the bill. Cummings *v.* Cummings, 15 Ill. R. 33.

When these allegations are neither admitted nor denied, they must be proven. De Wolf et al. *v.* Long, 2 Gil. R. 679. The case in 4 Gil. R. 370, is not in conflict with this rule; it relates to written and oral testimony.

While the execution of the mortgage and the notes are admitted, all indebtedness under either is denied, and no proof appears in the record to establish it, not even the recital of a fact proven in the decree.

Tested by the rules laid down in the above decisions, it is impossible to sustain this decree for want of proofs.

The same remark fully applies to the identity of the mortgaged property. The lands are not described by abuttals, monuments, metes and bounds, or numbers, in the mortgage, but by reference to a will, as the mode by devise, and plaintiff's father as the testator and devisor.

The original answer admitted the ownership of the lands, and a small amount of indebtedness; but the ownership of these lands, by devise from his father, was not admitted or denied. A bare ownership, if not acquired in that way from his father, is insufficient to answer the description of the mortgage, or to include them in, or incumber them by, it. But this answer was wholly withdrawn by leave of the court, on amending the bill, and was not refiled. None of these admissions are to be found

in the answer to the amended bill. We therefore expect satisfactory proof of the identity of the lands described in the bill and mortgage.

The answer is very meagre. To avoid the expense, and cumbering the record with proofs of matters that the defendant might admit, the court would, if asked, compel him to admit or deny all the facts and allegations, of which proof would be required.

Upon the present record the decree cannot be sustained.

Decree reversed and cause remanded.

Decree reversed.

THOMAS SHIRLEY, Appellant, *v.* THEODORE F. PHILLIPS *et al.*, Appellees

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

An execution against William K. cannotbind the goods of Benjaman K. against a purchaser in good faith, although the judgment and execution were intended for Benjaman, as the real person.

An amendment of the judgment cannot retro-act against such purchaser, or effect invcrventing rights acquired between the rendition and amendment of the judgment.

THE proceedings in this case were had before J. M. WILLSON, Judge, of the Common Pleas Court. The facts are stated in the opinion

H. E. SEELYE, for Appellant.

J. KEDZIE, for Appellee..

SKINNER, J. Shirley, the appellant, and Phillips and others, the appellees, entered their appearance in the court below, upon an agreed case, substantially as follows : On the 16th of November, 1855, the appellees, being the holders of a promissory note against Benjamin Kroger with a warrant of attorney to confess judgment thereon, entered judgment on the same in the Cook County Court of Common Pleas. The declaration alleged the cause of action against Benjamin Kroger. The cognovit, or, plea of confession, was in the name of William Kroger, as also the filing of the papers, and the docketing of the case, and the judgment was rendered against William Kroger. On the 20th, execution issued upon the judgment against William Kroger, and was on the same day delivered to the sheriff to execute, who

on the 21st, levied the same upon certain goods, in the possession of the appellant, as the property of Benjamin Kroger. On the 20th, but after the delivery of the execution to the sheriff, Benjamin Kroger assigned and delivered the goods to the appellant, in trust for the payment of debts generally. By mutual arrangement of the parties in interest, it was agreed that appellant should hold and convert the goods into money, and hold the same subject to such disposition as should be directed by the court upon an agreed caee. On the 22nd, on motion of the attorney who appeared for Kroger under the warrant of attorney and filed the plea of confession, and without notice to Kroger or Shirley, the court amended the plea, filing of the papers and judgment order, by striking out the word William, and inserting the word Benjamin, wherever it occurred. Neither Kroger nor Shirley had notice of the rendition of the judgment at the time of the making of the assignment. The goods were converted into money and amounted to enough to satisfy the execution. Both parties reserved the right of appeal. Upon this agreed case the court below decreed that appellant, out of the proceeds of the goods, pay off the execution of appellees, and from this decree the appellant appealed.

Our statute provides, that "no execution shall bind the property of the goods and chattels of any person against whom such writ shall be issued, until such writ shall be delivered to the sheriff or other officer, to be executed." R. S. 301, Sec. 8. Our law also provides for the keeping of a judgment docket, exhibiting, in alphabetical order, the names of the parties against whom judgments are rendered; and an execution docket exhibiting the issuing, return and deposition of executions. These dockets, together with the judgment order upon which they are founded, are public records of the court to which all have access, and operate as notice of what they contain. Neither a judgment order against William Kroger, an execution docket showing the issuance of an execution against William Kroger, nor an execution in the hands of the sheriff against William Kroger, could, of itself, be notice of a judgment or of an execution against Benjamin Kroger; nor would such execution in the hands of the sheriff, as against *bona fide* purchasers without notice, bind the goods of Benjamin Kroger. The policy of the law, as well as of equity, is against secret liens, and where the law provides, as in this case, under what circumstances the lien accrues and the means of ascertaining its existence, we cannot hold, that a judgment and an execution against William Kroger can operate, as against a *bona fide* purchaser without notice, to bind the goods of Benjamin Kroger, although the latter be the real person intended in the record and execution. The names are essen-

tially different, indicate, unexplained, different persons, and there is no pretence that the defendant in execution is known or called by the one name as well as by the other. Nor is there anything in the agreed case impeaching the good faith, or the validity of the assignment, or showing knowledge in the appellant, or in those for whose benefit the assignment was made, that the judgment and execution were intended to be against Benjamin Kroger. But it is insisted that the subsequent amendment of the judgment and execution have relation back, and operate to create a lien from the time of the delivery of the execution to the sheriff. We do not question the general power of amendment, nor the propriety of its exercise in furtherance of justice, and where the rights of third persons will not be injuriously affected; but amendments cannot operate to destroy vested rights acquired in good faith. It is true, another question might have arisen in this case, had the assignee, Shirley, been a party to the proceeding to obtain the amendment. In such case, perhaps, he would be bound by the adjudication allowing the amendment, collaterally brought in question. Neither the appellant nor the creditors under the assignment, were made parties to the proceeding through which the amendment was obtained, and their rights, fixed and complete by the assignment, could not be divested or destroyed by the *ex parte* action of the court. The order of amendment, as to them, was a nullity to the extent of their pre-existing rights. It is not necessary to discuss the effect of want of notice to Kroger of the proceeding in which the amendment was made, nor whether the attorney, by virtue of the power conferred by the warrant of attorney, could appear for Kroger and consent to the amendment. The amendment may be good against him and effectual for all purposes and against all persons after the making thereof, and yet have no effect upon intervening rights of third persons accrued prior to the amendment. The principles here laid down are sustained by the following authorities: Sale *v.* Compton, 1 Wilson 61; The President, &c. of Bank of Newburgh *v.* Seymour and Smith, 14 John. 219; Zimmerman *v.* Briggans, 5 Watts 186; Berry *v.* Spear, 13 Maine 187; Gardner *v.* Hust, 2 Richardson 601; Van Wyck *v.* Conde, 3 Cow. 39; Peck *v.* Sill, 3 Conn. 157; Willis *v.* Crooker, 1 Pick. 204; Fairfield *v.* Baldwin, 12 ibid. 388; Robb *v.* Bostick, 4 Scam. 116. (*a*)

The power of amendment incident to all courts of general jurisdiction, is a delicate, though a useful power, and is properly exercised to sustain and protect right, and advance the ends of justice; but it cannot rightfully be so used as to cut off existing *bona fide* rights and liens; and it is better, in the order of

(*a*) O'Conner v. Mullen, 11 Ill. R. 59.

amendment, to expressly save from its operation all intervening *bona fide* rights.

The decree is reversed, and a decree will be entered in this court discharging the appellant from the payment of the execution, and for his costs in this court and the court below.

Decree reversed.

JAMES E. GREENLEAF, Appellant, *v.* NELSON C. ROE, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Motions to set aside defaults are addressed to the sound discretion of the court and that discretion will not be interfered with, unless it is greatly abused.

THIS was an action of assumpsit. A demurrer to the declaration was filed and overruled. The defendant then obtained time to plead. The other proceedings are stated in the opinion.

Judgment was rendered for plaintiff in the court below, by J. M. WILSON, Judge, at the March special term, 1856.

E. W. TRACEY, for Appellant.

DAVIS and MARTIN, for Appellee.

SCATES, C. J. We have examined the declaration, and find no matter of substance obnoxious to a demurrer, and deem it unnecessary to enter into any discussion of the subject. The plaintiff had time allowed him to file a plea, and did file the general issue, with notice of special matter of set-off. But for want of an affidavit, of merits, the plea was stricken from the files, a default entered, and judgment rendered upon proofs heard before the court.

The plaintiff entered his motion to set aside the default, supported by affidavit of his attorney, to the merits of the defence, that the plaintiff was a resident of Boston, Massachusetts, and that he had not time to procure an affidavit of merits since the filing of the plea. This motion was heard and denied. The motion was again renewed, and a plea of the general issue, notice of special matter of set-off, and an affidavit, by plaintiff, of merits, filed. This motion was also denied.

Motions to set aside defaults are addressed to the sound discretion of the court, and it must be a very gross and flagrant

abuse of that discretion that will warrant the revision and interposition of this court, if at all. Such is not apparent upon this record.(*a*)

Upon affidavit of plaintiff's non-residence, had the party asked time to procure an affidavit of merits, a much stronger case would have been presented. But no time has been asked. The party suffered judgment to go for want of a plea, and threw himself upon the discretion of the court. He has simply shown, by affidavit, a counter demand, and, for anything appearing, may bring his action and recover his demand, when established by law proofs. There is, therefore, no ground to set aside the default, simply to enable the plaintiff to plead a set-off, which is recoverable in another action.

Judgment affirmed.

ORRIN J. ROSE, Plaintiff in Error, *v.* WILLIAM E. MORTIMER, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Under the general issue, it is not competent to show a total or partial failure of consideration of a promissory note.

THIS was an action of assumpsit upon a promissory note. Plea, non-assumpsit and similiter. The plaintiff below offered in evidence a promissory note, signed by defendant. The defendant then offered evidence to show a failure of the consideration, for which the note offered in evidence was given. This evidence was excluded by the court. To the exclusion of which evidence, the defendant below excepted, and assigns its exclusion for error.

The cause was heard before J. M. WILSON, Judge, without the intervention of a jury, at September term, A. D. 1855. Judgment was for plaintiff in the court below.

DAVIS and MARTIN, for Appellant.

GOODRICH and SCOVILLE, for Appellee.

CATON, J. This was an action on a promissory note, by an assignee, to which the defendant filed a plea of the general issue. Under this plea the defendant, on the trial, offered to prove a failure of consideration, which the court ruled out, and which is the decision complained of.

(*a*) Rich vs. Hathaway, 18 Ill. 548.

The court decided correctly. The right to defend a promissory note for a want, or failure, or partial failure of consideration, is conferred by the 10th section of chapter 73, R. S., and that statute requires the defence to be pleaded. There is hardly a volume of our reports, in which cases are not found, where this court has passed upon the sufficiency of such special pleas; but I do not find that it has before been attempted to set up the defence under the general issue. (*a*) The statute does not authorize it and the court properly ruled out the defence offered.

The judgment must be affirmed.

Judgment affirmed.

HANNAH ASHBAUGH, Plaintiff in Error, *v.* OLIVER T. ASHBAUGH, Defendant in Error.

ERROR TO STEPHENSON.

In contemplation of law the residence of the wife follows that of the husband.

Desertion for the period of two years, by the husband, residing in this State, although commenced in a foreign jurisdiction, will enable a wife to obtain a divorce.

This bill for a divorce was heard before SHELDON, Judge, at September term, 1855, of the Stephenson Circuit Court, and dismissed. The facts are stated in opinion.

U. D. MEACHEM, for Plaintiff in Error.

J. LOOP, for Defendant in Error.

SKINNER, J. This was a bill in equity for a divorce. The bill charges that the parties were married in Canada in 1849, and there lived as man and wife until 1852, when the defendant, the husband, wilfully and without cause, deserted the complainant, and that he has continued such desertion for more than two years, and up to the filing of the blll. The proofs show the marriage as alleged; that the defendant came to this State about three years before the filing of the bill, where he has since resided; that during said time he has refused to live with or support the complainant; that she has made repeated efforts to induce him to permit her to live with him, and that he refuses so to do, or in any manner to provide for her wants.

It is not shown that the complainant has resided in this State one year prior to the filing of the bill, and for this cause the circuit court dismissed the bill.

(*a*) Keith vs. Mapt, 38 Ill. R. 305.

Our statute is as follows: "No person shall be entitled to a divorce, in pursuance of the provisions of this chapter, who has not resided in the State one whole year previous to the filing of his or her bill, unless the offence or injury complained of was committed within this State, or whilst one or both of the parties resided within this State."

In contemplation of law the husband and wife are one person, and her residence follows that of the husband. Admitting, however, that the statute has reference to actual residence only, the bill should not have been dismissed. The injury complained of is desertion for the period of two years, and this occurred and became complete within the terms of the statute while the defendant resided in this State, although it had its inception in a foreign State. R. S. 196, Sec. 1; ibid. Sec. 3.

Two whole years of such desertion elapsed while the defendant resided in this State, and the fact that the original act of desertion took place in Canada, cannot effect the complainant's rights, the injury entitling her to a divocre, under our law, being complete within this State and while the defendant resided here. Vischer *v.* Vischer, 12 Barbour 640; Masten *v.* Masten, 15 N. H. R. 159.

The policy of this statute is to prevent persons from wrongfully and clandestinely obtaining decrees of divorce, and the reason of the provisions is consistent with the construction here given.

Decree reversed and cause remanded.

Decree reversed.

RUFUS HAYWOOD *et al.*, Plaintiffs in Error, *v.* ISSAAC D. HARMON *et al.*, Defendants in Error.

ERROR TO COOK.

Where two are sued as copartners, and the general issue is filed, not sworn to, it is not error to exclude evidence tending to prove they were not partners.

Separate signatures to a submission to arbitration does not change the relation of copartners.

Whether an award is made within a reasonable time, within the intention of the parties, is a question for the jury

Notice to one of several copartners, where they have signed a submission separately, is sufficient.

A substantial statement of an award in a declaration in assumpsit, showing the obligation to pay money, is sufficient.

All reasonable intendments will be indulged in support of an award, where no fraud, corruption or unfairness is shown.

The declaration was as follows:

That on the 28th of April, 1854, differences arose and depended between plaintiffs, defendants and John P. Chapin, touching a certain contract for sale of 30,000 bushels of corn, by Harmon & Huntoon to Haywood & Giroux, made about 27th August, 1853, and guarranteed by said Chapin. To put an end to the same, the plaintiffs, defendants and Chapin, on the 28th April, 1854, submitted themselves to the award of George Steele, J. L. Lyon and H. H. Carpenter, arbitrators chosen by them—mutual promsies to submit to award. On the 12th October, 1854, said George Steele, J. L. Lyon and H. H. Carpenter made an award, and thereby awarded "that Haywood & Giroux should pay to the said Harmon & Huntoon $3,425.91 in full satisfaction and discharge of said matter in difference." That H. & G. had been requested to pay and had refused.

That whereas the said H. & G., on October 12th, 1854, were indebted to plaintiffs in $4,000 upon a certain award made by George Steele, J. L. Lyon and H. H. Carpenter, by virtue of a certain submission before then made by plaintiffs, defendants and Chapin, whereby they agreed to submit to arbitration of three persons—one to be chosen by Harmon and Chapin, one by Giroux or Haywood, and the other by the persons so selected—all differences arising or growing out of a certain contract for the sale of 30,000 bushels corn, as therein stated, made in August, 1853; whereupon the said George Steele, J. L. Lyon and H. H. Carpenter, were duly chosen arbitrators under said submission, by and with the consent and approbation of defendants, plaintiffs and Chapin, and upon and by virtue of said reference and submission, the said George Steele, J. L. Lyon and H. H. Carpenter had then and there awarded that the said H. & G. should pay a certain sum of money, to wit: $3,425.91 to H. & H., and being so indebted, H. & G. promised to pay the same when requested.

Common counts for money lent, money had and received, and on account stated, and general breach.

Plea by Haywood at the October term, 1855.

General issue, containing a denial "that he was a partner of or jointly with said Giroux, undertook and promised in manner and form as the plaintiffs have above thereof declared against him—of this he puts himself upon the country, etc.

Issue joined at same term.

Haywood moved to continue cause, because a copy of the instrument in writing declared on had not been filed with the clerk ten days before term.

Court, on motion of defendant, Haywood, ordered the plaintiffs below to file a copy of submission and award, which was done.

The defendant then requested the court to instruct the jury, in writing, as follows;

1st. Unless the jury shall beleive, from the evidence in the cause, that the arbitrators mentioned in the award were selected by the persons, and in the manner, and within the time required by the submission, they will find for the defendant.

Given by the court.

2nd. That the selection of the arbitrators and making the arbitration, was by the submission to be made within a reasonable time, and unless there is proof before the jury to show that the said Haywood agreed to extend the time for making the award, or was present and submitted to their award, then the award is not made within a reasonable time, and they should find for the defendants.

Which the court refused to give, and the defendants excepted.

3rd. That to entitle the plaintiffs to recover, proof must be given that the defendant, Haywood, had notice of the time and place of, or attended upon the arbitrators at the making of it — and the jury are not at liberty to presume this, if there is no proof on the subject.

Which the court refused to give, as written, but amended the same by adding as follows: "but if the jury shall find that the defendants were partners at the time the submission and award was made, then it will be sufficient to charge Haywood under the instruction, if the proof shows that the defendant, Giroux, had noticed of the time and place, or attended before the arbitrators."

To the giving of which, as amended, and refusing it as originally written, the said defendants excepted.

The jury brought in a verdict for plaintiffs below for $3,674,28, and defendants moved for a new trial.

The cause was tried before MANIERRE, Judge, and a jury, at November term, 1855, of Cook Circuit Court.

FARNSWORTH and BURGESS, for Plaintiffs in Error.

C. B. HOSMER, for Defendants in Error.

SCATES, C. J. We are unable to discover, in the copies of the award and account sued on, any such defect or variance as would have entitled plaintiff, Haywood, to a continuance, either before or after plea, or such as would exclude the original from being read in evidence on the grounds of variance. Giroux, in moving to vacate his default, addressed himself to the sound discretion of the court without presenting any facts or other

grounds than the same want of true copies, and a copy of the submission. In all these reasons we discover nothing to question the correctness of a refusal. And the same remark will apply to the refusal of leave to Haywood to withdraw his plea of the general issue, with a veiw to plead over.

Haywood and Giroux are sued and declared against as partners. The general issue, unsworn to by one or both, does not put the fact of partnership in issue, and the court did not err in excluding evidence to disprove the partnership. Stevenson et al. *v.* Farnsworth et al., 2 Gill. R. 716; Warren *v.* Chambers et al., 12 Ill R. 124. Plaintiffs, therefore, stand by the issue, as admitted partners before the court in the corn transaction, out of which this submission and arbitrament arose; and their several separate signatures to the submission, which is proven, does not change that relation in adjusting a settlement of this transaction. 1 Pet. R. 229. The submission stipulated that the one or the other might appoint the arbitrator. This was done by Giroux, who also attended before the arbitrators, investigated the dispute, without objection as to the lapse of time, or to the making of an award. Nor should the court, for them, as asked to instruct, say to the jury that the power conferred by the submission was revoked by lapse of time, and the award a nullity. A reasonable time within the true intent of the parties, under such circumstances, is a question to be left to the jury, under the instruction of the court. The instructions asked, took the whole question from tha jury and assumed that submission was void— a violent assumption in the face of the mutual investigation of the parties, without a word of objection for any cause whatever. While one partner may not bind his copartner by a submission to arbitration, (Karthaus *v.* Ferrer et al., 1 Pet. R. 229,) yet when both have separately signed the submission, as here—referring a partnership matter to arbitrament—notice to, or the attendance of, one will be good for the firm: and to this part of the proceedings of the arbitration we think the objections without foundation in law.

The defendants here set forth the award, substantially, to their declarations, showing the obligation of defendants below to pay the money, upon which the law would raise an implied promise; and this we deem sufficient in assumpsit upon such an award as this. It is so in debt, (note 5 to Hodsden *v.* Harridge, 2 Saund. R. 62*a*, 62*b*,) and we perceive no reason for a distinction, in the form of action, where suit is brought on the award.

The objection appears to be predicated upon the idea that the award requires acts to be done in the nature of a precedent condition, or of mutual and dependent conditions, which must be

averred to be performed, or a readiness to perform, on defendants' part, to sustain an action—according to the doctrine and distinctions on that subject laid down in th e decisions. See Pordage *v*. Cole, 1 Saund. R. 319 *i* and note 4, 320 *a b c d e*.

But this award presents no such precedent, or concurrent and dependent conditions, or acts to be performed by defendants. The rights and obligations of the parties are to be ascertained from the true intent and meaning of the arbitrators as expressed in the awaıd,(Hery *v*. Brown, 12 Wend. R. 592,)acting within the powers conferred in the submission—having given all parties due notice. Elmendorf *v*. Harris, 23 Wend. R. 630.

We cannot pass upon the merits of the controversy presented before the arbitrators, even if allowed by settled rules to do so—not having the evidence before us; but we can see that the award is within the submission. And we understood the arbitrators to have settled and awarded that plaintiff s should take the corn, as it was then delivered and in store, (more or less, we cannot tell, having no proofs before us,) in fulfillment of the contract—first paying to plaintiffs the balance found due, and to the warehouseman in possession of it all charges for storage. No act is left for, or required of, defendants. The award finds as we undrestand the arbitrators, that defendants had performed their contract of sale by a delivery of the corn for every purpose, except a lien for the purchase money, and which is still preserved by them, to defendants in the award as well as to warehouseman, by requiring both to be paid before the plaintiffs can rightfully take the corn away. This is consistent with the principles of law, and in the abscence of any proof on the contrary, we presume with the facts and justice of the case.

It is objected that the award does not show the place and quantity of corn, nor the amount of charges due and payable for storage, &c. Nor need it show either. We presume that the arbitrators had such proof as satisfied them of the delivery of so much in quantity as made the sum awarded; and that it was so delivered and preserved as to charge plaintiffs with it, as it then was proven to be, or might be, in store. The amount and legality of warehouse charges or storage, was before them for adjustment. They could, therefore, and did, only award the liability for their payment to plaintiffs. They may find out the amount by application to those entitled to receive them; and will be entitled to the delivery of the corn by them, discharged of all lien for such charges upon payment of what is legally due and chargeable.

All reasonable intendments will be indulged in support of an award, where no fraud, corruption, unfairness, &c., is shown. 1 Pet. R. 222; Butler *v*. Mayor N. York, 6 Hill R. 489: Joy

v. Simpson, 2 N. Hamp. R. 181; Spear *v.* Hooper, 22 Pick R. 144: Rixford et al. *v.* Nye et al., 20 Vermt. R. 132; Gerrish *v.* Ayres, 3 Scam. R. 245; Merritt, *v.* Merritt 11 Ill. R. 567; McDonald *v.* Arnout, 14 Ill. R. 62.

Judgment affirmed.

HORACE SMITH, for the use of George C. Lamb, Plaintiff in Error, *v.* ABRAHAM H. SMITH, impleaded with John W. Hull, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A judgment of another State will be conclusive in this, if it appear that the court of such State had properly acquired jurisdiction of the person and the subject matter.

A want of jurisdiction in the court need not be pleaded, where the fact affirmatively appears on the record produced.

Where a foreign judgment was rendered against two, one of whom was served with process, and suit is brought against the party served, as upon a joint judgment, he may show the variance upon a proper plea, and so exclude the record when offered as proof.

This is an action of debt, on a judgment of the Superior Court of the city of New York, rendered January 14th, 1842, in favor of the plaintiff in error, for $6,087.534, against the defendants Smith and Hull, under the New York "Joint Debtor Act" of 1830. The suit on the judgment was commenced in the Cook County Court of Common Pleas, by the plaintiff in error, in 1854, by *capias ad respond.*, which was served on defendant Smth, but returned "not found," as to defendant Hull. Defendant Smith appeared, by his counsel, and filed two pleas to plaintiff's declaration: 1st, *nul tiel record*; 2nd, *nil debet.* Upon the trial the plea of *nil debet* was withdrawn by defendant, and the case was submitted to the court upon the plea of *nul tiel record* alone.

This cause was heard by J. M. WILSON, Judge, at October term, 1865.

The only evidence offered in the case was an exemplified copy of the record of judgment of said Superior Court, duly authenticated; from which it appeared, that the suit in the New York court was brought in assumpsit upon a bill of exchange, accepted by the defendants, Hull & Smith, as partners, under the firm name of Hull & Smith, doing business in the State of New York, and within the jurisdiction of said court. It appeared, further, that the *capias* issued originally in the suit in New York, had been served upon the defendant Smith, by arrest-

ing him, and not upon Hull, as to whom the return "not found," was made, and that judgment was rendered by default against both of the defendants, for the amount above stated.

To the admission of this record in evidence, the defendant, Smith, objected, on the ground that it did not tend to prove the joint liability of said Smith and Hull, and the court sustained the objection, and rendered judgment for the defendant.

The plaintiff excepted to the ruling of the court, and the case has been brought to this court to procure a reversal of said judgment.

CORNELL, JAMIESON and BASS, for Plaintiff in Error.

HOYNE and MILLER, for Defendant in Error.

CATON, J. Where a judgment is rendered by the courts o another State, against citizens of that State, it is to be held conclusive here, unless it appears that that court had no jurisdiction of the subject matter or of the person, acquired in pursuance of the laws of that State. The first question to be considered is, in what mode must this want of jurisdiction be shown? Ordinarily, it must be done by averments and proof; but upon principle, this cannot be necessary where the record itself shows affirmatively the want of jurisdiction. All agreed that a judgment rendered without jurisdiction is utterly void. It is not a judgment. It is a blank, as if it had not been written. It is not a record, and, consequently, is not admissible in evidence, on a plea of *nul tiel* record. This court said, in the case of Bimeler *v.* Dawson, 4 Scam. 541: "Where the record shows neither service of process, nor notice to the defendant, nor appearance by him, the judgment is a nullity, when attempted to be enforced in another State, the record not affording even a presumption in favor of the jurisdiction." In such a case, there can be no doubt that the want of jurisdiction need not be pleaded, for the reason that there is, in law, no *prima facie* record to answer and avoid. It contains its own answer, and shows itself to be a nullity. It is, *prima facie*, void, and vouches its own nothingness.(*a*)

Such is the character of this record, as to Hull. It shows affirmatively, that he was not served with process, and that he did not appear to the action, either in person or by attorney, for the judgment professes to have been taken by default. Over Hull, then, there can be no pretence of jurisdiction, for he was not brought before the court in any way. We may, and must, presume everything in favor of the validity of the judgment as against Smith, who was served with process, and over whom the court had complete jurisdiction. We must presume, as to him

(*a*) Warren vs. M'Carthy, 25 Ill. R. 103; Line vs. Frank, Id. 127.

that the judgment was entered up in proper form, so as to bind him, and the laws of that State required that, in form, the judgment should be entered up jointly against all the parties sued, in order to bind those who were served; but we cannot presume that those laws made a judgment, although nominal, and in form, against the parties not served, binding upon them. No presumption can be indulged against the party not served, for as to him, the court could, by the principles of natural justice, and the acknowledged rules by which the civilized world is governed, adjudge nothing against him. A State may undoubtedly provide for bringing its own citizens or subjects before its tribunals by constructive notice, which may not, in all cases, come to the actual knowledge of the party; still, the presumption is, that he has actual notice, or might have such notice by the exercise of proper care and diligence. Such a notice may, no doubt, be binding upon the subject of the State providing for it, but here there is no pretence of any constructive notice. A capias was issued, and returned "not found," as to Hull, and he was then defaulted. This was a default before the party was put in any sort of fault. But, as before suggested, we must presume that this, as a matter of mere form, was required, in order to make the judgment binding on Smith, who was served.

Thus far I have considered this case without taking notice of the statutes of New York, as matters of fact, except so far as the legal presumption, above referred to, may be doing so. As matters of fact, we may not notice the statutes of another country or State, but they must be averred and proved, the same as any other fact upon which a party relies, except, as in this case, where we may presume certain things to have been done according to the law of the place, for the purpose of sustaining their validity. But if we go beyond this record, and take notice of the "Joint Debtor Act" of New York, under which this judgment was rendered, and the construction which has been given to that act by the courts of that State, as found in their reports, we find that the provisions of that law are substantially the same as, without noticing the praticular act, we must presume the law to be, under which this judgment was rendered. That is, we find that the court was required, in form, to render a judgment against both defendants, but the effect of which is not a personal judgment against the defendant not seved. Such is the plain language of that act, and such is the construction which it has received by the Court of Appeals of that State. Oakley *v.* Aspinwall, 4 Comet. 514.(*a*) And this case is expressly in point, also, as to whether the objection can be taken on a plea of *nul tiel record.* It was there held not to be a joint judgment against both defendants.

(*a*) D'Arcy vs. Ketchum, 11 How. U S. R. 165.

In all the cases which have occurred, the defence has been set up, or objection taken, in the second suit, by the party who was not served in the first action; whereas, in this case, Smith alone was served in the first action, and he alone is served in this, and he alone has appeared and makes this defence; and, it is insisted that he is estopped to deny that this was a joint judgment, because it was valid and binding on him. He is certainly estopped to deny that the judgment is valid and binding upon him, but he is not estopped to inquire into the character and legal effect of that judgment. While he may not deny that it is a judgment against him, he may deny that it is a judgment against him and Hull. And that was the precise question before the court. The declaration was upon a joint judgment against Smith and Hull, and the plea was *nul tiel record*. And, in support of that issue, the plaintiff produced, not a joint judgment, valid and binding upon both, but a judgment, in legal effect, against Smith alone. It was a question of variance which was raised by the objection of Smith, and not whether Smith was bound by the judgment. If the record would not answer a plea of *nul tiel record* interposed by Hull, it could not when interposed by Smith. It either corresponded with, or was variant from, the record described in the declaration, and its character could not be altered by the fact that one party or another interposed the defence. The case above referred to shows that the objection was good, on a plea of *nul tiel record*, interposed in New York, by the party not served, and it follows, as a necessary consequence, that it is no less a variance when the plea is filed by the party who was served, and is bound by it.

The Circuit Court decided properly in ruling out the record of the judgment offered in evidence to support the issue, and the judgment must be affirmed.

Judgment affirmed.

THE PEOPLE, for the use of James Kelly and others, Plaintiffs in Error, *v.* CYRUS P. BRADLEY *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS

If a defendant dies between the *teste* of an execution and its delivery to the sheriff he cannot proceed to make a levy under it.

THIS cause was heard before J. M. WILSON, Judge, of the Common Pleas, at March term, 1855. Judgment was rendered

or the defendants. The opinion of the court furnishes a statement of the case.

FARNSWORTH and BURGESS, for Plaintiff in Error.

HOYNE and MILLER, for Defendants in Error.

SKINNER, J. This was an action of debt against Bradley and others, on the bond of Bradley as sheriff of Cook county. The plaintiff assigned for breach of the conditions of the bond, that Kelly and Blackburn, on the 30th day of October, 1854, in the Cook County Court of Common Pleas, recovered a judgment against one Harper, upon which judgment, execution on the same day issued against the goods and chattels of Harper, and which execution was delivered to Bradley, as such sheriff, to execute, on the 31st day of October, 1854; that Harper had goods and chattels within said county, liable to be levied upon and sold in satisfaction thereof, of sufficient value to satisfy the same, and that Bradley refused to levy the execution of said goods and chattels. The plea denies the averment that there were goods and chattels of Harper liable to be levied upon and sold under the execution. The cause was submitted to the court for trial, upon an agreed state of facts, from which it appears, that the execution issued and bore date the 30th day of October, 1854; that Harper, the defendant in execution died on the evening of the same day; that the execution was delivered to Bradley to execute on the 31st day of the same month, and that he refused to levy the same of the goods and chattels on which Harper died possessed, on the ground that Harper was dead at the time the execution came to his hauds. If the goods and chattels, of which Harper died possessed, were liable to be levied upon and sold to satisfy an execution against him issued before his death, but which was delivered to Bradley to execute on the day after his death, then the judgment should have been for the plaintiff, otherwise for the defendants. It seems that by the common law the goods of a defendant were bound from the *teste*, that is, the date of the issuing of the execution; and that although the defendant died after the *teste* and before the writ of execution came to the hands of the sheriff, it might have been levied of the goods of the defendant at the *teste* of the writ in the hands of thrid persons, or of the executor or administrator. 4 Comyn's Digest, title "Execution," D. 2; Cro. Eliz. 149; 2 Cro Car. 149; 1 Rol. 893, 1. 23.

Our statute provides that, "no writ of execution shall bind the property of the goods and chattels of any person against whom such writ shall be issued, until such writ shall be deliv-

ered to the sheriff, or other officer, to be executed." R. S. 300, Sec. 8; ibid. Sec. 1.

The common law is, therefore, changed, and neither the judgment nor execution is a lien upon the goods of a defendant, until execution is *delivered* to the officer whose duty it is to execute its commands. In New York the statutory provision in this respect is the same as ours, and it is there held, that executions only bind the goods from the time of delivery of the writ to the sheriff. Haggerty et al. *v.* Wilber et al., 16 John's R. 287; Cresson et al. *v.* Stout, 17 ibid. 116; Lombart et al. *v.* Paulding, 18 ibid. 311; Beals *v.* Allen, ibid. 363.(*a*)

When the execution in this case came to the hands of Bradley there was no such person in being as the defendant named therein; there was no existing lien upon the goods by virtue of which they could be seized, and other rights had intervened which could not be affected by a subsequent delivery of the execution to the sheriff. Under our law, the widow had become entitled to certain of the goods and chattels of the deceased, and the balance was subject to be applied to the payment of his debts generally, according to a statutory rule wholly inconsistent with the existence of any lien or priority in favor of the judgment or of the execution. Welch *v.* Wallace, 3 Gil. 490; Judy et al. *v.* Kelly, 11 Ill. 211.

We hold that Bradley could not lawfully have levied the execution, which came to his hands after the death of Harper, upon goods and chattels of which Harper died possessed, and, therefore, in refusing to do so, violated no official duty.

Judgment affirmed.

HIRAM W. FOLTZ, Administrator of Almon Leach, deceased, Appellant, *v.* THOMAS PROUSE, Appellee.

APPEAL FROM JO DAVIESS.

Accruing rent descends to the heirs, and the administrator has no concern with it.
Where an administrator shows by his report that he has given an unauthorized preference to creditors in the payment of assets, it is sufficient to justify his removal.

THIS cause was tried before SHELDON, Judge, at May term, 1854, of the Jo Daviess Circuit Court.

On the 9th day of January, A. D. 1854, Thomas Prouse filed a petition in the Probate Court of Jo Daviess county, represent-

(*a*) Dodge vs. Doherty, 22 Ill. R. 93

ing that he was a judgment creditor of the estate of Almon Leach, and that said Leach died about the 8th day of September, A. D. 1852, in the State of California, leaving real and personal estate in Jo Daviess county; and that Hiram W. Foltz, representing himself as a creditor of said estate, procured himself to be appointed administrator of said estate, while in truth said Foltz was not a creditor of said estate, but was largely indebted to said estate, and procured himself to be appointed administrator to enable himself to commit various frauds and speculations on said estate, and to cover up and sequester the property of said estate.

That said Foltz made a report, as such administrator, at the November term, A. D. 1853, that there were no assets except certain rents due from himself, and that he had paid out, in attorney's fees, the whole amount due from himself, which petitioner charges "is untrue in principal and particular," and that the reasonable use of the real estate occupied by Foltz each year amounted to more than the whole amount reported, and that the pretended payments, if any were made, was in fraud of the rights of creditors, and that defending said estate was done to defraud *bona fide* creditors.

That Leach left Galena for California about four years since, and left said Foltz in the possession of two certain shops and grounds on Franklin street, of the value of $1,800, the rent of which, each year, above the taxes, would be about one hundred and fifty dollars; that said property was encumbered by mortgage, to petitoner, for about $250, and said Leach was also indebted to one John Garner, in about the sum of one hundred and sixty dollars, and to John Carthew in the sum of sixteen dollars, which were all of the debts remaining unpaid when said Leach left for California.

That while Leach was in California, he became indebted to petitioner in the sum of $2,200, for which petitioner obtained judgment in California, and brought the record to Galena to enforce the payment of the same out of the property of Leach in Galena, and attached the premises in possession of Foltz, and on the death and administration aforesaid, DISMISSED said suit, and filed the same as a claim in this court aganst said estate, and had the same allowed on the 12th day of November, 1853, at $2,453, from which said Foltz, as administrator, appealed to the Circuit Court, and that on appeal petitioner recovered $2,360, all of which appear of record, and refers to records where the same remains unsatisfied and wholly unpaid.

Petition further states that John Garner obtained a judgment against said Leach by attachment against said lot on the 27th

day of August, A. D. 1852, for $212.12, and that said Foltz purchased said judgment from Garner to carry out and perfect his fraud on the estate of which he was the administrator, did not place the assignment of his judgment on record, but caused an execution to issue, and came in as a judgment creditor and claimed to redeem from a former sale to petitioner on the foreclosure of his mortgage, and that the brother-in-law of said Foltz purchased said property for $600, all of which is fraudulent and corrupt, and to the injury of creditors.

The petition sets forth that said Foltz, at the time of the purchase of the Garner judgment, was indebted to said estate greatly beyond the amount of the judgment, and that in purchasing said judgment Foltz used money that rightfully belonged to said estate, and that the redemption so made ought to have been made for all of the creditors, and that a sale should have been made by order of court, etc., and that the sale as made is fraudulent and void.

Petitioner says his claim was a bona fide debt, and was not, and could not be, successfully defended, and that this fact was well known to Foltz who employed counsel, and appealed for delay only, that the property might be purchased in for the use of Foltz; that the design was to overreach and defeat Prouse's claim.

Petitioner further states that Foltz neglected the interests of said estate by not paying taxes, and that he purchased the lot at a tax sale, and attempted to acquire a tax title.

Prays that Foltz may be cited to appear and make a report of his doings, and that the redemption made by him may be taken as a redemption on behalf of the estate, and that the property be held as a part of the estate, and that the letters of administration may be revoked.

At the trial of said cause, the following evidence was introduced on the part of the plaintiff:

John Garner, being called in as a witness for plaintiff, testified, that he knew lot number 14, on Franklin street, Galena, which belonged to Almon Leach at the date of his decease; that Foltz, the defendant, had occupied said premises ever since Leach went to California, which was in 1849 or 1850; that said premises are worth about $1,800; that the rents of the same would be worth $150 per year during the time that said Foltz occupied the same; that said Leach stated that he had let or leased said premises to said Foltz, which was just before Leach left for California; that Foltz is not reported as responsible, though witness could not say what or how much he was worth; that said Foltz has beeen carrying on business as a wagon maker—having a shop and carrying on business ever since 1850, in the

city of Galena ; that George McCully was the brother-in-law of Foltz ; that said McCully was considered as insolvent at the time he purchased said lot, under execution on the Garner judgement ; that he, with Foltz, attended the sale. It was also shown that said McCully was security for Foltz on his administrator's bond.

The plaintiff then introduced John Adams as a witness in the cause, who testified, that he knows lot 14 in question, which is worth about $1,800 ; and the rent of the same ought to be worth $150 per year ; that said Foltz has occupied said lot and premises ever since Almon Leach went to California, which he thinks was in 1850.

The plaintiff then offered A. C. Swan, the deputy clerk of the County Court, who testified that there was no inventory or appraisement bill now on file in the clerk's office of said court, of the personal or real estate in the estate of the said Almon Leach, deceased ; that he carefully examined the papers in said estate, and that the papers in said office are kept carefully by themselves.

It was then agreed and admitted by said parties, that said Foltz has occupied said lot 14 ever since the 1st day of September, 1849, to the commencement of this suit : that he commenced said occupation under a written lease of same date, which said lease was admitted in evidence ; that the same bears date the 1st day of September, 1849, and is given for the term of two years, at the yearly rent of $50 per year.

That said Leach departed this life about the 8th day of September, A. D. 1852, as appears by petition of said Prouse ; that said Foltz took out letters of administration on the 2nd day of November, A. D. 1852, on said Leach's estate, which said letters are in the said record set forth and are in due form.

That on the 23rd day of October, A. D. 1852, said Foltz purchased and took an assignment of the John Garner judgment against said Almon Leach deceased, which said judgment was recovered against said Leach in the Circuit Court of Jo Daviess county, on the 27th day of August, 1852, for the sum of $212.12, and costs of suit $11, which said assignment and transfer was duly executed by said John Garner.

That on the 14th day of October, A D. 1853, said Foltz, under said judgment so assigned to him, redeemed said lot 14 from a sale thereof under a judgment in favor of said Thomas Prouse, and against said Almon Leach, deceased, which said last mentioned judgment was rendered against said Leach on the 11th day of May, 1852, in said Circuit Court of Jo Daviess county, for the sum of $257.90, together with costs.

That said Foltz paid to said Prouse the sum of $310, to redeem said premises.

That said lot was, on the 26th day of December, 1853, sold on said Garner judgment to one George McCully, for the sum of $600; and that said Foltz has filed two reports in the said county court in said Leach estate.

The first of said reports was filed at the November term of the Jo Daviess county court, A. D. 1853, and sets forth that the same was made in pursuance of citation; that said Foltz, as such administrator, has received no personal chattels of any kind or nature, belouging to said estate, and that he has no personal knowledge of the existence of any, except rents due from himself to the said estate to the amount of $150, being a balance due to said estate for the use of two shops on Franklin street, in Galena, for the period of about four years and one and a half months, at $50 per year; and that said Foltz, under an order of said county court, has paid out to Messrs. Higgins and Strother for counsel fees, etc., the sum of $150.

And as to the existence of any real estate, said report sets forth that said administrator has no knowledge of any whatever, or any interest therein belonging to said Leach's estate, except that said Almon Leach in his lifetime, to wit, in August, A. D. 1852, was the owner of said lot 14 on Franklin street, at Galena; that in said month of August, 1852, said lot was sold on execution in favor of said Prouse, and bid off by him for the amount of his said judgment, and that the said Foltz, as such administrator, had not, within the time allowed by law, sufficient funds of said estate of said Leach, to enable him to redeem the same.

The second of said reports, made to said county court at the February term, A. D. 1854,

Shows the redemption of said lot 14, for - -	$313.82
Under said Garner judgment, the issuing of a fi. fa. on said Garner judgment, which, exclusive of costs, amounts to - - - - - - - - - - - -	229.08
And the costs thereon, amounting to - - - - - -	23.08
Making against said Leach's estate the sum of -	$565.98
And showing the sale to McCully of said lot 14, for	600.00
Leaving in the hands of said Foltz, for said Leach's estate, - - - - - - - - - - -	$34.02
Besides rents to the amount of - - - - - -	9.70
Making - - - - - - - - - -	$43.72

Which said sum of $43.72 is subject to a set-off of $25 for taxes paid by said administrator on said lot 14, while the same belonged to said Leach.

Here a tax receipt, bearing date May 31, 1850, for $6.96, paid by Foltz, on said lot 14, was introduced.

Also a tax receipt, bearing date March 10th, 1851, for $6, paid by Foltz on said lot.

Also tax certificate, bearingdate June 13th, 1853, showing purchase by said Foltz of said lot 14, for $16; also petition of said Prouse for report and to revoke letters of administration, etc.

Which were substantially all the evidence and papers and records offered in this cause, upon which the court decreed in substance as follows:

And on the 24th day of May, A. D. 1854, said court having considered and advised upon said cause, it was considered that so much of the order of said county court as adjudges that the said letters of administration of said Hiram W. Foltz be revoked be affirmed, and that there was on the 14th day of October, 1853, on a just and full settlement in the hands of said administrator the sum of three hundred and thirty dollars and eighty-six cents belonging to said estate, which said sum is exclusive of, and without reference to, the redemption money paid to the sheriff for the redemption of lot 14, on Franklin street, which is in no way taken into consideration in making up the sum, the said administrator refusing to consent that it should be allowed as a credit of money paid for the benefit of said estate.

Which report and finding said Foltz by his counsel moved to have set aside, which said motion was then and there overruled, and said Foltz by his counsel excepted to the ruling of the court, and thereupon brings his appeal.

The errors assigned in this case are—

1st. The circuit court erred in affirming that part of the decree of the probate court which directed the revocation of the letters of administration granted to said Hiram W. Foltz.

2nd. Such finding of said circuit court was contrary to evidence.

3rd. Such finding was contrary to law.

4th Said court erred in finding that there was due from plaintiff in error on the 14th of October, A. D. 1853, the sum of $330.86, to said estate of Leach.

5th. The court erred in refusing to set aside the order, finding and judgment, entered in this cause in the probate court.

HIGGINS, BECKWITH and STROTHER, for Plaintiff in Error.

M. Y. JOHNSON, for Defendant in Error.

Scates, C. J. Foltz had a lease on a lot for two years, ending on the 1st September, 1851, at $50 a year. This lease had expired, at which time the rent became due, by the terms of the lease, deducting the taxes which he had or might pay. He, without any new agreement, or any thing being said or done by either party, held over, until the 8th day of September, 1852, one year and eight days, on a second, when the landlord, Leach, died. There was due, on the 1st September, 1852, one hundred and fifty dollars, for rent, less the taxes paid; and this amount, or balance so due on settlement with Foltz, as tenant, became assets for the payment of debts. The rent was not due for the current year, from September, 1852, to September, 1853, for which time his lease continued at the former rent and terms, by holdingover eight days, without objection from Leach. This accruing rent descended to Leach's heirs, on his death, as a chattle real; and with it the administrator has no concern any more than the land in the mean time. Green *v.* Massie, Ex'r, 13 Ill. R. 364; Baker *v.* Root, 4 McDean R. 572; Jaques et al. *v.* Gould et al., 4 Cush. R. 386; Abeel *v.* Ratcliff, 15 John. R. 506; Jackson ex dem. Wood *v.* Selmon, 4 Wend. R. 327; Diller *v.* Roberts, 13 Serg. and Raw. R. 62. (*a*)

In taxing the account with Foltz, as administrator of Leach, the County Court found a balance due from him, as such administrator, of $365.04. The circuit court reduced this, and found a balance of $330.86. We are not able to reach or fix upon either sum, from the evidence in the record. Were we to state an account upon the evidence in the record, and under the principles we here sanction as law, we could only find as assets, the three years' rent, to 1st September, 1852, at $50 per annum, subject to a deduction of $28.96, paid for taxes, as agreed in the lease he should do; leaving a balance of only $121.04.

I can only conjecture that the circuit and county courts arrived at their results by taking into account subsequent rents, and also the sums paid on redemption, &c., from the mortgage sale, and the sum bid at the second sale, under the Garner judgment. I need not stop to verify or state the account upon this supposition. It is sufficient to remark, only, that under this petition, neither the county court, nor the circuit court, on appeal from it, had any jurisdiction of these transactions; either of the subsequent rents, the redemption from the first, its sale under the second judgment, or the proceeds of that sale. That is a case between the several judgment creditors, purchasers and Leach's heirs; and its jurisdiction belongs to the circuit court, either at law or in chancery. The county court may grant an order to sell to pay debts, upon a proper case presented by the administrator; but it is only of such lands as belong to decedent, and without

(*a*) Dixon vs. Nicholes, 39 Ill. R. 384; Green vs. Massie, 13 Ill. R. 364.

the power or jurisdiction to investigate and decree titles, in the manner contemplated by, and done in, the orders before us. If relief be sought upon such a state of facts as is shadowed forth here, I presume a bill in equity is the proper course.

The order of a motion of the administrator will be affirmed. Of that, the county court clearly had jurisdiction for the causes specified in the order. We are no further able to judge of the sufficiency of the proofs than they are set forth in the record. The administrator's report claims a credit for a payment, by order of the county court, to Higgins and Strother, of a counsel fee of $150; but no such order is shown. The claim may have been allowed, and stood for payment *pro rata*, with other claims an order of classification and preferance is quite another thing. No such order appears, and consequently the administrator shows, by his own report, an unauthorized preference in payment to these creditors.

It may be said—but the proofs here do not show it—that this payment to Higgins and Strother was made by him as debtor tenant, at the request of Leach, and that he is entitled to set of that payment in settlement of the rent. If this were so, it should heve been proven. In the absence of such proof the order of a motion is right.

Judgment reversed and cause remanded for further proceeding, not inconsistent with this opinion.

Judgment reversed.

CALVIN W. HOWE *et al.*, Appellants, *v.* HORACE HARROUN, Appellee.

APPEAL FROM KANE.

Where a case is submitted to the court for trial, the plaintiff may take a nonsuit after the court has announced its opinion, and before a note thereof is entered.

THIS was an action of assumpsit brought to the Kane Circuit Court and tried before I. G. WILSON, Judge, at February term, 1855. The court found for the defendant on the issues joined.

Afterwards, on the 4th day of June, A. D. 1855, the same being one of the days of the May term of said court, the plaintiffs came by their counsel, and on their motion it is ordered by the court that the records of last term be amended *nunc pro tunc*, so as to show that after the finding of the court had been announced, but before the judgment had been entered upon the docket, the plaintiffs asked leave to submit to a nonsuit; and

that the court overruled said motion, to which ruling the plaintiffs excepted, and prayed an appeal to the Supreme Court of this State, which was allowed by the court.

The bill of exceptions shows that on th e 28th day of February, A. D. 1855, it being one of the days of said term, after the court had announced his judgment in the case in favor of the defendant, but before he had entered his minutes of the same upon the docket, the said plaintiffs asked leave to submit to a nonsuit, and afterward and before the determination of said appliction for leave to submit to a nonsuit, he presented the following proofs in support of same.

David L. Eastman, on oath, saith, that he is counsel for plaintiffs in the above entitled cause, and was at the February term of the court. That before this court adjourned, at the said February term, affiant procured the affidavit of A. B. Fuller, an attorney of this court, in support of a motion for a nonsuit. That affiant delivered said affidavit to the court in person, and has been informed that the same has been mislaid or lost by the court, and that the said affidavit cannot now be found; affiant has appended hereto a copy of the said affidavit, which affiant states he verily believes to be substantially true in all the main facts therein contained. Said copy is hereunto appended, and marked " B." The date of said affidavit he cannot now state, but the same was duly sworn to before a justice of the peace before the same was delivered to this court.

A. B. Fuller, on oath, saith, that he was present ta the Kane County Circuit Court, at the February term thereof, A. D. 1855, when the case of Calvin W. Howe & Co. *v.* Horace Harroun was tried. The case was submitted to the court and but one witness sworn for the plaintiffs, D. L. Eastman, Esq., the counsel for the plantiffs. There was also offered in evidene a note and account, which the testimony of said witness referred to.

The counsel for plaintiffs then opened the case, from which affiant learned that the statute of limitations was pleaded. Plaintiffs' counsel then read from Greenleaf's Evidence as an authority, and rested his case,

J. H. Ferguson, Esq., attorney for defence, then opened for the defence—read from a written brief and cited authorities; then produced Breese's Reports, and read from that; next read from the 12th of the Illinois Reports, and argued his case, and made the point, that to take the present case out of the statute, a new and unqualified promise must have been made, to charge the defendant, and rested. Plaintiffs, counsel then re-read the case cited by defendant's counsel, and laid down the book and contended and so argued that the case cited was conditional, and not analagous to the one before the court. At this time Mr.

Eastman, plaintiffs' counsel, was standing in front of the pillar that supports the "bar." That after plaintiffs' counsel had commented on the case cited in the 12th of Illinois, he turned around, apparently looked for a book, and as he did so, the court requested him to pass him up the 12th of Illinois, which he did, and remained standing in front of the pillar above mentioned, while the court examined the report just passed him, looking earnestly at the court, who, after an examination of some length, and before he closed the volume, said, " this is a broad case;" whereupon Mr. Eastman said, "I will take a judgment of a nonsuit, sir." The court then remarked, "I don't know what the practice is in these cases, after argument; I will look into it." Affiant was sitting in the "bar" at the trial of this case, and noticed the whole or nearly all the case, as it was a question that interested this affiant.

D. L. Eastman, on oath, saith, that he is the attorney of Calvin W. Howe & Co., in a cause pending in the Kane County Circuit Court, wherein Calvin W. Howe & Co. are plaintiffs, and Horace Harroun is defendant. Affiant says that said cause was set down by agreement for trial by the court, and that on the trial the plaintiffs called but one witness, and the defendant produced no evidence; that affiant for the plaintiffs, in connection with the testimony of said witness, offered in evideece a note made by said defendant, and an account against him, and all in favor of said plaintiffs, and rested. Defendant's counsel argued the cause to the court, and in support thereof read from Breese's Reports and from the 12th of Illinois Report, and rested defence. Affiant then read case cited in the 12th of Illinois Reports to the court, and argued therefrom that that case did not cover the point before the court, as the case there cited was a case of a conditional promise, and the case before the court was unconditional promise, that after affiant had commented upon this authority, he turned to look for some books, to introduce further authority to the court, and while affiant was about to do so, the court requested affiant to pass up the case in the 12th of Illinois before referred to, which affiant had just laid down, which this affiant did, and the court examined in silence the case, and this affiant remained standing, ready to proceed with futher argument when the co rt, without raising his eyes from the case in question, voluntarily remarked, "that is a very broad case," and was about closing the book or report, when this affiant, lest he should fail to preserve all the rights of his clients, remarked to the court, " I will take a judgment of a non-suit, sir." The court then proceeded to say, he was not fully apprised of the practice in such a case, but would take time to look into the case.

Defendant resisted said motion, and offered the following proofs:

O. D. Day sworn.—I was present at the time of this suit. Mr. Eastman was sworn as a witness, and Mr. Ferguson took down his testimony in writing. Mr. Eastman opened the argument and Mr. Ferguson followed, and cited the court to a decision in the 12th of Illinois, and also to a case in Breese's Reports. Mr. Eastman concluded the case, and, as I thought, submitted it to the court, and took his seat. The court asked for 12th of Illinois Reports, which was handed to him. The Judge read the case and said it seemed to be a broad case, and covered the ground. Mr. Eastman rose, and, I think, commenced talking with the Judge. After some talk, the court announced that he should give judgment for defendant. Then Mr. Eastman said he wished to submit to a nonsuit. I had not been paying very particular attention to the trial. I had been reading the decision in Mr. Burchell's case at Washingron. I have not thought of the case since the trial but once, when Mr. Ferguson called my attention.

After hearing the parties, the court refused to allow the plaintiffs to take a nonsuit, to which ruling of the court in refusing the same, the said plaintiffs then and there excepted.

E. L. Leland and D. L. Eastman, for Appellants.

Farnsworth and Burges, and J. H. Ferguson, for Appellee

Caton, J. Unlike the common law our statute authorizes the parties, by mutual consent, to submit issues of fact to the court for trial in place of a jury; but this statute prescribes no time within which the plaintiff shall submit to a nonsuit, or be deprived of his right to do so By the common law the plaintiff could take a nonsuit at any time before the verdict of the jury was announced to the court. And we have a statute which further restricts the right requiring the plaintiff to take a nonsuit before the jury leaves the bar to deliberate upon their verdict. But in the case before us there is no law limiting the right to any particular time. It is not a very easy matter to say what the rule should be. Both by the common law and by our statute, when the case is tried by a jury, the plaintiff, before he determines whether he will take a nonsuit, not only has an opportunity of knowing precisely what the testimony is upon which his rights depend and upon which the jury are to act, but he also hears the charge of the court to the jury, so that he knows by what rules of law the jury are to be governed in deciding upon those facts. And all know, who have carefully observed the course of *nisi prius* trials, that it is necessary to understand how

the law is to be laid down to the jury as to know what are the facts, to enable a party judiciously to determine whether or not to take a nonsuit; while it may be conceded, with equal propriety, that the party should not know what is the opinion of the jury.

Now both these desirable ends cannot be attained when the court tries the question of fact in place of the jury. Either the plaintiff must have the benefit of the views of the court upon the law by which the case is to be governed, which can only be done after the court has expressed an opinion, or else he must be deprived of a right which was always guaranteed to him by the common law, and which is preserved to him by our statute in all cases of jury trial. It is true it may be impracticable to secure to him the right of knowing the views of the court upon the law of the case without his also becoming informed of its views of the facts. Were it practicable, we should certainly sanction the rule which should secure it. As it is, we must either abridge or extend the common law right. We prefer to adopt the latter course, as we think more conducive to justice, and hold that the plaintiff must have the right to take a nonsuit after the court has announced its opinion and before a note thereof is entered. (*a*) We are aware that a different rule was adopted in Indiana, but the reasoning which led to that decision does not strike us with the same force that it did that court.

We are of opinion that the court erred in refusing to allow the plaintiff to take a nonsuit, and the judgment must be reversed and the cause remanded.

Judgment reversed.

JOSEPH McCLELLAN, Plaintiff in Error, *v.* PHILO KELLOGG, Defendant in Error.

ERROR TO PEORIA.

Claim and color of the title, within the meaning of the statute of limitations, is the same as that given to those words by the courts, when applied to support an adverse possession.

Color of title may commence without any writing; and, if founded upon a writing, such writing need not show on its face a *prima facie* title, but may be good as a foundation for color, however defective otherwise.

Adverse possession is not to be made out by inference, but by clear and positive proof. The possession must be such as to show clearly that the party claims the land as his own, openly and exclusively.

AT the September term, 1853, of the Circuit Court of Peoria county, the plaintiff, McClellan, filed his declaration in eject-

(*a*) Adams *vs.* Shepherd 24 Ill. R. 464

ment against said defendant, Kellogg, for the W. half S. W. qr. of Sec. 36, T. 10 N., R. 5 E., in said Peoria county. On the 16th day of September, 1853, the defendant appeared and filed the general issue.

At the May term, 1854, of said court, the cause was tried by the court without the intervention of a jury, and judgment rendered in favor of defendant.

By the bill of exceptions, it appeared that the plaintiff, to sustain the issue on his part, proved and read in evidence to the court—1st, a certificate of the register of the land office at Quincy, Ill., of the entry of the *locus in quo*, by William B. Tucker, on the 27th of April, 1836; 2nd, plaintiff offered and read a deed for said land, from said Tucker to himself, duly acknowledged and recorded in said Peoria county, on the day of its execution, viz.: the 9th day of May, 1836. Plaintiff then proved by Charles Kettelle, that the defendant claimed title to, and assumed to own, said land at and prior to the commencement of the suit; and by Simeon D. W. Brown, that a small part of said land in the south west corner, to wit: three or four acres, is fenced on the east and north sides, and forms part of a large field, extending south and west of said track; that said three or four acres, so cut off from the land in dispute, is only enclosed by fence on the east and north sides, but that there is a young hedge, one or two years old, apparently, on the west line of this eighty acre tract—the south side is open; that, in a conversation a few months since, between defendant and witness, defendant said he was in possession of this small enclosure, and was cultivating the same, and that he had been in possession about three years. Witness further stated that the residue of the tract was unoccupied, and that defendant did not reside on or near the same. And here the plaintiff closed.

The defendant then offered and read—1st, exemplified copies from the general land office, of the register's certificate of the entry by Tucker on said 27th April, 1836, of the land in question, and of the assignment, by Tucker, on the 13th November, 1837, of his said certificate of entry, to David K. Cartter. 2nd, exemplification of patent for said land from United States to said Cartter, as assignee of Tucker, dated December 5, 1838.

Defendant next offered and read, in connection with the statutes of Ohio on the subject of acknowledgment of deeds, a deed from said Cartter to defendant, dated January 9th, 1839, for this and several other tracts of lands, containing 600 acres in all; which deed was recorded in Peoria county on the 23rd June, 1840. To the reading of this deed plaintiff objected; but the court allowed it to be read, and plaintiff excepted.

Defendant then called Wellington R. Kellogg, a son of defendant, who testified : that he knows said Cartter, and all the lands described in the deed from Cartter to his father; that his father had a farm of 150 acres in Ohio, rated at $20 per acre, which he exchanged for the lands in the deed, and that the *locus in quo* is of about an average value with the other lands in said deed mentioned; that this tract is separated from the others; that his father deos not reside on it, and that there have never been any buildings on it; that his father is in possession of this tract, and has been since the 25 th May, or 4th June, 1846; that then, and for several years before, one Adams, and, afterwards, one Sutton had possession of four acres in the south-west corner of the tract, and that then Sutton surrendered said four acres to witness, as agent for his father, and thereupon took a lease of the same from defendant, and continued to occupy and cultivate as before, but as tenant of defendant, for four years from that time; that, since then, said four acres have been cultivated, part of the time by other tenants, and part of the time by defendant himself; that the residue of said W. half S. W. qr. of Sec. 36, is still unoccupied. Witness does not remember whether any written lease was given to Sutton or not.

Said four acres first came to be enclosed thus; Adams owned lands south and west, adjoining the *locus in quo*. Wishing to make a square field about the south-west corner of this tract, he ran the east fence of his field far enough north in the tract to reach the parallel of the north line or fence of the field. From this point he run his fence due west to the west line of his field, and so cut off and enclosed in his field said four acres; that the fences still stand as first set, and said four acres still remain part of said field; that Adams sold his land to Sutton, that neither of them ever claimed said four acres, or pretended to hold the same adversely; that when Adams sold to Sutton, he told him he had no claim to the four acres, and that Sutton must surrender the same whenever an owner appeared to claim them; that Sutton did so peaceably and willingly when he claimed for his father.

Defendant next offered and read receipts for payment of taxes by him on said land, for the years from 1843 to 1853, both inclusive, on the whole of said tract. Defendant here rested his case.

Plaintiff then read receipts for taxes, of 1842 and 1844, paid by him on said land, and it was admitted that plaintiff had paid a good and valuable consideration to Tucker for the land.

This was all the proof given in the case. Plaintiff then moved to exclude the title and testimony offered by defendant,

and to find for plaintiff, which motion the court overruled, and gave judgment for defendant, and plaintiff excepted.

J. K. COOPER, for Plaintiff in Error.

MANNING and MERRIMAN, for Defendant in Error.

SCATES, C. J. I do not deem it important to refer to all the authorities, in addition to those already referred to in Wood ward *v.* Blanchard, 16 Ill. R. 433, 434, which sustain the gen eral principle asserted in that case, that claim and color of title, within the meaning of general statues of limitation, is the same as fixed and used by the courts, as sufficient to support an adverse possession. That color may be given for title without a deed or writing at all, and commence in trespass; and when founded upon a writing it is not essential that it should show upon its face a prima facia title, but that it may be good as a foundation for color however defective. Without further discussion of that point, I simply refer to some of the many additional authorities which clearly support that principle: Laframbois v. Jackson, 8 Cow. R. 589; Jackson &c., v. Young et al., 1 Johns. R. 157; Smith v. Burtis, 9 Johns. R. 180; Jackson, &c., v. Wheat, 18 John. R. 40; Jackson, &c., v. Newton et al., 18 John. R. 355; Jackson, &c., v. Camp, 1 Cow. R. 605; Hawk v. Senseman et al. 6 Serg. and Raw. R. 21; Miller et al. v. Shaw, 7 Serg. and Raw. R. 129; Bell v. Hartly, 4 Watts and Serg. R 32; Malson v. Fry, 1 Watts R. 433; Fredrick v. Searle, 5 Serg. and Raw. R. 236; Boyer et al. v. Benlow, 10 Serg. and Raw. R. 303; Dufour v. Camfranc, 11 Mart. La. R. 715, 716; Whiteside v. Singleton, Meigs Tenn. R. 207.

The Act of 1839 (Rev. Stat. p. 104, Secs. 8, 9,10,) limited and confined this general principle to "claim and color of title made in good faith," (Sec. 8,) by written or "paper title" for the actual "possession" will be bounded by the extent "and according to the purport" of such "paper title." I have been unable to discover, upon careful re-examination and consideration of the provisions and phrases of that act, and the circumstances under which it was passed —the evils with their proposed remedy — any indication of an intention to use "claim and color of a title" in a different sense than that long fixed and known to the law by repeated decisions, upon color of title predicated upon writings.(*a*)

Finding nothing in the act to warrant a departure from the established and received meaning of color, inference to the character and goodness of writings as evidence of title, upon

(*a*) M'Cagg vs. Heacock, 34 Ill. R. 478.

which it could be predicated to sustain an adverse possession and claim, and finding the whole current of authorities supporting the rule laid down, I adopted it in argument of that case, as the meaning of our legislators, and must receive more light than has to me been shed upon it, ere I can think otherwise. This has received the sanction of the Supreme Court of the United States in the case of Wright *v.* Matteson, 18 How. R. p. 50, as a correct exposition of the meaning of color, under the general rule, and of our own statute, independent of any deference to it as an authoritative interpretation of it by the local courts, and in accordance with their own general decisions previously made.

Hypercriticism could, and may, present as many and great difficulties and objections to all modes and all evidence of facts tending to show the *quo animo*, or intent of the mind with which an act was done, in all other cases as well as this, where the intention of the mind must accompany the doing of an act. In any and all such cases, while all might readily agree that certain facts and circumstances, including our different degrees of intelligence and knowledge of facts on the given subject would be legitimate evidence tending to show, and from which the individual intent might be inferred; yet we may readily suggest others of a doubtful, uncertain, unsatisfactory character, about the legitimate admissibility of which we might differ, and even if admissible, we might draw widely different inferences and conclusions. Such difficulties and differences among the triors in agreeing upon the influence and weight of facts, or the inferences and conclusions authorised by them, can never be adopted as a rule for the exclusion of the facts themselves, or testimony to establish them. Otherwise, the range of proof would be extremely narrow indeed, and in nine-tenths of the cases the intent could not be proven in any way. I am wholly unable to perceive how the judge, the counsel or the juror, would be in the least relieved of this difficulty in the discovery of the "good faith" or intent of the mind, by adopting, as a standard to judge the mind by, titles which are, upon their face, good *prima facie*. Is such a title a fixed fact, known to and the same in every man's mind? I presume men may—and professional ones too—differ as much about that quality and character of title as any other. It may be for the first time settled by the court upon trial, and against it, when the party in his ignorance of law would learn with suprise that he had occupied and held his color of title in bad faith, while he believed in fact that it was genuine and sufficient.

As difficult as it may be to judge of the intelligence of men in particular given cases, and to determine whether one can be

so stupid and ignorant as to believe a title good, which an expert, or astute judge or attorney knows to be worthless upon bare inspection, yet it ever has been, is, and will be true, as a matter of fact; and we must inquire, as best we may, into the actual, not the supposed, state of mind as an existing truth or fact. Ignorance of the law, and, its conclusions and operation upon given facts, until adjudged, is quite as common as upon other subjects; and that ignorance may not preclude or prejudice the party, except in those cases where from principles of public policy he is deemed to know it, and must answer and abide it accordingly. For certain purposes of notice of a conveyance, etc., our recording acts are of this character; and from the recording, all persons are deemed to have that notice, and must abide the consequences, even though ignorant in fact of the conveyance (*a*)

Kellogg must be deemed to have had notice of the prior conveyance by his vendor, and that at the time he took the conveyance from him, he had no title to the land. It is of no strength or validity as a title to overcome the former deed. But it is unnecessary to discuss here whether such constructive notice would taint the title with bad faith, in his mind, if actually ignorant of the former deed, so as to prevent his taking possession and making adverse claim and color under it— as I am of opinion he has failed to show such adverse possession and claim under it for seven years.

This view is grounded upon the evidence and the principles of law which govern it.

Adams, to square his fields with straight lines of fence, enclosed about four acres. He took possession as a trespasser merely, without pretense or color of claim or title, but intending to hold subordinate to and under the true owner. This was neither an ouster, eviction or disseizin of plaintiff; but as the law deems every one having a conveyance to unimproved land to be seized, (Rev. Stat. 102, Secs. 1, 4,) it was in effect the adding of actual possession to his seizin through Adams, whose possession becomes that of the plaintiff. Proprietors of Kennebeck Purchase v. Spring, 4 Mass. R. 417.

The evidence of an entry by defendant to dispossess plaintiff, is founded in the verbal acknowledgment of Adams to the son of defendant, (now an heir and defendant,) that he had no claim and held subject to the true owner, and upon witness claiming title in his father, Adams took a verbal or written lease, it does not appear which, and continued to hold the same four years by himself and vendee without rent. This I deem altogether insufficient to show an ouster, dispossession or disseizin of plaintiff, for the purposes of asserting an adverse possession under color of title.

(*a*) Ante. 254 & notes. Chickering v. Failes, 26 Ill. R. 520; Dickenson v. Breeder, 30 Id. 326,

The intent to assert title in himself by his son, may be clear enough from the proof, for this must be shown. Blunden *v.* Baugh, 3 Croke R. 302. But the doctrine of adverse possession is to be taken strictly, and is not to be made out by inference, but by clear and positive proof, (Bonnell et al. *v.* Sharp, 3 John. R. 169 ; Rochelle ads. Holmes, 2 Bay R. 491,) and proof of actual ouster shown. 2 Espin. N. P. 9, old paging. The possession must be with such circumstances as are capable in their nature of notifying to mankind that he is upon the land, claiming it as his own, in person or by tenant—it must be visible, open, exclusive, (Irving *v.* Brownell, 11 Ill. R. 413) ; it must be hostile in its inception, and so continue, (Turney *v.* Chamberlain, 15 Ill. R. 273) ; and notorious; and not secret, as this cannot answer the purpose of notoriety to adverse claimants, cannot extinguish their claim for not being put in in due time. Adams on Eject. App. 485 ; Angell on Limit. 400, Sec, 4, p. 416, Sec. 13. p. 427, Sec. 19. For the law proceeds upon the presumption of an acquiescence, which cannot be where the possession and claim are unknown ; and the acts of possession are such as not to give notoriety to it. Id.

These acts were not of this character. Adams' possession was merely that of plaintiff, although it might be without a knowledge of plaintiff's ownership. Defendant is the first claimant that appears, and he readily acknowledges his claim, having and making none himself. He consented to hold under him, and held on, without rent or other notice to plaintiff or the neighborhood than this private conversation, or a private, secret writing, if any, indeed, existed. A collusive, or a secret attornment of a tenant at will, or, by sufferance, paying no rent, or surrender, by trespasser, in the bare possession, surely can never be allowed to be the assertion, by possession, of an adverse and hostile claim and color of title, until a knowledge of the fact is brought home to the adversary claimant. Laframbois *v.* Jackson, 8 Cow. R. 589 ; Smith *v.* Burtis, 9 John. R. 174 ; Jackson, &c., *v.* Camp, 1 Cow. R. 605; Hawk *v.* Senseman et al., 6 Serg. and Rawl. R. 21; Day et al. *v.* Cochran, 24 Miss. R. 261.

There is no fact or change shown here that could, of itself, possibly afford the slightest notice to the neighborhood, of any assertion of an adverse claim of title, until defendant took actual possession himself, only some three years before suit.

We shall not presume that plaintiff had actual knolwedge or notice of this verbal assertion of claim, and verbal assent to it or parol lease, without rent, or other act, of which notice might be taken. See Pipher *v.* Lodge, 4 Serg. & Rawl. R. 310.

Reversed and remanded.

JOSEPH A. EDDY *et al.*, Appellants, *v.* PORTEUS B. ROBERTS, Appellee.

APPEAL FROM PEORIA.

The main inquiry, under the statute of frauds, where one person is called upon to pay the debt of another, is, whether the promise is an original and independent, or, whether it is collateral to and dependent upon, the debt or liability of another. If the liability of the original debtor continues, the promise of another to pay his debt should be in writing.

A consideration is necessary to support all promises, and, without it, no action can be maintained upon the promise, whether it is in writing or not.

Where one enters into a simple contract with another, for the benefit of a third person, such third person may maintain an action for the breach, and such a contract is not within the statute of frauds.

THE facts of this case are statad in the opinion of the court. This cause was heard before GALE, Judge, and a jury, at May term, 1856. Verdict and judgment for appellee.

N. H. PURPLE, for Appellants.

MANNING and MERRIMAN, for Appellee.

SKINNER, J. The declaration contains three special counts and the common count for goods sold and delivered. The first alleges that one Williams was indebted to the plaintiffs below; that defendant, in consideration that plaintiffs would release Williams' debt, promised the plaintiffs to pay them the debt of Williams, and that they did release, &c. The record alleges that Williams was indebted to the plaintiffs, for which debt plaintiffs had a lien on property of Williams; that defendant in consideration that plaintiffs would release said property from their lien, promised plaintiffs to pay them the debt of Williams, and that they did release, &c. The third alleges that Williams was indebted to plaintiffs, that defendant having hands at work for him, in consideration that plaintiffs would advance to them on defendant's account goods out of plaintiffs' store, promised to pay for the goods, and also to pay plaintiffs the debt of Williams and that plaintiffs did advance the goods, &c.

The defendant pleaded the general issue and the statute of frauds.

The evidence substantially shows that Williams had been engaged in cutting wood, and employed hands for that purpose; that he made an arrangement with plaintiffs to pay his hands out of their store and obtained credit for their goods, stating that "the debt would be good, for the wood would be theirs till they

19 Ills 79.
21 Ills 194.
80 " 126

got their pay;" that defendant, having bought out Williams, requested plaintiffs to let the hands have goods on his account; that plaintiffs refused unless the debt of Williams was paid; that defendant promised plaintiffs, that if they would let the hands have goods on his account he would pay for the goods and also the debt of Williams, and that plaintiffs did accordingly let the hands have goods on defendant's account; that Williams being indebted to plaintiffs sold his wood and other property to defendant, and that defendant, as a part of the transaction, agreed with Williams to pay to plaintiffs this debt.

The two first counts are not proved. There is no proof that the debt of Williams was ever released. His liability to plaintiffs, for aught that appears, still continues. There is no proof that plaintiffs had a lien on the wood, or that any supposed lien was released. The remark of Williams, on applying for credit, created no lien in law on the wood, in favor of plaintiffs. They had no lien to release.

The third count is substantially proved, and the question is, is the verbal promise of defendant therein stated, to pay the debt of Williams, binding on him in law?

The statute of *frauds* and *perjuries* declares, "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the promise or agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." This is substantially like the English statute upon the same subject, and similar provisions exist it is believed, in all of the United States. The plain object of the statute is to require higher and more certain evidence to charge a party, where he does not receive the substantial benefit of the transaction, and where another is primarily liable to pay the debt or discharge the duty; and thereby to afford greater security against the setting up of fraudulent demands, where the party sought to be charged is another than the real debtor, and whose debt or duty, on performance of the alleged contract by such third person, would be discharged. The decisions on this branch of the statute, both in England and the United States, are numerous, and, to a considerable extent, apparently contradictory, insomuch that any attempt to review and reconcile them would be a hopeless undertaking. It cannot be denied that courts in many instances, to prevent the successful interposition of the statute against apparently meritorious claims, and in the *particular case* to avoid a seeming wrong, have departed from the plain letter and spirit of the statute. Hard cases are said to make bad precedents, and, in our judgment, it is not only

better in the general operation, but the imperative duty of the courts to hold, in all cases, to the statute as it reads, avoiding all nice, complicated, or shadowy distinctions. By such a course the law is rendered more certain and uniform in its administration; and principles, instead of mere cases, become the foundation of judicial decisions. The main question for inquiry under the statute is, whether the promise is an original and independent one, or whether it is subsidiary, collateral to, and dependent upon, the debt or liability of another? (*a*)

If another is primary, or principal debtor, and the relations of debtor and creditor remain unchanged, both as to the right and the remedy, and no trust is created by the transaction out of which the promise arises, such promise is in its nature collateral and not original. If the debt be paid, or duty performed, by him who is primarily liable, the incident, or collateral promise, is of no force for any purpose; there is nothing remaining upon which it can operate. Tested by these rules the contract alleged in the third count is void, if not in writing. The debt of Williams existed at the time of making the promise; Williams continued liable to the same extent as if the promise had not been made; the relations of debtor and creditor were in no manner changed; no remedy, pledge, or security was relinquished; and no trust devolved upon the defendant to execute, by reason of the transaction. Chapin *v.* Lapham, 20 Pick. 467; Russell *v.* Bulk, 11 Verm. 166; Tileston *v.* Nettleton, 6 Pick. 509; Nelson *v.* Boynton, 3 Met. 396; Cahill *v.* Bigelow, 18 Pick. 399; Stone *v.* Symmes, ibid. 467; Durham *v.* Anledge, 1 Strob. 5: Carville *v.* Crane, 5 Hill 483; Jackson *v.* Raynor, 12 John 291: Simpson *v.* Putton, 4 John, 422; Barker *v.* Bucklin, 2 Denio 45; Loomis *v.* Newhall, 15 Pick. 159.

It is urged that the promise is founded upon a new and independent consideration, moving from the promisee to the promisor, and, therefore, an original undertaking. We may admit that there is a sufficient consideration appearing in the count and proof and that, aside from the statute, the promise would be obligatory; but the statute steps in and makes the promise void if not in writing. A consideration is necessary to support all promises, for, without such consideration, no action can be maintained upon them, whether in writing or not.

Some promises, as in case of commercial paper, import a consideration. So do sealed instruments; and, in such cases to maintain an action, no extrinsic evidence of a consideration is required. Had the defendant promised, in writing, to pay Williams' debt, without a consideration therefor, valid in law, this would have been a naked promise which could not be enforced.

The statute does not change the common law in this respect

(*a*) Blank vs. Dreher, 25 Ill. R. 331; Williams vs. Corbet, 28 Id. 263.

but adds the requisition that the promise be in writing. Where the principal and the collateral contracts are made at the same time, the credit given, or consideration passing between the principal parties, may be sufficient to sustain the collateral promise, but such promise must be in writing. Where the collateral promise is subsequent to the creation of the principal contract or debt, the collateral promise must not only be founded on a new consideration but be in writing. In some of the cases it is said that the promise is an original one, and, therefore, not within the statute, where the promise arises out of some new and independant consideration moving between the newly contracting parties. This general language seems to me to overlook an essential requisite to a valid promise or contract—a consideration— and to strip the statute of that protection it was intended to afford, in the prevention of wrongs to third persons, by the setting up of fictitious contracts, and maintaining them by perjury. A close examination, however, of the cases where similar language occurs, will disclose that many, if not most of them, were where the creditor had a subsisting lien, or security for the debt, which was given up for the benefit of the defendant; where the creditor discharged the original debt ; where, by some transaction with the debtor, a trust was created, to be executed by the defendant, in favor of the plaintiff; or, where the promise was made to the debtor for the payment of his debt to the plaintiff. The substance of the contract alleged in the third count is this ; for an uncertain credit at the store of plaintiffs, the defendant guaranteed the debt of Williams, or promised to pay it in a reasonable time, if Williams did not; and no fair construction can take it out of the statute.

The evidence discloses that Williams sold and delivered certain property to defendant, and that defendant, as a part of the transaction, agreed with Williams to pay his debt to plaintiffs. We think that plaintiffs may recover upon this undertaking, although not in writing, declaring on the special contract as made to the plaintiffs. (*a*) Where one enters into a simple contract with another, for the benefit of a third, such third person may maintain an action for breach, and such contract is not within the statute. 1 Chitty's Pl. 4 and 5 ; Barker *v.* Bucklin, 2 Denio, 45 ; Schemerhorn *v.* Venderheyden, 1 John 139 ; Olmsted *v.* Greenly, 18 ibid. 13 ; Arnold *v.* Lyman 17 Mass. 400 ; Cabot *v.* Haskins, 3 Pick. 83 ; 5 Wend. 235 ; Hargreaves *v.* Parsons, 13 M. and W. 561 ; Eastwood *v.* Kenyon, 11 Ad. and El. 438 ; 2 Parsons on Con. 302, and note *m* : ibid. 307 and 8, and note *w*

But the plaintiff cannot recover under any count in this declaration. Neither of the special counts are upon this contract, nor can he recover under the general count for goods sold and delivered.

(*a*) Brown vs. Strai , 19 Il . R. 89; Bristow vs. Lane, 21 Id. 194; Eggleston vs. Buck, 24 Id. 262.

In general, if the plaintiff might recover had there been no special contract, then he may recover under the appropriate common count, if, at least, the special contract be executed on his part, and nothing be left to be done under it but the payment of money. Here there is nothing upon which the plaintiffs could recover in the absence of the special contract; nor would this count at all inform the defendant of the real cause of action.

Judgment reversed and cause remanded, with leave to the plaintiffs to amend their declaration.

Judgment reversed.

THE GALENA AND CHICAGO UNION RAILROD COMPANY, Appellant, *v.* LEWIS H. YARWOOD, Appellee.

APPEAL FROM KANE.

A passenger in a railroad car need only show that he has received an injury, to make a *prima facie* case against the carrier; the carrier must rebut the presumption, in order to exonerate himself.

Negligence is a question of fact, which the jury should pass upon.

Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for them and leaves the circumstances of their conduct to the jury.

THIS was an action of trespass on the case by Yarwood against the appellant, for personal injuries.

The first count of the declaration avers that Yarwood was a passenger on the cars of the appellant from Elgin to Clinton, in the county of Kane, on the 2nd of August, 1852; that "just before reaching the said station or stopping place at said Clinton, by the action of the wheels of the said engine and cars, the said iron and wooden rails were torn up for a great distance, to wit, for the distance of twenty feet, in consequence of the said rails being constructed of poor material, and so insufficiently and insecurely fastened as aforesaid, the said car on which the said plaintiff was then and there a passenger, as aforesaid, was thrown violently off the said road, by reason of which the life of the said plaintiff was put in great peril and danger, insomuch so that the said plaintiff was obliged, and did jump from the said car to the ground, (the said car being then and there so off the said track, and still running at a rapid rate over the ties of said road, and apparently about to run off a very steep bank then and there being), in doing which the said plaintiff's left leg was broken near the ankle, his ankle badly and severely strained and bruised, and his body otherwise severely bruised and injured, all of which

was caused by the unskillfulness and carelessness of the said defendant and its servants, and by reason of the said injuries so received as aforesaid, the said plaintiff was," &c., concluding with the damage.

The second count is substantially like the first, only averring that the cars were run at double their usual rate of speed, and at a dangerous rate of speed, &c.; and averring that the car which the plaintiff was a passenger in, was off the track, &c., like the first count.

The third count avers that "the car in which said plaintiff was riding was thrown with great violence off the said track, and the said plaintiff, without fault on his part, and by reason of said carelessness and improper conduct of said defendant, thereby came with great force and violence upon the earth, and his left leg was thereby broken near the ankle," &c., &c.

Fourth count substantially like the third.

Plea, general issue.

The case was tried the 23rd of May, 1855, by a jury, I. G. Wilson, Judge, presiding. Verdict for the plaintiff of $2,500. Motion for new trial overruled and judgment upon verdict; and exceptions and appeal.

The proof showed that appellee and two others took a seat in the baggage car attached to the passenger train of cars of appellant, to ride from Elgin to Clinton, about four miles; that during the trip the cars ran off the track, and the appellee, under the excitement of the occasion, was injured by leaping from the car. The appellant showed the track to have been in good order, and that appellee and companions had been scuffling together, and running from the baggage to the other cars just preceeding or at the moment of the accident. The baggage car remained upon the track, and those in it remained uninjured. None of those who remained in the cars were injured.

The following were the instructions asked, given, or refused or modified. Those asked by the plaintiff in the court below, are as follows:

1. That if the jury believe, from the evidence, that the plaintiff was a passenger on board of the cars of the defendants, in the month of August, 1852, at the county of Kane,—that the cars of the defendants were thrown off the track of the road by reason of the unskillfulness or negligence of the defendants or their agents, and that by means of such accident the plaintiff was injured in his person, they will find a verdict for the plaintiff, and assess his damages.

2. That if the plaintiff was injured by means of an accident occurring on the railroad of the defendants, while he was a passenger on the cars, that then the burden of proving that

such accident was not the result of the negligence or unskillfulness of the defendants, or their agents, is cast upon the said defendants.

3. That in order to authorize the jury to find a verdict for the plaintiff, it is not necessary for the jury to be satisfied that the defendants were guilty of gross or even ordinary neglect in the reparation of their road, or management of their train; but if the jury believe, from the evidence, that SLIGHT NEGLECT of the defendants or their agents, was the cause of the accident and injury of the plaintiff, they will find a verdict for the plaintiff and assess his damages, provided the jury believe, from the evidence, that the plaintiff was a passenger on board the cars of the defendants, at the time of such accident aud injury.

4. The carriers of passengers by railroad are bound to use all precautions, as far as human foresight will go, for the safety of their passengers; and are answerable to injured passengers for SLIGHT NEGLECT of themselves and agents, in the reparation of the track, and conduct and management of their trains, whereby injury ensues.

5. The omission of any precaution which would produce, or increase the safety of, or reduce the probability of danger to the passenger, constitutes such a neglect in carriers of passengers, as will make them answerable in damages to a passenger injured by means of such neglect.

6. That railroad companies are answerable for injuries to a passenger resulting from a defect in their track, which might have been discovered by a most thorough and careful examination; and if the jury believe, from the evidence, that the injury complained of in this case, was occasioned by the neglect of the company, or its agents, to examine the track prior to the passage of the train on which the accident occurred, they will find a verdict for the plaintiff, and assess his damages.

8. That if the jury believe, from the evidence, that the accident and injury occurred by reason of the too rapid speed of the train, by reason of the neglect to apply the brake in time, or because of any other neglect or unskillfulness in the management of the train, they will find a verdict for the plaintiff, and assess his damages.

9. That if the jury believe, from the evidence, that the accident and injury complained of happened by reason of the neglect of the engineer in charge of the locomotive attached to the defendants' train, or to blow his whistle in time, or by reason of the neglect of the conducter to warn the engineer in time, or by reason of the neglect of the brakeman to apply the brakes in season, they will find a verdict for the plaintiff, and assess his damages.

10. That if the jury believe, from the evidence, that the accident and injury happened by reason of the bad order of the track, and want of due care and attention of the company, or any of its agents, in the reparation of the track, or in the management and conduct of the train on which the plaintiff was, they will find a verdict for the plaintiff, and assess his damages.

11. That the mere fact that the plaintiff jumped from the cars, while they were in motion, to the ground, and thus sustained the injury complained of, will not alone deprive him of his right to a recovery against the defendants, if the jury believe, from the evidence, that an accident had occurred; that the cars were off the track, and running at the rate of from three to five miles an hour; and the plaintiff had reasonable ground to believe, and did believe, that his life or limbs were in danger, and that it was necessary to leap from the cars in order to avoid the danger which threatened him, provided that the injury was not occasioned by the plaintiff's own neglect, nor that his negligence contributed to produce the injury complained of.

11½. That although the jury may believe that the plaintiff would not have received injury had he not leaped from the cars, and that, as the event proved, his jumping was an unwise act, that does not necessarily prevent the plaintiff from recovering in this case. The question is not so much whether there was in point of fact any danger, as whether the plaintiff reasonably apprehended danger, and so leaped from the cars; and in judging of his state of mind, the jury should take into consideration whatever circumstances of alarm and confusion existed at the time, the law not requiring the same coolness nor accuracy of judgment, in a person under a state of excitement and alarm, as under other circumstances.

12. That in determining the question whether the plaintiff had reasonable ground to believe himself in danger, the jury have the right to consider the experience and knowledge of the plaintiff in regard to perils of this character, the commotion and consternation among the passengers, and the fact, if it be so, that one of the brakemen abandoned his post and leaped from the cars.

13. That the mere fact that the plaintiff was, a few minutes previous to the occurrence of the accident and injury, scuffling and playing in a sportive manner with others on the cars, will not deprive the plaintiff of his right to recover from the defendants, if the jury believe, from the evidence, that the defendants or their agents were guilty of any neglect, HOWEVER SLIGHT, whereby the accident and injury occurred; provided the injury

was not occasioned by the plaintiff's own neglect, nor that his negligence contributed to produce the injury complained of.

14. That in estimating the damages which the plaintiff may have sustained by reason of the injury complained of, the jury, if they find for the plaintiff, are not confined to such damages as may have resulted to the plaintiff by loss of time, and expense of medical attendance, but may give such additional damages for the loss of natural use of the plaintiff's limb, which the jury exercising a sound discretion, and in view of all circumstances, may see proper to award, not exceeding the amount claimed in the declaration.

15. That unless the jury believe, from the evidence, that the passenger cars were full, and that it was a part of the contract that the plaintiff should occupy, during the trip, the baggage car, the mere fact that the plaintiff left that car and went into the first class passenger car, is not of itself such negligence in the plaintiff as to defeat a recovery in this case.

16. That passengers upon railroads are not to be bound or affected by rules established by such roads in relation to the conduct of passengers, unless the proof shows that the passenger had a knowledge of such rules and regulations.

Which instructions were given by the court, to the giving of which instructions on the part of the said plaintiff, the defendant, by counsel, at the time excepted.

Defendant then asked the court to instruct the jury as follows:

1, A. That if the jury believe, from the evidence, that the injury to the plaintiff in this suit, happened to him by mere accident, without fault on the part of the defendant, then the plaintiff cannot recover in this action.

5, B. If the jury believe, from the evidence, that the plaintiff, while on his passage from Elgin to Clinton, was guilty of carlessness, and unnecessarily exposed himself to danger by wrestling and scuffling on the cars, or by imprudently passing from one car to another while the car was in motion, and that said carelessness or imprudence contributed in any degree to produce the injury, then the plaintiff cannot recover.

6, C. If the jury believe, from the evidence, that the plaintiff, while on defendant's cars, imprudently and carelessly exposed himself to danger by wrestling, playing, running, or jumping, and that the injury to him was in any way produced by such carelessness or imprudence, or that such carelessness and imprudence in any way contributed to produce the injury, then the plaintiff cannot recover, even though the jury may believe that the defendant has also been guilty of negligence.

7, D. If the jury shall believe, from the evidence, that the

plaintiff was guilty of negligence while a passenger upon the defendant's cars, and that his negligence concurred with the negligence of the defendant in producing the injury, then the plaintiff cannot recover.

10, E. If the jury shall believe, from the evidence, that the plaintiff leaped from the cars of the defendant under a rash and undue apprehension of danger, when in reality there was no danger, and that the injury to the plaintiff was the result of such leaping, then the plaintiff cannot recover.

12, F. If the jury believe, from the evidence, that the plaintiff carelessly leaped from the cars of the defendant, and that such careless manner of leaping contributed to produce the injury to the plaintiff, then the jury should find for the defendant.

13, G. If the jury believe, from the evidence that the plaintiff leaped from the car of the defendant while it was in motion, under a rash and undue apprehension of danger, and in reality there was no danger, and that the injury was caused by such leaping, they should find for the defendant, although the plaintiff might have really thought himself in danger and leaped to the ground to save himself from harm; the question is, whether, under the circumstances, his jumping was an act of rashness.

16, H. If the jury believe, from the evidence, that the injury to the plaintiff was the result of the negligence or imprudence of both plaintiff and defendant, their verdict should be for the defendant.

Which was done by the court.

The defendant then also asked the court to instruct the jury as follows:

2, I. If the jury shall believe, from the evidence, that the defendant exercised due care, diligence and skill, in the preservation and repairs of the track, and in managing and operating the road at the time of the accident, and that the accident could not have been prevented by the use of said care, diligence and skill, then the plaintiff cannot recover in this action.

4, J. That every traveler in a public conveyance, must meet the risks incident to the mode of travel he adopts; and if the jury shall believe that the injury to the plaintiff was the result of an accident which could not be avoided by the exercise of due care and skill in the preparation and management of the means of conveyance on the part of the defendant, then the plaintiff cannot recover.

8, K. That the plaintiff, before he can recover in this action, must not only show that the injury to him was the result of care lessness or negligence of the defendant, but also that he himself was without faultin producing said injury.

9, L. That in this action the plaintiff cannot recover, unless the jury shall believe that he exercised proper care and circumspection while on his passage from Elgin to Clinton, and that the defendant was guilty of negligence, from which the injury was received, and the burden of proof is upon the plaintiff to show not only that the defendant was negligent, but he himself was not guilty of negligence.

15. M. Unless the plaintiff has proved to the satisfaction of the jury that the defendant was guilty of negligence or misconduct, and also that plaintiff used proper care and prudence, and that his own misconduct, want of care, or negligence, did not contribute to produce the injury complained of, the jury should find for the defendant.

Qualifications to defendant's 8th, 9th, and 15th instructions: "But proof that the plaintiff was a passenger, of the accident, and the injury, make a *prima facie* case of negligence, and throw the burden of explaining upon the defendant."

18, N. The jury are also instructed that it is their duty to regard and obey the law as given them by the court, (and that the law as laid down by the Supreme Court in its decisions, is the highest judicial authority of the land,) and the jury are not at liberty to disregard or overrule it.

Which the court refused to give as asked, but gave with the following qualifications, viz.: by adding to the first of said instructions these words—"But due care required the use of the utmost prudence and caution; a carrier of passengers being liable for slight negligence;" and by adding to the second of said instructions these words—"But due care required the use of the utmost prudence and caution."

And by adding to the next three of said instructions these words: "Qualification to defendant's 8th, 9th, and 15th instructions— 'But proof that the plaintiff was a passenger, of the accident, and the injury, make a *prima facie* case of negligence, and throw the burden of explaining upon the defendant.'"

And the last of said instructions by striking out the following words therefrom, viz.: "And that the law, as laid down by the Supreme Court in its decisions, is the highest judicial authority of the land."

To which decision of the court in refusing said instructions as asked, and each of them, and qualifying them and each of them as aforesaid, the defendant then and there excepted.

And the defendant then also asked the court to give the jury the following instructions:

14, O. If the jury believe, from the evidence, that the plaintiff leaped from the car of defendant, under circumstances that would not have justified such an act on the part of a prudent,

careful man, and that the injury was the result of such jumping from the cars, then the plaintiff cannot recover, unless the jury believe that such injury was willfully caused by the defendant.

3, P. That the defendant, as a common carrier of passengers, is not an insurer of the personal safety of the passengers against all accidents, but is liable only for the want of such care and dilligence as is characteristic of cautious persons. And if the defendant exercised such care and diligence in the transportation of the plaintiff, then the plaintiff cannot recover in this action.

Q. That if they believe, from the evidence, that Yarwood and his companions, when they took passage in the cars of defendant at Elgin, were told by the conductor that the passenger cars were full, but they could go in the baggage car, and that thereupon they got into the baggage car to ride to Clinton, then it was the duty of Yarwood to remain and ride in that car.

R. And if the jury further believe, fron the evidence, that at the time of the accident and when the plaintiff jumped off the cars, the baggage car was not off the track, nor in any danger, but that the plaintiff, with his companions, had got into a play and scuffle, which brought on a racing through the other cars and in one of which, Yarwood was brought to that apprehension of imminent peril which induced him to leap from the cars, and thereby received the injury complained of, then the plaintiff cannot recover, and the jury should find for the defendant.

S. And the jury are further instructed, that if they believe from the evidence, that Yarwood, the plaintiff, with his companions, at the time they took passage in defendants' cars at Elgin, to ride to Clinton, were told by Capt. Wiggins, the conductor, to go in the baggage car, as the passenger cars were full, and that plaintiff, in pursuance thereof, went into said baggage car, then it was his duty to continue therein to the said Clinton.

T. And if the jury further believe, from the evidence, that at the time of the accident, the plaintiff had left the baggage car and gone into another car, and had thereby placed himself in a position of apprehension of imminent peril, which induced him to leap from the cars and thereby received the injury complained of, and that the baggage car was not off the track at all, or in any danger, then such conduct of the plaintiff was culpable negligence, and the jury should find for the defendant.

U. If the jury believe, from the evidence, that the standing upon the platform of cars, or the going about from car to car by a passenger whilst the cars are running, are acts of imprudence and negligence, and if they further believe that at the time the cars ran off the track, the plaintiff was so standing or going about, and that such conduct of the plaintiff increased his appre-

hension of peril, and he was thereby induced to leap from the cars when in motion, and, in consequence of such leap, received the injury, when, had he remained in the cars, he would not have been injured, he is not entitled to recover in this action.

V. If the jury believe, from the evidence, that the plaintiff leaped from the cars of the defendant under circumstances that would not have justified such an act on the part of an ordinarily prudent, careful man, and that the injury was the result of such leaping, then the plaintiff cannot recover.

Qualifications asked by defendant to plaintiff's instruction number 9.

W. But unless the plaintiff has proved, to the satisfaction of the jury, that his own carelessness or negligence did not contribute or assist to produce the injury complained of, then the jury should find for the defendant, and the burden of such proof is upon the plaintiff.

X. If the jury believe, from the evidence, that at the time the plaintiff took passage on the defendant's cars at Elgin, he was directed by the conductor to take his place in the baggage car, because there was not room for him in the passenger cars, and that the plaintiff did go on board of the baggage car at the time of starting, and that whilst on the way from Elgin to Clinton he left said car without any reasonable cause, and that the injury to the plaintiff happened in consequence of his so leaving the car, then he is not entitled to recover in this action.

Which the court refused, and mark the same "refused;" to which decision of the court in refusing to give said last mentioned instruction, the defendant then and there excepted, and the defendant then also asked the court to give the following instructions :

Y. If the jury believe, from the evidence, that the plaintiff, with his companions, at the time they took passage in defendant's cars at Elgin, to ride to Clinton, were told by the conductor of the train that the passenger car was full, or nearly full, and that they could go in the baggage car, and that plaintiff in pursuance thereof went into said baggage car, then it was his duty to continue there, unless it was necessary to leave the same; and if the jury further believe, from the evidence, that at the time of the accident, the plaintiff had unnecessarily left the baggage car and gone into another car, and was walking about or standing upon the platform of the hind car, and had thereby placed himself in a position of peril, or apprehension of great peril, while the baggage car was not off the track, or in danger, then such conduct was culpable negligence.

Z. If the jury believe, from the evidence, that Yarwood was unnecessarily standing upon the platform of one of defendant's

cars at the time of the accident, then he was guilty of improper conduct and negligence in so doing.

&. That it is the duty of every passenger, on a railroad car, to take his place in the car in which he takes passage, and to remain therein, unless it is necessary to leave the same for a reasonable refreshment, or some other necessary purpose.

Which the court marked "giving" "consent," and when the court read the last mentioned instructions to the jury, he remarked to the jury, and in their presence, that he gave these by the consent of plaintiff; to which remark of the court as aforesaid, the defendant then and there excepted.

The jury thereupon retired, and afterwards came into court, and rendered the following verdict:

"We the jurors find the defendant guilty, and assess the damages $2, 500."

E. Peck and J. F. Farnsworth, for Appellant.

E. Leland and R. S. Blackwell, for Appellee.

Scates, C. J. The preponderance of evidence is not such, on this trial as it was on the former, as to demand the interposition of the court.

The instructions demand the only notice that we are called upon to give this case, and these, being numerous, we shall confine ourselves to such as appear questionable, or have been particularly challenged.

The ninth and fifteenth instructions in the defendant's series, given by the court, are as follows:

"9. That if the jury believe, from the evidence, that the accident and injury complained of happened by reason of the neglect of the engineer in charge of the locomotive attached to the defendant's (plaintiff's) train; or to blow his whistle in time; or by reason of the neglect of the conductor to warn the engineer in time; or by reason of the neglect of the brakeman to apply the brakes in season, they will find a verdict for the plaintiff and assess his damages."

"15. That, unless the jury believe, from the evidence, that the passenger cars were full, and that it was a part of the contract that the plaintiff should occupy, during the trip, the baggage car, the mere fact that the plaintiff left that car, and went into the first class passenger car, is not of itself such negligence in the plaintiff as to defeat a recovery in this case."

The plaintiff asked, and the court refused, the following qualification to the 6th instruction: "But unless the plaintiff has proved to the satisfaction of the jury that his own carelessness

or negligence did not contribute or assist to produce the injury complained of, then the jury should find for the defendant, and the burden of such proof is upon the plaintiff."

Upon mature reconsideratiou of the principles of law laid down in this case in 15 Ill. R. 468, we feel compelled by authority of adjudged cases, as well as justice, to approve and reassert them.

The principle contained in the qualification has been questioned and denied, in this case, but more especially its application to passengers. There is, doubtless, a sensible distinction between persons receiving an injury while sustaining this relation to the wrong doer, and those who do not. But that distinction will not wholly destroy its application to passengers, but will only modify the rule for applying it. This distinction was taken in the former decision of this case, 15 Ill. R. 471, when the court say: "Proof that the defendant was a passenger, the accident and the injury, make a prima facie case of negligence. This is done, and the burden of explaining is thrown upon the plaintiffs."

Where the plaintiff in the action does not sustain that relation to the defendant, he must, in addition to the accident and his own injury, affirmatively show his own freedom from carelessness or negligence in causing or contributing to produce it.

If the distinction be a sound one, the modification is improperly worded, and should not have been given. It should have been so worded as to throw that proof upon the defendant below.

The 15th instruction is erroneous. The facts, or acts of defendant, recited in it, are withdrawn from the consideration of the jury, and decided bydoth court, as a question of law, instead of fact. The court say these acts do not constitute negligence or carelessness in defenant. Negligence is a question of fact and not of law; and the court had no right to determine it. Had the jury found these facts specially—that the passenger cars were not full; that defendant, being directed by the conductor to the baggage car, went into that car without a special contract for passage on that car, and, after riding some distance on it, left it, and went into the first class car—without finding that these facts did or did not constitute negligence, under all the circumstances of the case, no court could pronounce any judgment of law upon it, for want of completeness. Negligence is the fact to be found. The acts of the party, and the circumstances under which they were done, are not the fact to be found, but are merely evidences of that main fact. The court has only assumed the province of the jury in assuming that such circumstances and acts as are enumerated in the instruction, are not sufficient proof of the party's negligence Had the instruction further assumed that the jury find the conclusion that the court

is made to find, then might the court well have said, the right of action is not barred by those facts.

Intimately connected with the giving of this instruction, indeed, the counterpart of it, was in the refusal of plaintiff's instructions, "W." and "X." They are as follows: "If the jury believe, from the evidence, that the standing upon the platform of cars, or the going about from car to car, by a passenger, whilst the cars are running, are acts of imprudence; and if they further believe that, at the time the cars ran off the track, the plaintiff was so standing or going about, and that such conduct of the plaintiff increased his apprehension of peril, and he was thereby induced to leap from the cars when in motion, and, in consequence of such leap, received the injury, when, had he remained in the cars, he would not have been injured, he is not entitled to recover in this action."

"X. If the jury believe, from the evidence, that, at the time the plaintiff took passage on the defendant's cars at Elgin, he was directed by the conductor to take his place in the baggage car, because there was not room for him in the passenger cars, and that the plaintiff did go on board of the baggage car at the time of starting, and that, whilst on the way from Elgin to Clinton, he left said car without any reasonable cause, and that the injury to the plaintiff happened in consequence of his so leaving the car, then he is not entitled to recover in this action."

We must ever keep in mind that there might be an accident to the train without an injury to defendant; that there might be such accident and injury from his own negligence, without liability of plaintiff therefor.

In the ninth instruction given for defendant, the court assume that if the accident and injury were occasioned by the omission of plaintiff's servants to do certain specified acts, plaintiff's liability would be thereby fixed; and yet the court refuse, in plaintiff's instruction "*X*" to lay down a similar principle for the discharge of their liability, if a particular act of defendant caused the injury. The two instructions are of precisely like principle. Both or neither, should have been given. With each given, the case would have stood so before the jury. It is true, the ommission to blow the whistle or warn the engineer, or apply the brakes in time, might have occasioned the accident, and that might have resulted in the injury; but had the defendant remained in the baggage car, he might have been safe, notwithstanding the accident, and so the one instruction might charge the other, and might discharge the plaintiff.

So again of the defendant's 15th instruction, and the plaintiff's instruction "*W.*" In the former, the court tells the jury that the fact of defendant's leaving the baggage car and going

into the first class passenger car, was not negligence in him under all the circumstance; and yet the court refuse to add, in instruction " *W*, " that if they believe that standing upon the platform of cars, or going about from car to car whilst the cars are running, are acts of imprudence, and that defendant was so standing and going about when the cars ran off the track, and that such conduct increased his apprehension of peril, and induced him to leap from the cars while in motion, from which leap he received the injury, and that had he remained in the cars he would not have been injured, they should find for plaintiff. If the court was authorized to draw conclusions of fact from the evidence in the former, so may it in the latter exclude the facts themselves as authorizing the jury to draw no conclusion from them.

The defendant has, by asking the court so to direct the jury, shown that the jury might so regard and find the facts as establishing negligence, but for that direction.

These facts were properly before the jury, and were proper for their consideration as tending to prove negligence in going unnecessarily into a position, from the apparent dangers of which he was induced to leap off the train, and the court should have neither found for the jury any conclusion of fact of its own, nor withdrawn the facts from the consideration of the jury. Such we consider to be the effect of refusing these instructions

The qualifications made to the 2nd, 4th, 8th, 9th and 15th instructions asked by the plaintiff, were correct. The degree of care required, and liability imposed, appear to be considerately and correctly stated; and the facts that will establish a *prima facie* case of negligence are such as this court sanctioned on the former hearing of the cause in 15 Ill.

In the remarks of the court that instructions " Y," " Z," and " &, " were given by consent of defendant, we can perceive no injury necessarily arising to plaintiff, as no motive, design or effect of the remark is apparent on the record.

The instructions " 14, O," " 3, P," " Q," " R," " S," " T," and " V, " were properly refused.

Persons under imminency of peril may not be required to exercise all the presence of mind and care " of a prudent, careful man, " with impending danger. The law makes allowance, and leaves the circumstances to the jury to find if the party acted rashly and under an undue apprehension of the danger.

Instructions of the character of " 3, P," have already been condemned by this court as not defining correctly the rule of care and diligence of common carriers of passengers. Chief Justice Savage was not defining the rule, but arguing the principle, when he used the expression in Camden and Amboy Rail-

road Co. *v.* Burke, 13 Wend. R. 626; Angell on Carr., Sec. 523. And Mr. Angell, in Sec. 568, gives a more careful and accurate definition of the degree of liability of carriers.

The other instructions, like that of defendant's, commented on above, assume to decide upon the facts, and draw conclusions for the jury.

For the errors in the instructions noted, we reverse the judgment and remand the cause again for a *venire de novo.*

Judgment reversed.

CHARLES FOLLANSBE, Appellant, *v.* JAMES P. KILBRETH and HARVEY DECAMP, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where a person purchases property as the agent of another, though he may have the deed or contract of sale made out in his own name, the principal from the moment of the purchase, acquires an equitable title thereto, subject to all the incidents attaching to such an estate, and the agent holds it in trust for the principal.

An equitable title derived under such circumstances may be divested out of the *cestuique trust* otherwise than by alienation, before the trust is actually performed. If the trustee has practised any fraud toward his *cestuique trust*, the latter may, when he discovers the fraud, repudiate the acts and purchase of the trustee and thus divest himself of his equitable title, or he may waive the fraud and claim his rights as *cestui que trust;* or, before he has discovered the fraud, he may treat the purchase as his own by selling his equitable title. The *cestui que trust* may also divest himself of his equitable title by laches, fraud, or by agreement.

A court of equity will permit a *cestui que trust* to show a speculative disposition toward his trustee. If a *cestui que trust* discovers facts which would give him a right to repudiate the acts of his trustee, and has investigated them, or had a reasonable time to do so, he is bound to declare whether he will avail himself of the right or not, and cannot lie by in a position to affirm the bargain, if a profitable one, and repudiate it if it is a losing one.

Where a *cestui que trust*, having a right to repudiate a transaction, laid by for three years, and suffered his trustee to go on and make payments for the property; *Held*, he was not entitled to relief.

THIS was a bill in chancery, filed February 17, 1854, in the Cook County Court of Common Pleas, by the appellees against the appellant, praying for a decree, declaring the defendant to be a trustee of the complainant's of block 57, Canal Trustees subdivision of Sec. 7, T. 39 N., R. 14 E., and for a conveyance, &c. It appeared that on or about the 7th of November, 1848, the defendant purchased the above block for $1,500; $500 of which was paid by a conveyance of 80 acres of land, belonging to the defendant in McHenry county; $250 was paid in cash; and the remainder on the 6th of September, 1849, 1850 and 1851. The defendant took from the vendor a bond to himself, for a

deed when the deferred payments should be made. The bill sets forth a voluminous correspondence between the parties, showing that the defendant purchased the property as the agent of the complainants and one Person, who had since transferred his interest to them, and that the taking of a bond for a deed to the defendant was contrary to their instructions

The answer sets forth a further correspondence between the parties showing that the defendant executed his own bond to the complainants and Person for the conveyance of the property, upon payment of the sum of $1,500, less $375 in the defendant's hands, in three annual installments, due on the 1st of September, 1849, 1850 and 1851; and claiming that they had accepted of the relation of vendee of the defendant, and were bound by the terms of the contract.

As an excuse for not making the payments at the times when they became due, the complainants alleged that the defendant misrepresented to them the value of the land purchased; and had paid his own land toward the purchase at the nominal sum of $500, when in truth and in fact it was only worth $100 or $200 at the time. Evidence was introduced to support these allegations.

The other facts in the case sufficiently appear in the statement of them in the opinion of the court.

C. Beckwith and A. Huntington, for Appellant.

G. Goodrich, for Appellees.

Caton, J. I agree with the position assumed by the complainants' counsel, that when the true character of this original transaction is fairly understood, the positions of the parties must be considered as that of principals and agent, and that the land was purchased by Follansbe in trust for the complainants, although the purchase was nominally to himself. Nor do I deem it essential to inquire whether their subsequently treating him as their vendor without objection, changed that relation so as to entitle him to insist upon the rights of a vendor instead of a trustee. If he is entitled now to the position of a vendor, there is no pretence for inferring a specific performance against him by reason of the inexcusable laches of the purchasers, so that the first bill which was filed with that view was no doubt properly dismissed. We shall, for the present, consider the case, assigning to Follansbe the position of agent and trustee. Considering such to be the case, the complainants acquired an equitable title to the premises the moment the purchase was made, which was at the time subject to all the incidents attach

ing to such an estate. It is assumed on the part of the complainants that such an interest could not be divested except by alienation. They assert that when a trust once exists it must always continue till it is performed. In this they are undoubtedly mistaken, as may be shown by the very case made in this bill. Admitting the fraud which is charged against Follansbe, and they have undoubtedly a right to repudiate his acts in purchasing the land and taking the bond for a title to himself, and compel him to assume all the responsibilities of a purchaser, or they might waive the fraud and claim their rights as *cestui que trusts*. Or they might, before they discovered the fraud, considering themselves bound by the acts of their agent, treat the purchase as their own, and sell their equitable title, which would undoubtedly be a valid sale. Or, not having sold, they might, when they discovered the fraud, abandon it on account of the fraud. By adopting the latter course they would, no doubt, divest themselves of that equitable title to which they had a right to assert a claim, and which was actually vested in them till the time of such renunciation. In this case, then, they would become divested of an equitable title in or right to land, without any alienation. These rights must be reciprocal when circumstances are so changed as to leave an option of election in the trustee, whether he will recognize further the existence of an equitable title in the *cestui que trusts*, as, where they may have been guilty of a fraud in inducing the trustee to act for them and incur personal responsibilities which he would not have undertaken but for the fraud practiced upon him. Such a case of fraud might, no doubt, be supposed on the part of the principals as would justify him in repudiating the agency, and thus, without their consent, would the principals be divested of their equitable estate, which till then would have existed, and which would have continued to exist had the agent chosen to have recognized it. Again, such equitable estate might, no doubt, be destroyed by the mutual agreement of both parties without fraud on either side. Nor am I prepared to say that such an estate might not be defeated by laches, or subsequent miscoduct on the part of the principals or *cestui que trusts*.

Let us address ourselves to the case in hand and apply these principles to the facts before us.

The complainants resided in Ohio, and the defendant in Chicago, where the premises in question are situated. In November, 1848, the defendant, as the agent and for the benefit of the complainants, purchased the property in his own name for fifteen hundred dollars, of which he paid five hundred in a lot of land which he owned in McHenry county, and two hundred and fifty in money, and gave his obligation to pay the balance

in one, two and three years, with six per cent. interest. The purchase was approved by the complainants, who received a certified copy of a bond for a deed to themselves from the defendant, which had been executed and recorded, and miscarried in the mail. This bond obligated the defendant to convey the land to the complainants upon their paying to him the fifteen hundred dollars, one-fourth down, and the balance in three equal annual instalments. No objection was then made or subsequently, till this bill was filed, that the defendant originally purchased the land in his own name instead of the complainants. At the time of Follansbe's purchase he had in his hands three hundred and seventy-five dollars of the money of the complainants for the purpose of investment in land, which was sufficient to pay the first instalment. Before the second payment fell due Follansbe wrote to the complainants to put him in funds to meet it, which they neglected to do. This payment fell due on the 1st of September, 1849. Up to this time their correspondence shows that the complainants felt perfectly satisfied with the purchase and with the course of the defendant in relation to it, but it is quite apparent that as they resided at a distance, they derived their information in relation to the value of the land solely from Follansbe, and placed implicit confidence in his integrity and representations. In the latter part of September, 1849, Kilbreth, one of the complainants, visited Chicago and examined the premises, and made inquiries as to their value, and for the first time expressed dissatisfaction with the purchase; and shortly after, on the 24th of November, Person, another of the purchasers, wrote to the defendant accusing him of fraud in misrepresenting the value of the land, and offering to take it at one thousand dollars. To this the defendant replied, vindicating himself, but, I confess, without satisfactorily explaining the representations he had made as to the value of the land, and the prices at which contiguous land had been sold. The defendant concluded that letter in these words: "Now all I ask of you is to remit me the payment on this purchase now due, or forever hereafter hold your peace." To this letter no answer appears to have been given, nor was the money remitted as requested, but the defendant was left to pay the purchase money with his own funds.

When Kilbreth, one of the complainants, was in Chicago, in September, 1849, after the second payment fell due, he employed Mr. Rees, a land agent in Chicago, to examine the title, and with him examined the land. At this time he appears to have been dissatisfied with the purchase. And he then told Rees that he did not intend to make any further payments on the property, or under contract, or on the bond, to Follansbe,

(in his various examinations he uses all three expressions,) unless the land should increase considerably in value. He left Chicago without making any payment to the defendant, or putting him in funds with which to make the payment, then overdue on the original purchase. Nor did they put Follansbe in funds, or make the subsequent payments as they fell due. Nor do they appear to have taken any further notice of the purchase, or to have done anything in relation to it subsequent to the correspondence above referred to, till nearly three years after, and after the time for making the last payment had expired. In October, 1852, they appeared and tendered to the defendant the amount due on the bond which he had given them for a conveyance.

We cannot hesitate to say that here was a clear abandonment of whatever rights they had in the purchase made by the defendant for them as their agent or trustee. They had an undoubted right to a reasonable time to investigate the conduct of their agent; and, if they found he had practiced a fraud upon them to repudiate the purchase, and make him assume its responsibility; but, in so doing, they must necessarily relinquish to him its benefits. For this there was an abundance of time prior to the maturity of the second payment. They did make such investigation, and condemned his conduct, and refused to go on with the purchase. This is apparent, from the fact that they refused to put him in funds or make the payment then due, and from the letter which Person wrote to him in the November following, in which they not only decline to go on with the purchase upon the original terms, but propose a new arrangement, and to take it at one-third less, but above all is their intention apparent not to hold themselves bound by the purchase in the declaration made by Kilbreth to Rees, at the time he was in Chicago, in September, 1849, in which he declared they would make no more payments unless the land rose considerably in value. Now this declaration shows unequivocally an intention to speculate on the chances of an enhancement in the value of the land. He made no complaint of a want of information on the subject, and no doubt or objection to the title; but the value of the property was the only point involved in his consideration of the subject. On this point there can be no doubt he fully informed himself, and upon the value as it then stood, he chose not to go on with the purchase, reserving to himself, if he might do so, the right to reserve the benefits of it, should it subsequently rise in value, so as to make it a good speculation. This speculative disposition is as repulsive to a court of equity, in a *cestui que trust*, towards his trustee, as in a purchaser towards his vendor. The one is as much bound to deal fairly as the other. The law must prohibit the

one as much as the other from speculating upon chances or future events. Granting to the complainants the right to repudiate this purchase, and throw it upon the hands of the defendant for any cause, he had a right to know whether they would avail themselves of that right, so soon as they discovered the facts which conferred upon them that right, and had investigated, or had a reasonable time to investigate, the facts by which their election to affirm or disaffirm his acts was to be controlled. They had no right to hold him in suspense while they could take the chances of the fluctuations in the value of the land. An attempt was made upon the argument, which is also apparent in the examination of Rees, to avoid the effect of his testimony, by insisting that Kilbreth did not intend to repudiate the original purchase made by Follansbe, for them, as their trustee, but that he had reference solely to the purchase they had apparently made of him by accepting his bond for a deed; but this distinction will not bear the scrutiny of an impartial examination. It is very apparent that Kilbreth, at the time, had no such distinction in his mind, but that his declarations were made in reference to the whole transaction, and to whatever right they had in it; and that he intended to make no further payments towards the land, in any way, unless it should rise in value. Unless such rise should take place he intended to throw the land, and all consequent responsibilities, upon Follansbe. Had he intended to abandon any rights under the bond, and to insist that the original purchase was made for their benefit, he undoubtedly would have so explained himself at the time.

This distinction must be looked upon as an after thought. Nor will it do to say that Kilbreth was ignorant of the law, and did not know that he had a right to claim that the original purchase was made in trust for them, and that Follansbe was only their trustee, and, hence, not knowing it, he could not assist their rights against him in that capacity. Knowing the facts, he was bound to know the law, and the defendant was no more bound to wait three years for them to learn what were their legal rights, than he was bound to wait and see whether the property would rise in value or not. During that time Follansbe was bound to meet the payments upon the land, and he had a right to know whether he was making those payments for himself or for them, and whether he had a right to dispose of the land in the meantime, to protect himself, should an opportunity offer.

But it was said that the complainants had not yet been able to learn whether the title which Follansbe had purchased was good or not, and that they had a right to know what the title was, before they decided whether to avail themselves of the benefits of the purchase or not. Whether this be so or not, it

is very certain that the question of title had no influence on the minds of the complainants in determining on the propriety of the purchase. No doubt or question seems to have arisen on that point. Had any arisen, and the records were not satisfactory, the most natural and proper inquiry would have been of the defendant, had he really desired to have his doubts solved, who could have given him a satisfactory explanation at once. No such inquiry seems to have been made, and we are constrained to the conclusion that his conduct was not controlled in the least degree by any question as to the title. If it was, then he acted unfairly, by not applying to the defendant, and giving him an opportunity of satisfying him on the subject. It is evident that this question of title was also an after thought.

Even after all that Kilbreth did in September, when in Chicago, and after Person's letter in November following, evincing a settled disposition not to be bound by the purchase in any way, or to make any further payments on it, Follansbe wrote them, giving them still an opportunity of reconsidering the matter and completing the purchase, and admonishing them that if they still persisted in refusing to do so, he should acquiesce in their election to throw the purchase upon his hands, and to assume it on his own account; and still expressing the opinion that it would turn out an advantageous operation. Such is the effect of the defendant's last letter to Person. To this letter no answer appears ever to have been made, and no funds were sent. If what had previously transpired was not conclusive upon the complainants, as an abandonment of the purchase, their profound silence for nearly three years after this correspondence must surely be construed into an acquiescence in the proposition of the defendant, that they would hold their peace. The defendant had a right so to understand their silence. Unless we can say that they had a right to lie by, indefinitely, to see if property would not rise in value, so as to make the purchase a speculation, and, if it should fall in the market, to throw the loss on the defendant, and, if it should rise, to claim the advance as their own, we must conclude, from all that took place, that they abandoned the purchase. Unless the defendant was deprived of all rights to protect himself,—unless they could compel him to make all the payments and run all the risks, and then, after waiting as long as they chose, adopt or reject his acts as subsequent events might dictate, they must be held to have abandoned the purchase. Admitting that Follansbe had paid too high a price for the land, fraudulenty and for his own advantage, as charged in the bill, there was still some limit to the extent of their rights; nor was he deprived of all his. The greatest malefactor has rights, which courts of justice will protect; and the

defendant, admitting the truth of all that is charged against him, is not in a worse condition. He was not entirely at the mercy of the complainants. They were bound, in a reasonable time, to decide definitely whether they would adopt or repudiate his acts ; and, having decided, they were bound by it. They could not, after having charged the defendant with fraud, and in consequence thereof, repudiated his acts, and refused to advance the money to meet the payments, leaving him to make them, come in, after three years' silence and acquiescence, and revive their claim, and seize upon a speculation which, in the meantime, had become inviting, by a rise in the property, which they did not anticipate, or of which, as least, they wanted confidence. If, when Kilbreth was in Chicago, in September, 1849, they intended to repudiate the relation of vender and vendee, as between themselves and the defendant, and to assert that of trustee and *cestui que trusts*, justice and equity required that he should then have declared his intention, and have met the responsibilities of the position thus assumed, by paying the money due from them on the purchase. But they avowed no such intention, nor did they evince any by their conduct. If they kept silence when equity required them to speak, they cannot be allowed to speak when equity requires them to keep silence. This is an old maxim, and applicable to the case before us. We think the complainants have not made out a case for the relief prayed, and that the bill should have been dismissed. For convenience, I have treated the case as if Person had not sold out to his associates, and was one of the complainants, as it could make no difference in the result.

The decree must be reversed and the bill dismissed.

Decree reversed.

JAMES H. CARPENTER *et al.*, Appellants, *v.* STEPHEN HOYT *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

A variance between the writ and declaration must be taken advantage of by plea in abatement and upon a fault.

A bond, under the provisions of the twenty-ninth section of the attachment act, conditioned for the payment of the judgment, may be assigned, as well as a bond given for a return of the property under the ninth section.

THIS action was brought upon a bond given to the sheriff of Cook county, showing that an attachment had been issued and served by the sheriff at the instance of appellees against one

Pierre Bourlier, on divers articles of merchandize which Bourlier was desirous of retaining, conditioned that Bourlier should pay the amount of the judgment and costs, which might be rendered against him in the suit of the Hoyts. This bond was assigned to the appellees. Judgment was rendered by default upon the assigned bond, in favor of appellees at September term, 1855, of the Common Pleas Court, J. M. Wilson, Judge, presiding. A motion to set aside the default was denied, and thereupon an appeal was taken. The errors assigned are, that the writ claims a debt of $761.60, while the judgment is for $1,000. That the declaration upon its face is sufficient, not showing any legal right in appellees to recover. That the bond set out in the declaration is void, it having been taken *colore officii*, and not according to the statute. That the motion to set aside the default should have been granted.

Farnsworth and Burgess, for Appellants.

Hoyne and Miller, for Appellees.

Scates, C. J. A party must take advantage of a variance between the writ and declaration by plea in abatement. Duval *v.* Craig et al., 4 Cond. R. 29; Chirac *v.* Reinicker, 6 Cond. R. 317; Garland *v.* Chattle et al., 12 John. R. 430; Prince *v.* Lamb, Breese R. 298; Cruikshank *v.* Brown, 5 Gil. R. 76; Weld *v.* Hubbard, 11 Ill. R. 574.

Without discussing the effect of our statute as to its making the writ a part of the record, and how far we might look into the writ upon demurrer for any purpose, we look at the question of mere variance after default, and upon assignment of error, as coming too late.

We are of opinion that a bond given under the provisions of the 29th section of the attachment act, conditioned for the payment of the amount of the judgment and cost, which may be rendered in the attachment suit, may be assigned to the plaintiff in the attachment, as bonds may for a return of the property, given under the provisions of the 9th section.

The 10th section expressly makes the fourth-coming bond, under the 9th section, assignable, if forfeited; and the 29th section, authorizes, instead of the fourth-coming bond for the property, provided in the former, the party to "give a like bond and security in a sum sufficient to cover the debt and damages sworn to, in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs, which may be rendered against him in that suit, on a final trial, within ninety days after

such judgment shall be rendered." The provisions of the statute must all be construed together, as a whole. The intent to secure the plaintiff in a lien upon the property is exceedingly clear, and in case of default in its return, he shall have an assignment of the forth-coming bond and his remedy upon it, in place of sale of the attached property. Here an absolute obligation for a sufficient sum, conditioned to pay the amount recovered, is substituted. It could not have been the intention of the legislature that he was not entitled to a remedy upon this bond, in substitution of the other bond, or the property. To "give like bond" must import "like" in its assignability, for it is not "like" in its conditions, being for the money absolutely upon recovery of judgment, and not for a return of the property attached. We should destroy the symmetry, mar the design, and defeat the obvious intent of the legislator, in any other interpretation.

There is no solidity in the objection that the bond was taken by color of office. The law expressly authorizees it, and when made, it may be negotiated according to law, by the sheriff, the obligee, to the plaintiff in the suit.

Judgment affirmed.

CHARLES C. BONNEY, Plaintiffs in Error, *v.* MICHAEL SMITH, Defendants in Error.

ERROR TO PEORIA.

A quit-claim deed is a sufficient consideration for a promissory note.

The appointment of one party to act for another, where it is coupled with an interest is irrevocable. The interest, coupled with the power must be in the thing itself, upon which the power is to operate, or the power must be created upon a valuable consideration.

Where the person empowered to act for another has only an interest arising out of its execution, as in the proceeds as for compensation, the power is revocable. But if the power is expressed to be irrevocable, and the attorney has an interest in its execution, it will remain irrevocable.

THIS was an action in assumpsit by plaintiff in error against defendant in error, on a promissory note payable by him to said plaintiff.

Defendant in error filed four pleas to said declaration, to wit:

First plea, want of consideration; that the only consideration was a certain deed for part of lot in Peoria from the county of Peoria, by the plaintiff in error, her commissioner and attorney in fact, appointed June 23rd, 1855, by the board of supervisors of Peoria county, grantor, to the defendant in error, grantee,

dated November 1st, 1855. Deed recites power, and is set out in plea. By such power said commissioner is authorized, first, to enquire into the title of Peoria county to any land in the city of Peoria, and to "grant, bargain, sell, convey and confirm, or otherwise lawfully dispose of" such land and title, for such price, and to such persons as he shall think expedient, &c.; second, said commissioner shall make such enquiry at his own risk and expense, shall make sale, &c., and of proceeds thereof shall pay one-half to county treasure, and "shall have, receive, keep, and appropriate to his own use the other half in full for his services and expenses in this behalf; third, said commissioner is authorized to compromise conflicting titles, &c.

Second plea, want of consideration; that the only consideration was the deed aforesaid; and that before the making thereof to wit, on the 15th day of September, 1855, the board of supervisors, by their resolution of that date, revoked the authroity of said commissioner.

Third plea, want of consideration; that Peoria county was owner of the land deeded; that said commissioner pretended that he had power to sell and convey the same; that note was given for consideration of said deed, and that such deed was the only consideration of such note; and averment that the said appointment gave said commissioner no power to sell or convey said land.

Fourth plea, want of consideration; that after the said appointment of said commissioner, the said board of supervisors appointed a committee to determine the price at which such lands should be offered for sale, and declared that no such lands should be sold till such committee had fixed such price; averment that, such committee never fixed such price, &c.

There was a demurrer to pleas of defendant and each of them. Demurrer overruled and judgment for defendant.

This cause was heard at March term, 1856, of the Peoria Circuit Court.

C. C. Bonney, in person.

G. F. Harding, for Defendant in Error.

Skinner, J. This was an action of assumpsit on a promissory note executed by the defendant to the plaintiff. The defendant pleaded in bar four special pleas, to each of which the plaintiff demurred. The court sustained the demurrer and the defendant had judgment. The first plea alleges that the sole consideration of the note was a deed for a lot in Peoria, as the property of Peoria county; sets forth the deed, which is an ordinary deed

of *quit-claim*, executed by plaintiff as agent and commissioner of the county of Peoria, and an order of the board of supervisors of Peoria county, appointing the plaintiff commissioner to sell and convey, at discretion, all interest of the county in the lot described in the deed, and allowing to plaintiff the one-half of the proceeds of sales, as a compensation for transacting the business. This plea is no defence to the action.(*a*) The deed of *quit-claim* was sufficient consideration for the note, and the authority of the plaintiff to execute it is apparent from the plea. The board of supervisors, as successors of the County Commissioners' Court, had power to appoint the plaintiff commissioner, and through him convey the interest of the county in the lot.

The second plea substantially alleges a revocation of the authority and appointment of the plaintiff, by an order for that purpose, made by the appointing power, and entered of record in the County Court, prior to the sale and conveyance by the plaintiff. No question was made upon the argument as to the sufficiency of the act of revocation to effect the purpose designed, and to avoid, for all purposes, the power conferred, if the power was such as could be revoked by the act of the body from which it emanated. If the appointment constituted a power, *coupled with an interest*, it is irrevocable, and the act of revocation would have no effect upon the authority conferred.

A power, *coupled with an interest*, must create an interest in the thing itself upon which the power is to operate ; the power and estate must be united, or be coexistent, and this class of powers survive the principal and may be executed *in the name* of the attorney. Hunt *v.* Rousmaniere, 8 Wheaton, 174 ; Story on Agency, 483 ; Comyn's Digest, title " Attorney " C. 9 and 10, Vol. 1, 774 ; 2 Kent's Com. 644, 646.

Another class of powers is where they are created upon a valuable consideration, and to operate as a transfer, mortgage or security to another, although the power can only be executed *in the name* of the principal. Reynolds *v.* Squire, 11 John. 47 ; Walsh *v.* Whitcomb, Esp. R. 565 ; Spence *v.* Wilson, 4 Munf. 130 ; DeForrest *v.* Bates, 1 Edwards' Chy. R. 394 ; Story on Agency, 477.

These are irrevocable by the act of the principal, for they are founded upon sufficient consideration, and created to subserve purposes in which another has an interest. Another class is where the attorney has an interest only arising out of the execution of the power, as in the proceeds, as a compensation for the business of its execution. 8 Wheaton, 174; 2 Kent's Com. 644. This power is of the latter class, and revocable by the principal, although the principal might perhaps be liable to the agent or attorney for any damages sustained. It is a naked

(*a*) Owings vs. Thompson, 3 Scam. R. 507 & notes; Kinney vs. Turner, 15 Ill. 184.

power, with an interest *in the proceeds*, based only upon its execution, which execution is dependant upon the continuing will of the principal. Mr. Story lays down this rule : that where the power is expressly declared to be irrevocable, and the attorney has an interest in its execution, and both of these circumstances concur, the power is irrevocable by the principal. Story on Agency, 406. Here there is no stipulation against the exercise of the right of revocation, and upon general principles the right remains. The third plea is substantially like the first, and in another form questions the sufficiency of the authority of the plaintiff to make the sale and deed. The fourth plea alleges that the board of supervisors, after the appointment of the plaintiff, appointed a committee of their number to consult with the plaintiff and fix upon the price at which the property of the county should be sold by the plaintiff, and resolved that no lot should be sold until the price should be fixed by the committee and the plaintiff ; and that no price has been so fixed. For aught that appears from the plea, this resolution may have been adopted *after* the execution of the conveyance ; but at most, it is but a regulation between the parties to the power, in no way affecting the authority of the plaintiff under the power, so far as third persons, not cognizant of it, are concerned, and does not attempt to revoke the power conferred on the plaintiff to convey.

The demurrer should have been sustained to the first, third and fourth pleas, but the defendant was entitled to judgment on the demurrer to the second plea ; that plea being, if true, a bar to the plaintiff's action.

Judgment affirmed.

VIRGIL H. EACHUS, Plaintiff in Error, *v.* THE TRUSTEES OF THE ILLINOIS AND MICHIGAN CANAL, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

An action for flooding lands is local, and must be brought within the jurisdiction where the lands lie.

THIS action was brought in the Cook county Court of Common Pleas, to recover damages for backwater, resulting from a dam erected in Will county for the purpose of feeding the Illinois and Michigan canal with the water of Calumet river.

The land injured is alleged to be in Lake county, Indiana,

and was the property of Mary Eachus, the mother of this plaintiff, who claims damages as her heir at law.

To the declaration a general and special demurrer to each count was filed, and the demurrer sustained in the court below, and from that decision this writ of error is brought. The demurrers were heard by J. M. WILSON, Judge, at September term, 1854.

E. W. TRACEY, for Plaintiff in Error.

I. N. ARNOLD, for Defendents in Error.

SCATES, C. J. The plaintiff complains in case for flooding his land in Indiana, in the lifetime of his mother, and continuing the same since her decease and their descent to him, by the erection of a dam upon the Calumet river to his damage $2,500. Objections were taken by demurrer, which was sustained, to the right to sustain an action in Cook county and the direction of a summons to Will county, where defendants keep the office of canal tustees, and to the right to maintain suit in Illinois for injuries to real estate in Indiana.

Without disscussing the former objection, we are clearly of opinion that the cause cf action, and consequently the action itself, is of the class denominated local, and that the courts of the Sate, within whose jurisdiction the lands lie, can alone take jurisdiction of it at the common law. We conceive that there can be no distinction in this respect, whether the remedy be in trespass, case, or ejectment. And so it has been held in actions of debt or covenant for rent, brought against the assignee of the term, where the liability is to be fixed by showing a privity of estate; while at the same time actions of debt or covenants for rent, founded on privity of contract, are transitory, (see 1 Bacon's Ab. Actions, Local and Transitory, A. 79, 80); and so is debt for use and occupation. This is a well settled general rule at the common law, that every action founded upon a local thing shall be brought in the county where the cause of action arises, for there it can be best tried. For examples in many cases see 1 Comyn's Dig. Action, (N. 4) (N. 5) (N. 6) pp. 251 to 254.

Thus an action upon the case for a nuisance to land is local. Warren *v.* Webb, 1 Taunt. R. 379 ; Company of Mersey & Irwell Navigation *v.* Douglass et al., 1 East R. 560.

So is trespass for entering a house in Canada ; and in Daulson *v.* Matthews et al., 4 Term R. 500, the court overruled Lord Mansfield's dictum to the contrary in Mostyn *v.* Fabrigas, 1 Cowp. R. 161, and that without any allegation or averment that there were no courts in Canada having jurisdiction of the mat-

ter. Lord Mansfield had cited and approved in that case several cases where settlers' houses in Nova Scotia, and fishing huts on the coast of Labrador, had been pulled down by order of the Admirals on these stations, for which damages had been recovered before him. Eyre, C. J., he says, had overruled a similar objection ; and so he did upon the ground that the reparation here was personal and for damages, and otherwise there would (or might) be a failure of justice, in a country without courts, as among the Esquimaux Indians, and in cases where the defendant does not or will not return into the locality again, where he might be sued. It isobservable that in Mostyn v. Fabrigas the cause of action, false imprisonment was transitory—not calling for a decision upon this point —and what is said is arguendo upon an objection to the jurisdiction in England for false imprisonment, in the island of Menorca, of a native, by the governor, acting as such. A case was referred to in argument between Skinner and the East India Company, referred by the council board to the twelve judges, where the agents of the company had assaulted his person, seized his warehouse and carried away his goods, and took and possessed themselves of the island of Barethe, which he had purchasd. The question propounded was, whether Mr. Skinner could have full relief in any ordinary court of law? The judges answered that the courts could give relief for taking away and spoiling his ship, goods and papers, and assaulting and wounding his person, notwithstanding these were done beyond the seas. But that as to the detaining and possessing of the house and island, he is not relievable in any ordinary court of justice.

The same considerations upon which Mostyn v. Fabrigas was ruled, namely, that the satisfaction was in damages, and that there might be a failure of justice, were urged in arguments in Daulson v. Matthews et al., in support of the jurisdiction as of a transitory cause of action. But Lord Kenyon said, the contrary had been held in a case in the Common Pleas, and Justice Buller said it was too late for us to inquire, whether it were wise or politic to make a distinction between transitory and local actions ; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. See also Shelling v. Farmer, 1 Strange R. 646.

I have referred more at length to these cases, because Mostyn v. Fabrigas is the principal case which supports the jurisdiction ; and Daulson v. Matthews et al., has been received as fully overruling that dictum, and settling the contrary rule as law. See notes to 1 Smith Lead. Cas. 590, 18 Law Lib., and 1 Brocken. R. 203, Livingston v. Jefferson, where Chief Justice Marshall decided that the Circuit Court of the United States for Virginia,

had no jurisdiction of a trespass committed upon plaintiff by, removing him from the Batture, in the city of New Orleans-though the same grounds, of a recovery of damages and a failrure of justice, were urged in support of it. Judge Story, afte review of the decisions, sums up with the same conclusion. Story Confl. Laws, Sec. 554.

In New York, the Supreme Court in Watts *v.* Kinney, 23 Wend. R. 484, and the Court of Errors in the same case, 6 Hill R. 82, in a case very like this before us, brought in New York city, for cutting a ditch, and so injuring a water power, and disturbing a way on lands in New Jersey, the same want of jurisdiction was affirmed ; and again in Graves et al. *v.* McKean, 2 Denio R. 639, while the jurisdiction of a justice of the peace was sustained upon a statute.

In Hunt and Wife *v.* Town of Pownal, 9 Vermont R. 411, it was contended that an action for injuries, occasioned by want of repairs of a highway, was local to the place of injury, but the court held otherwise, taking a distinction between injuries occasioned by doing certain acts, and those resulting from neglect to do ; the neglect to repair is not local, so far as civil remedy is concerned. The same distinction is adverted to in Titus *v.* Inhabitants of Frankfort, 15 Maine R. 98, and was taken in Grimstone *v.* Molineaux et al., Hobart R. 251. The case in Maine sustained the jurisdiction upon a statute. And so it was in Sumner *v.* Finegan, 15 Mass. R. 280.

In Ohio all distinctions between local and transitory actions is done away by construction of their statutes ; and so an action for rent, against the assignee of the term, will lie out of the county where the demised premises are situate. Genin *v.* Grier, 10 Ohio R. 209

It cannot, in any sense, be said to impair or weaken this principle of jurisdiction in courts at law, by showing that courts of equity will exercise jurisdiction over the persons of defendants, within their jurisdiction, by attachment to compel the execution of their decrees respecting boundaries, or conveyances, or delivery up of deeds or contracts, concerning lands in foreign countries, where the bill is predicated upon articles of agreement between the parties, or are for the specific enfocement or cancellation of express contracts. Penn *v.* Lord Baltimore, 1 Ves. Jr. R. 444 ; Anonymous, 1 Salk. R. 404, S. C. in 2 Vern. 494, by name of Toller *v.* Curteret; Arglasse *v.* Muschamp, 1 Vern. R. 75 and 135 ; Tullock *v.* Hartley, 1 Younge and Colby R. 114, (20 Eng. Ch. R. 113;) Guerrant *v.*. Fowler et al., 1 Henning and Munf. R. 5 ; Mitchell *v.* Bunch, 2 Paige R. 606; Wa;d v. Arredondo et al., 1 Hopkins R. 213. See also

Austin's Heirs *v.* Bodley, 4 Monroe R. 434; Williams *v.* Burnett, 6 Monroe R. 322.

There are many other cases supported by other distinctions, supporting the jurisdiction to afford relief in cases incidentally growing out of, touching or concerning, lands and things local, but I deem it unnecessary to pursue them further, having discussed those most applicable, pointed, and bearing the strongest analogy to the one before us.

Whatever defect there may be thought to be in the administration of justice, in finding a wrong without a remedy, it is a case for legislative, and not judicial, correction and amendment.

Whatever may be the effect of our statute, in destroying the distinction of local and transitory actions, which we do not construe in this case, we think causes arising extra-territorially, and of a local character at the common law, were not within the view of the legislature in passing this act.

Judgment affirmed.

James M. Wiley *et al.*, Plaintiffs in Error, *v.* Jacob Platter, Defendant in Error.

ERROR TO MARSHALL.

A court may refuse the continuance of a chancery cause where it appears there is a want of diligence in the party asking the continuance.

A party cannot obtain a continuance, where the original case is ripe for hearing, by filing a cross-bill, and having the same answered, without showing sufficient cause for delay.

If an award is obtained by fraud, or is, for any cause, vicious, it may be set aside upon application in the original suit without recourse to chancery.

The facts of this case are stated in the opinion of the court.

This cause was heard before Leland, Judge, at October term, of the Marshall Circuit Court.

Manning and Merriman, for Plaintiffs in Error.

N. H. Purple, for Defendant in Error.

Skinner, J. In 1845, Platter filed his bill in equity against James and John Wiley, for a specific performance of a contract of sale of real estate by the Wileys to Platter. In 1846, the cause was of issue, and in 1848 it was by agreement of the parties referred to arbitrators, with a stipulation that the award

should be made a rule of court. In 1849 an award was made and filed in the cause, awarding a specific performance of the contract in the bill alleged ; and thereupon the defendants moved the court to vacate and set aside the award. In 1851 the complainant filed in the cause a supplemental bill, making one Brooks, a purchaser *pendente lite* from the defendants, a party ; which bill was answered and issue joined thereon ; and in 1853 the complainant dismissed the supplemental bill. In the meantime the proofs had been taken, and the cause stood for hearing. At the same term of the court at which the supplemental bill was dismissed, the defendants, upon affidavits filed, moved for a continuance of the cause, upon, the ground that the complainant, in August, 1850, in his examination as a witness upon a trial of an indictment against the defendants on the charge of forging certain promissory notes, had stated that certain notes shown him, and purporting to have been executed by him to the defendants, and which notes it was alleged the arbitrators found had been paid, were not paid ; and that they could prove this admission by diffierent persons who heard the same. It also sufficiently appeared that, upon this examination, the complainant insisted that he had paid the defendants for the real estate sold by them to him, and of which sale a specific performance is sought by the bill, and that the notes shown him were forgeries. The court refused the continuance, and the defendants thereupon filed a croos-bill, setting up substantially the same matters of defence as contained in their answers to the original bill and their motion to set aside their award, and alleging as excuse for not before filing the croos-bill, that they were advised that they could test the validity of the award under the supplemental bill, and that they were prevented from doing so by the dismissal of the same. The complainant answered the cross-bill, and the defendants again moved for a continuance, for the same reasons upon which their previous motion was based, and for time to take proofs under the cross-bill. The court refused the continuance, heard the cause, and rendered a decree in pursuance of the award.

The orignal suit had been pending since 1846, had been at issue since 1846, and no step had been taken to bring on the hearing from the time of filing the aware, in February, 1849, until October, 1853. Even admitting that in a chancery suit a refusal to grant a continuance at a subsequent term after issue joined can be assigned for error, yet the court, for want of diligence, properly refused the continuance. Reece *v.* Darby, 4 Scam. 159. The fact sought to be established had been known to the defendants since 1850, without any effort obtained

proof of it ; and this delay is not accounted for, nor in any way excused. The complainant had a right to dismiss his supplemental bill probably improvidently filed, and we cannot see how by any possibility the defendants could be prejudiced by such dismissal. Nor had the defendants a right to a continuance upon filing their cross-bill and the filing of answer thereto. It is evident that the cross-bill was interposed by defendants for delay, and to accomplish what they had failed to do by their previous motion for a continuance. The cross-bill dose not make a case entitling the defendants to affirmative relief, but substantially strikes at the award and seeks to avoid and set it aside. If the award was obtained by fraud, or was for any cause vicious, it was competent for the court, upon application in the orignal suit and proof, to vacate and set aside. But the defendants, on filing a cross-bill at this stage could not delay the hearing of the original cause without at least showing some sufficient excuse for the delay. The proper time for filing a cross-bill, when it is necessary, is at the time of answering the orignal, and before issue joined. At this stage a defendant has a right to file his cross-bill and to a stay of proceedings under the original bill, until both can be heard together. And a defendant may at any time file his cross-bill and go to a hearing, without delay, to the complainant, upon bill and answear ; but he cannot, after unnecessary delay, and when the original cause is ready for hearing, by interposing a cross-bill, postpone the hearing of the original cause. We are now speaking of, the rights of a defendant ; for the court may, under special circumstances, and for the purpose of finally settling the rights of all parties arising out of the matters of the original suit, at and time before final decree, allow, or even direct, a cross-bill to be filed, and continue the original suit for issue and proofs under the cross-bill. 2 Barbour's Chy. Prac. 129, 130; Story's Eq. Pl. Secs. 395, 396 ; 1 Smith's Chy. Prac. 460, Chap. 1 ; 3 Daniel's Chy. Prac. 1744, 1745; Hoffman's Chy. Prac. 352, 353 ; White *v.* Buloid, 2 Page Chy. R. 164 ;Gouverneur *v.* Elmendorfe, 4 John. Chy. R. 357 ; Field *v.* Schieffelin, 7 ibid. 250 ; Cartwright *v.* Clark, 4 Metcalf 104.

For the reasons here given, the decree of the Circuit Court is affirmed.

Decree affirmed.

THE CENTRAL MILITARY TRACT RAILROAD COMPANY, Appellant, *v.* A. ROCKAFELLOW, Appellee.

APPEAL FROM BUREAU.

The law makes a distinction in the liability of railroad carriers, between injuries to persons and property transported, and injuries to persons and property coming upon a railroad track, without the intervention of the company.

Railroads are not common highways in the sense of public wagon roads.

In passing public highways and streams, where others have common rights, railway companies must exercise the same care, and their liability will correspond with that of all others passing and doing business on them.(*a*

In an action against a railway company for killing an animal, it is erroneous to charge the jury, that if the animal was running at large, and went upon the road where the same was unfenced, that it was lawfully there, and if killed by any want of ordinary care and diligence, then the railroad company is liable for the destruction; or that if said animal was killed, because the engineer in charge of the train was not keeping a proper look out in advance of the engine, without regard to his other duties, then it was such neligence as would make the company liable.

A railroad company has a right to run its cars upon its track, without obstruction, and an animal has no right upon the track without consent of the company; and if suffered to stay there, it is at the risk of the owner of the animal.

An allegation of negligence in the management of the train, is not supported by proof that too heavy a train was fastened to the locomotive.

A person who has no religious belief, who does not acknowledge a Supreme Being, and who does not feel himself accountable to any moral punishment here or hereafter, but who acknowledges his amenability to the criminal law, if he forswears himself, cannot become a witness.

The unbelief of such a person is best established by the testimony of others; though he may be permitted to explain any change of belief, and leave the court to determine as to his competency.

THIS was an action on the case. The declaration alleges that plaintiff was possessed of an ox of the value of $100, which ox was then and there lawfully running at large, and the defendant was then and there possessed of a certain railroad, which was uninclosed, and of a steam engine and train of cars then running on said road, and the defendant so carelessly, negligently, unskillfully and improperly drove, goverened and directed said engine and cars that, by the carelessness, negligence, unskillfulness and improper conduct of the defendant, by its servants, the said engine was driven upon the ox of the plaintiff, and injured him so that he was rendered perfectly worthless.

Plea, general issue, and a special plea that the said ox at the time when, &c., was, by and through the fault, negligence and carelessness of the plaintiff, running at large in the vicinity of and upon the defendant's railroad, the plaintiff then and there knowing and suffering the said ox to run at large and upon the said railroad, and in consequence of said carelessness, fault and negligence of the plaintiff, the said ox was injured.

(*a*) G. & C. U. R. Co. vs. Dill, 22 Ill. R. 270; C. B. & Q. R. R. Co. vs. Cauffman, 38 Ill. R. 423; T. W. & W. R. R. Co. vs. Furguson, 42 Id. 449.

The case was tried by a jury and a verdict for the plaintiff for $50, and judgment thereon.

The bill of exceptions shows that on the trial the plaintiff showed, by deposition of William Fox, as follows: I know he had an ox killed about the middle of April, A. D. 1855. I suppose it was between six and seven in the evening. The ox was killed by a freight train about a quarter of a mile from the depot at Arlington; when I first saw the train, it was about three or four hundred yards from where it first caught the ox; when it caught the ox on the cow catcher, it shoved it along some seventy-five yards; when plaintiff and I first came up to the bank, the engineer was just in the act of knocking the ox in the head; the engineer looked up and said, is this your ox? plaintiff said, yes sir; then the engineer said, " you ought to have another one and go to hell;" then words passed between them which I do not recollect; they were pretty sharp words; by this time the conductor came up and told plaintiff he should be paid for the ox; by that time they had the ox knocked in the head; they rolled him off the bank and went ahead. The ox was not on the railroad track when I first saw the train coming; I did not see the ox on the track until the time it struck him; do not know whether the ox was on the track or not when I first saw the cars, I was about a quarter of a mile off; do not think I could have seen the ox if he had been on the track when I first saw the cars. Where the cattle cross the track, it was right at the mouth of a cut, and in lower ground than where I stood; so I think that on the cars they had a better opportunity than I had. The ox run along the railroad before the cars struck him seventy-two steps; I knew by the tracks; the railroad track was muddy; mud was six to ten inches deep; I was not acquainted with the engineer or conductor on that train; I had seen them before; the conductor usually run the freight train; the engineer the freight and passenger both; I heard the train whistle when it was about two hundred steps from where it struck the ox; the ox was worth $55 or $60 when killed. The ox was about nine years old; at the time plaintiff and the engineer were jawing, if my memory serves me right, the engineer stood in motion to throw his axe; plaintiff said, " if I had my gun I'd shoot you; did'nt see the ox at all from the time I first saw the train until the train stopped; plaintiff suffered the ox to run at large on the prairie in the vicinity of the railroad; it did not go on the railroad only as it crossed, as I know of; the railroad was not fenced—nothing to hinder him from going on it where he pleased.

Plaintiff then called John Briney as a witness, who testified

as follows: Somewhere about the middle of April, 1855, I was going to the stable; saw the locomotive coming; saw it stop still; I did not hear a whistle; went down there and found that they had run over plaintiff's ox; the ox had one horn off and was otherwise so badly bruised, he could not rise; the ox had gone along the track from the point where he came on the road ahead of the cars about seventy yards; he came on the track at a place where cattle and men were in the habit of crossing the railroad track; it was on plaintiff's land; it was between two cuts, through which railroad run; the train was running eastward; when I first saw the cars they were about one huudred yards from the place where the ox was killed. It was late in the afternoon, but I should think before sundown; it was rainy and foggy; I was about one-fourth of a mile off; I could have seen a man standing on the top of the cars when I first saw them; place where ox was killed was about half a mile from Arlington, east, the road was on a straight course from Arlington; I saw the tracks of the ox where he had passed along on the centre of the railroad track; I tracked him back from the place where he was killed, to where he came on; it was muddy; I knew the ox; drove him a good deal; he was worth about $60; we had worked him during the winter and the day before he was killed; the cattle had been running on the prairie and were going home when this ox was killed; the place where the ox came on the road was where men and stock usually crossed; I think it is down grade, from east to west, where ox was killed.

Cross-examined. The cattle were crossing; they all had crossed but this ox; he went up the track; the cattle were running at large; might have run on the railroad track if they liked; think the wind came from the east; people traveled on a track that run north from the place where the ox came on the railroad track; crossed the railroad track at that place; I don't know any thing about a laid out road; I did not mean that the railroad track where the ox was, was Rockafellow's land; it was his before the railroad was built; where the ox was killed the railroad occupied it one hundred feet wide.

Direct resumed. Plaintiff lived about fifty rods north from where the ox was killed; the track that was traveled was fenced on one side of Waigh's fence.

Plaintiff then called Benjamin Parks, who testified as follows: I have never traveled across the railroad at the place where the ox was killed; there is a track that is traveled somewhere there; I have never been enough along there to know much about the travel; I saw a place somewhere there where there were tracks across the railroad of men and horses—I think wagons, but am not positive; my son-in-law has been in the habit of

crossing repeatedly with his wagon and his sled somewhere there, and must have crossed there.

Here the plaintiff rested his case.

The defendant, to maintain the issue on its part, called Ira Aldrich. The plaintiff objected to his being sworn on account of his want of religious belief; said witness was then sworn on his *voir dire*, and examined by the plaintiff, and testified as follows:

I don't believe in the existence of a God, particularly; can't say whether I believe it or not; I have no belief either one way or the other; there may be a God and there may not; never made up my mind on that subject; I don't believe there is a God who punishes for perjury, either in this world or any other. I don't believe any thing about it; it may be and it may not; I have no opinion about it.

Examined by defendant. I am certain that there is an obligation on my part to tell the truth when sworn; I am not certain that there is a Supreme Being who rewards and punishes men; I am not satisfied that it is so, and I am not certain that it is not so; I have no belief one way or the other.

Examined by the court. I believe I should be responsible to the civil law if I should testify falsely; and, further, that I should be punished by losing the esteem of my fellow men; I don't know that I am bound in conscience, for I can't say what consceince is, unless it is judgment, I dont believe there is a Supreme Being who will reward and punish men; I do not believe that it is so, and do not say that I disbelieve it; I have no belief about it.

Examined by defendant. I only say I am not certain one way or the other; I have no certainty that I may not be punished for perjury, and no certainty that I may be; I feel obligated to tell the truth aside from the actions of the civil law, and aside from what others may think of me.

The court thereupon refused to permit said witness to be sworn or to testify.

The defendant then called James Waugh, who testified as follows:

I have seen the ox that was killed; have seen him work; the ox looked pretty hard; he was a rawboned ox and might be fatter than he looked to be; I think that ox worth $30 at least; Rockafellow's cattle run at large; we had a fence on one side of the railroad at my fathers farm; there is no fence north of the railroad; plaintiff's cattle could run on the railroad; I don't know of any road crossing the railroad where the ox came on to the track; the railroad put in a crossing for plaintiff about eighty rods east of where the ox came on the road; don't think there

was then any traveled track crossing the railroad where the ox came on the track.

Cross-examined. There was a traveled track crossing the line of the railroad there, running from the plank road north, across the railroad, and past defendant's house, before the railroad was built. There was no crossing put in across the railroad there after the road was built; there was a place where they could cross eighty rods further up east, when it was not very muddy; they there crossed under an aqueduct; a bridge was made by public officers not far from this cut; it was made before the railroad was built; the track leads north from the plank road; there used to be a great deal of travel on that line before the railroad was built. I saw the ox after he was killed: have seen all of plaintiff's cattle; when I saw the ox dead I knew which one it was; if the ox had been in right good order for beef, I think he would have weighed over one thousand pounds. There were two bridges built by the public officers on what I understand to be the laid out township road, between the railroad somewhere near where the old traveled track spoken of used to run; they were nearly on the same ground; the new road was short, and the traveled track differed from it by making a few meanders on account of the ground; they frequently run into each other; my father has a fence on the north side of the railroad, and also one which runs north and south, which comes south to railroad; the cut where the ox came on to the road.

The laid out road, which crossed the line of the railroad, and the old traveled track, both crossed the line of the railroad on that cut; the railroad company made a crossing for plaintiff, but they did not make it till after the ox was killed.

Direct resumed. Can't say that the track which was traveled before railroad was built, crossed the line of the railroad at the precise point where the ox came on the track; the bridges I understood to be on the laid out township road; this township road, as I understand it, varies from the old traveled track, though sometimes one runs into the other, sometimes not; I don't recollect about the old traveled track at the point where it crossed the railroad; the old traveled track used to run through where our field is before it was broken up; after our field was fenced, it crossed the line of the railroad not far from the line of our field.

Nelson Knapp was then called by defendant, and testified as follows: I was on the locomotive when the plaintiff's ox was killed; it was about the middle of April last, about 5 o'clock P. M., about half a mile east of Arlington; it was raining hard; it was not dark; should think it was about sundown; it was a

freight train going east; we had stopped at Arlington to wood and water; I don't recollect whether the window was open or shut; we sometimes close it when it rains hard. I saw some cattle cross the track. They all crossed the track except this one; he went down the track into a cut; then we hit him. The engine was reversed, and every thing done to save the ox. The train might have been forty rods off from the ox when he first came upon the track. The other cattle went across, and I thought he was going across, but he turned down on the track. He came up the bank, and appeared to be going across; he had got through the first cut when I discovered him; we were going not faster than five or six miles an hour. I think it is down grade going east, but I don't know, it seemed so to me. I did all I could to save the ox, reversed the engine and put on steam. It was a heavy train and the track was wet; I could not stop it. The engine was reversed and the train could not be stopped; I can't recollect whether the brakes were whistled down or not, think they were; it was customary always to do so in such cases; nothing could be done to stop the train. The ox was struck some six or eight rods from where it was when I first saw it; the train had nearly stopped; I think if there had been two or three rods more we could have saved it: don't think we were going more than half a mile an hour when we hit him, he was then on the track between the rails; the ox was walking all the way, did not run a step; I thought it was a poor ox; I thought if it had any life at all it could have got out of the way of that train; the ox was very poor, he staggered, seemed to be very weak before he was hit. If the whistle did blow, it was for the purpose of closing down the brakes.

Cross-examined. Was on board the locomotive; was engineer; was in the employ of the Central Military Tract Railroad Company; can't tell whether the track was filled up even with the ties at the time. The ox got under the cow catcher; this was because the pilot was too short. If there had been a long pilot it would have thrown him off any how; when I first saw the cattle, I had just got through the cut; sometimes we whistled to scare cattle off the track, but first we whistled the brakes down; I can't tell whether we whistled to scare the cattle or not, or whether I sounded the whistle or not. I did not see the cattle sooner on account of running in the cut. I tried to stop the train at once; I don't know whether the brakes were wound down or not. I can't tell how long it would take to stop the train on such a wet and clayey track; the weels of the locomotive did not hold any. I don't remember whether I looked down the track ahead of the engine coming through the cut; I don't remember that I swore before the justice that I was bu

five or eight rods off when I first saw the ox; don't recollect of saying before the justice that it was cold and raining, and I did not look ahead of the train down the track; I tried to tell the truth before the justice; I do not say I did not swear before the justice.

There was a full complement of men on the train, but I don't know whether they did their duty or not. It was my business to keep look out ahead; before I got near the cattle they were all off the track but this one; they were crossing the track when I saw them; some had crossed, some were crossing, and some were not yet on the track; can't say how far off. The engine was one of the heaviest on the road; it was a heavy train; dont't recollect how many cars there were; thirty, and perhaps not so many. As soon as I saw the ox turn down the track, I reversed the engine; I can not tell what made the ox turn down the track; I don't think it was bacause he was afraid of the engine; don't think it would take one-fourth of a mile to stop the train; don't know where the train was made up; don't know whether the cars were loaded, they usually were at that season of the year; don't think it safe to run so large a train that it could not be stopped in one-fourth of a mile; think I could have stopped this train in a quarter of a mile with a dry track and a proper train, and all things in reasonable good order. A train can be stopped in its own length, with a train such as I ought to have to be safe. A dry track and every thing right, I think a train could be stopped in twenty rods, perhaps; don't know exactly how far it was from the place where the ox came on the track to where he was hit. The train was heavier than the engine could manage; it was a very heavy train, too heavy to be safe; the train was on the Central Military Tract Railroad.

Direct resumed. A train cannot be handled any way when the track is in such a state; I don't know that I was in the employ of the Central Military Tract Railroad Company; don't know whether the railroad was owned by that company or the Chicago, Burlington and Quincy Railroad Company. I have seen cars marked in that name on the road, and I have run under the same employment on the Peoria and Oquawka Road. I was employed by a man by the name of Frink; he did not tell me for what company, but I was to run an engine on this road; don't know in whose employ Frink was.

Cross-examination resumed. I understood the Central Military Tract Railroad to run from Mendota to Galesburgh; it was on that road the ox was killed. If any one had asked me then in whose employ I was, I should have answered, in the employ of the Central Military Tract Railroad Company.

The defendant then called Samuel Huffstodt, who testified as

follows ; I was fireman on the engine when plaintiff's ox was killed ; it was some time in April last, in the evening about sundown ; can't tell how far we were from the ox when we first saw him ; I think we were coming out of the first cut from Arlington ; when I first looked out I saw the cattle crossing the track ; I think the engine whistled down brakes, but I could not say, I don't remember ; I shut the fire door, that is the rule. The engine was reversed ; we were some little distance off from the ox ; can't tell how far ; we were running very slow at the time, probably four or five miles an hour ; it is hard for me to tell the speed ; it is not my business ; the ox walked right down the track, he did not run ; I looked at him all the time on account of the danger ; we had almost stopped when we hit the ox ; we were not going faster than a man would walk ; the track was wet and very slippery ; the wheels were very slippery ; they would not stick. It was a heavy train ; I think it was a down grade we were running, but I am not certain ; I never noticed particularly.

Cross-examined. Don't know how many brakes there were on the cars ; all the cars had not brakes ; there were two brakes that could be worked in the way car on the inside ; can't tell whether the brakes on the other cars were on the top or on tacks.

This was all of the evidence.

The court, at the request of the plaintiff, instructed the jury as follows :

1. If the jury believe, from the evidence, that the ox of the plaintiff was killed by the engine of the defendant, in consequence of the fault, negligence or carelessness of defendant's servants, in charge of said engine, then the jury will find for the plaintiff the damages which the plaintiff has proven he has sustained thereby.

2. If the jury believe, from the evidence, that the ox in question was killed by reason that the defendant's engineer was not keeping a proper look out on the road ahead of the engine, then that is such negligence as would render the defendant liable in this action.

3. If the jury believe, from the evidence, that the ox in question was running at large, and went upon the defendant's railroad at a point where the same was unfenced, then the ox was lawfully upon the railroad ; and then if the jury believe from the evidence, that while said ox was so upon the road he was killed by any want of ordinary or reasonable care and diligence in the defendant's servants, then they will find for the plaintiff ; the degree of care to which the defendant is bound is such care as is ordinary or reasonable care in the business of transporting freight by steam on a railroad.

4. Said instructions were given by the court, and to the giving of each of said instructions the defendant then and there excepted.

The court refused to give the following instructions requested by the defendant :

8. The defendant has a right to use its railroad and run its cars thereon without obstruction ; and the plaintiff's ox had no right to be on said railroad without any person to take charge of him, and without the consent of the defendant ; and if the plaintiff either voluntarily permitted said ox to be on said railroad track without right, or negligently suffered said ox to stray upon the track, by means of which the ox was injured, the law is for the defendant.

9. The plaintiff, before he can recover in this cause, must prove that the ox was lawfully upon the railroad track, and said plaintiff had not the right by law to allow his ox to run at large upon the said railroad track of the defendant without the knowledge or consent of defendant ; and if he did so, it was at his own risk.

Which instructions the court refused to give ; to which refusal of the court to give said instructions the defendant then and there excepted.

The jury found a verdict for the plaintiff for the sum of fifty dollars. The defendants moved for a new trial ; the court overruled the motion.

Errors assigned.

1. The court erred in overruling the objection of the defendant below to the 8th and 9th interrogatories in the deposition of William Fox severally, and in permitting said interrogatories and the answers to the same severally to be read in evidence.

3. The court erred in giving each of the instructions asked for by plaintiff below.

4. The court erred in refusing to give the 8th and 9th instructions asked for by defendant severally.

5. The court erred in overruling defendant's motion for a new trial.

This cause was tried before HOLLISTER, Judge, and a jury.

GLOVER and COOK, for Appellant.

TAYLOR and STIPP, for Appellee.

SCATES, C. J. No replication to third plea is copied into the record, but it shows that one was filed, an issue joined, and was tried. This is sufficient to preclude advantage being taken of its absence from the record.

The evidence clearly fails to show gross negligence in plaintiff in killing the ox, and the jury were erroneously instructed as to the degree of dilligence required, and the degree of negligence for which they would be liable for damage done to property, circumstanced as the ox was in this case.

The degrees of care or diligence are three, and are well defined and illustrated in Story on Bailments, Secs. 15, 16, 186; Jones on Bailments, 8. Negligence is similarly divided, and made or defined to be the counterparts or opposite of each degree. Story on Bailments, Sec. 17; Jones on Bailments, 8, 9; Angell on Carr Sec. 10.

There is little difficulty in laying down the rule for care and for neglect, while we are content to state in the language long known, familiar to, and used by the courts and profession. The difficulty is very little greater, in determining what degree of each is applicable to any given state of facts. The great difficulty is the application of the rule to determine whether the particular facts show the want of the ascertained degree of care, or guiltiness of the negligence applicable to the relation of the parties under the circumstances.

This court, in Chicago and Miss. Railroad Co. *v.* Patchin, 16 Ill. R. 198, examined this subject with great care, looking into a great number of cases, and upon a great diversity of facts and circumstances, varying the relation of the parties to each other, and to the property injured, and upon very full consideration of it, in all its bearings perceivable by them, laid down the rule there adopted. Upon full reconsideration, we find nothing to shake or vary that opinion, and no new authority to settle it otherwise.(*a*)

We have been referred to Jackson *v.* Rutland and Burlington Railroad Co., 25 Vermont R. 162, as questioning the doctrine of New York and Erie Railroad *v.* Skinner, 19 Penn. State R. 298, as unsound, as repudiated by the English courts, but we have not adopted the rule laid down in that case in its full extent.

We are very liable to be misled when we look into the law regulating bailments and common carriers of passengers and goods, and such special relations of parties to each other, and to the property under their care, unless we keep constantly in mind that the principles laid down, as applicable to such relationships, do not apply in their full extent for injuries done to persons and property, with whom and which defendants in actions have nothing to do, and no relation, either as bailee, carrier, or freighter.

Counsel, in arguing these questions, seem frequently to forget distinctions between goods on freight, and trespassing stock

(*a*) C. & M. R. Co. vs. Patchen, 16 Ill. R. 198 & notes. Also Ante. 133.

on the road-bed—between walking or driving upon it from idle curiosity or business calls, and taking passage on the cars. But the two relations are very different, and, consequently, the duty for the degrees of care, and liability for degrees of negligence, cannot be the same. Every farmer, mechanic, laborer and citizen, in the pursuit of his ordinary occupation or calling, though not as dangerous and unmanageable as railroad trains, is yet equally liable with railroads for damage done to his neighbor's stock or property of this description. The degrees of care and negligence are the same, while pursuing it upon his own premises, and would be the same if transferred to or done upon the common highways. Railroads are not common highways, in the sense of public wagon roads, upon which every one may transact his own business with his own means of conveyance, but only in the sense of being compelled to accept of each and all, and take and carry to the extent of their ability. In passing public highways and public streams, where others have common rights of passing and transacting their business, the care and liability will correspond with that of all others passing and doing business on them.

Now the three instructions given in this case, at the instance of defendant, would charge the plaintiff for (1st) "the fault, negligence or carelessness" of plaintiff's servants, in any degree; (2) if "the engineer was not keeping a proper look out on the road, ahead of the engine," whatever other duties about the machinery might demand his attention; and (3rd.) if the road was not fenced, the ox had a right to be on it, and if killed while so upon it, "by any want of ordinary or reasonable care and diligence in the defendant's (plaintiff's) servants, then they will find for plaintiff (defendant). The degree of care to which defendant (plaintiff) is bound, is such care as is ordinary or reasonable care in the business of transporting freight by steam on a railroad." The obvious sense of these instructions is to put all the loitering stock on freight, or freighting, terms of care, diligence and negligence, upon the railroads of the country. Although we might not interpret them as making railroads insurers, as they are for freights, yet we cannot well stop short of all the care and liabilities of a bailee for reward. The relation of the parties to each other, and that of plaintiff to the property, is wholly misconceived. There are no such relations as bailment or carrier creates—and no such liabilities imposed. *Sic utere tuo, ut alienum non lædas*, has more application, and may be violated by a reckless, wanton, or grossly negligent injury, as we have said in 16 Ill. R. 198.

The eighth and ninth instructions of plaintiff lay down the rule, and should have been given.

The allegations and proofs should agree. The allegation of negligence in the conduct and management of a train is not supported by proof of making up a train too heavy to be managed and controlled by the engine attached to it for transportation. Mayor *v.* Humphreys, 1 Carr and Payne R. 251 ; 1 McLean R. 551 ; McKinney *v.* Neil, Angell on Carr., Sec. 592.

We may reasonably doubt the legal right of owners of wandering stock to question the size and heft of trains, and the power or inability of attached engines, as passengers and freighters might do in cases of delay or damage from such cause.

The questions, as to Aldrich's incompetency for want of religious belief in a God, and a liability to divine punishment for perjury, and the propriety of establishing this disbelief by his own sworn statements, may recur again upon another trial, and we therefore dispose of the question here.

The constitution (Art. 13, Sec. 3) has declared complete toleration of all religions, and a freedom of conscience to every man to worship as he may be enlightened and feel inclined, but it has no provision that modifies the rules of the common law in relation to requiring evidence in courts being given upon oath. Nor has it changed the rules for ascertaining those competent to give it.

The criminal code has declared persons injured by crimes and misdemeanors competent on the score of interest, leaving the question of competency on grounds of infamy, infidelity, lunacy, infancy, &c., as at common law, rendering blacks, mulattoes and indians incompetent, both in criminal and civil cases, against whites. Rev. Stat. 1845, p. 154, Secs. 15, 16 ; p. 237, Sec. 23. No statute regulates the question before us.

In early times Lord Coke laid down the rule as excluding all not christians—a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country. Lord Hale doubted and denied it, and the Lord Chancellor, Lords Ch. Justices of the K. B. C. P. and Ch. Baron expressly overruled it in Omichund *v.* Barker reported Willes R. 538 and 1 Atk. R. 21. Although the two reports differ somewhat as to the extent of the rule, I regard it as correctly laid down by Chief Justice Willes in his own report of the case, to be, that all are competent who believe that there is a God, the Creator and Preserver of all things, and that He will punish them if they swear falsely, in this world or in the next ; and a want of such belief will render them incompetent to take an oath, without which no one can testify in a court of justice.

A liability to civil punishment for perjury, and the fear of it, will not substitute that moral, conscientious obligation under

which witnesses are required to state facts as testimony, and which is supposed to be imposed and exist by an oath taken by one entertaining such belief. The rule laid down in Atkins had reference to future punishments in a life to come, and many writers and courts so follow it. His report of the case was made many years before the corrected manuscript note of it by C. J. Willes was published, which allows a belief of God's punishments in this life or a future state of existence to be sufficient. I think this a sufficient guarranty of truth and to be the true rule, founded in good sense, reason and humanity. The majority of American cases follow it, though there are decisions in favor of the former. But apart from this difference, there is great uniformity and unanimity in the adoption and application of the rule, unchanged by any constitution save that of Virginia, which ecures religious toleration and declares that men's religion ' shall in no wise affect, diminish, or enlarge their *civil capacities*.', This in argument by the court was construed to do away all test in Perry's case, (3 Gratt. R. 641,) though the proofs showed the witness competent, without such constitutional shield.

I have examined all the authorities accessible to me and need not review them ; a simple reference may suffice, as I feel confident no one can examine the whole without a conviction that the above rule is fully sustained. 1 Phil. Ev. 10, 11 ; 1 Stark. Ev. 93, 94 ; Roscoe Cr. Ev. 129 to 132 ; 1 Greenleaf Ev. Secs. 368 to 370 and notes ; Wakfield *v.* Ross, 5 Mason C. C. R. 18, note ; Jackson *v.* Gridley, 18 John. R. 102 ; Butts *v.* Swartwood, 2 Cow. R. 431 ; People *v.* Matteson, id. 431, note (*a*) ; Anonymous, id. 572, note ; Hunscom *v.* Hunscom, 15 Mass. R. 184 ; Smith *v.* Coffin, 18 Maine R. 157 : Curtis *v.* Strong, 4 Day R. 55 ; Atwood *v.* Welton, 7 Cong. R. 66 ; State *v.* Cooper 2 Tenn. R. 96 ; McClure *v.* Tennesee, 1 Yerg. R. 225 : Norton *v.* Ladd, 4 N. Hamp. R. 444 : Den *v.* Vancleve, 2 Southard R. 652 ; Arnold *v.* Arnold, 13 Vt. R. 364, Scott *v.* Hooper, 14 id. 538 ; Quinn *v.* Crowell, 4 Whart. R. 337 : Cubbison *v.* McCreery, 2 Watts & Serg. R. 262 ; Brock *v.* Milligan, 10 Ohio R. 123 : Queen's case, 2 Brod. & Bingh. R. 284, (6 Eng. C.L. R. 147) ; Gill *v.* Caldwell, Breeze R. 28 and note ; Noble *v.* the people, id, 29, 30 and note *c.* These cases only differ as to the belief of the present or future punishment by God for perjury, and they concur in the legality and necessity of administering the oath in the manner and form recognized by the witness as obligatory upon his conscience, according to the form used in the country and under the religion of his spiritual faith. So a christian should be sworn upon the Bible or Evangelists, (or affirmed, as allowed by statute,) the Catholic upon the cross, the Jew upon the Pentateuch, the Mohammodan upon the Koran,

the Gentoo by touching the foot of the priest interpretor, and he touching the hand of another bramin or priest, *et sic de similibus.*

But one having no religion, believing in no God, and not accountable to any punishment for falsehood here, or hereafter, except his own notions of honor, veracity, and amenability to criminal justice, cannot be sworn, as no legal, moral, conscientious obligations or responsibility, in the view of the law, can be imposed by an oath, and he may not testify without. And this is no infringement of freedom of conscience, or violation of constitutional tolerance. He may take official oaths, and make ex parte affidavits, for no one but a party interested can object to competency, and that only to giving testimony against him, or, it may be, to sit as a juror; McClure *v.* Tennessee, 1 Yerg. R. 206, and such acts as affect the rights of others.

It is simply absurd to swear a witness to testify whether he is capable of taking an oath. The current of the above authorities prescribe the proofs by other witnesses, who may testify to what they have heard him say of his belief, and would exclude the proposed witness from contradiction or explanation. Others would allow his unsworn and some a sworn statement, but would nor compel him to make a statement; yet they would allow him to explain what others had heard him say, or show a change of sentiments. I think evidence by the mouths of other witnesses, most consonant to reason, and sustained by the current authorities. Though I can see no well grounded objection to hearing the proposed witness in explanation, and on a change of belief, when voluntary on his part, and sworn or unsworn, as he may choose to offer it leaving its credit to the due consideration of the court. We are of opinion the witness is incompetent.

The judgment will be reversed, and cause remanded for the errors noted.

Judgment reversed.

Skinner, J. My views in regard to liability of railroad companies for injuries to stock on their roads, have been heretofore expressed. Great Western Railway Company *v.* Thompson, ante, p. 231. The rule as to the competency of witnesses, as affected by theological opinion, was laid down by this court as early as 1822, to be, "that all persons who believe in the existence of a God, and a future state," are, unless otherwise disqualfied, competent. Noble *v.* The People, Breeze 29. This criterion of competency, so long acquiesced in, I would not, by judicial decisions, disturb.

JAMES CUNNINGHAM, Plaintiff in Error, *v.* WILLIAM R. LOOMIS *et al.*, Defendants in Error.

ERROR TO COOK.

A case cannot be heard in the Supreme Court until after final judgment in the court below.

THIS was an agreed case in the Circuit Court of Cook county. That court, as appears from the case, adjudged in favor of the plaintiffs below, rendering judgment against the defendant for "damages and costs," not naming any sum. This decision upon the agreed case is presented to the Supreme Court.

W. K. McALLISTER, for Plaintiff in Error.

T. D. OWEN, for Defendants in Error.

CATON, J. However clear we might be that the Circuit Court decided correctly, so far as that decision went, yet, as there is no final order in the case, this court has no jurisdiction to affirm or reverse the decision. Upon the agreed case the court found for the plaintiffs and rendered judgment in their favor "for damages and costs." But those damages do not appear ever to have been assessed. Indeed the agreed case afforded the court no means of assessing the damages, but expressly provided that the damages should be assessed by a jury in case the court should find, from the facts stated, that the plaintiffs were entitled to recover. The damages have never been assessed as contemplated by the agreement. The judgment which was rendered was but interlocutory. It could not be final, till the damages were assessed. Should we affirm the judgment it would not be an end of the case. As yet the plaintiffs' judgment is for nothing. It merely determines that they are entitled to recover something. How much they are entitled to recover, is a question still pending before the Circuit Court, which has exclusive jurisdiction over it. That question may be tried in that court, at the same time we are hearing this cause here, and by the time this decision is made, the condition of the cause might be very different there from what it was when this case was brought up. It is the same question which was decided at the last term at Springfield, and must be decided in the same way. See Crull et ux. *v.* Keener, ante, 246.

The case must be dismissed for the want of jurisdiction.

Case dismissed.

WILLIAM NORTON *et al.*, Appellants, *v.* WILLIAM STUDLEY, Appellee.

APPEAL FROM BUREAU.

Under the provisions of the law of 1851 for township organization, the public is excluded from opening or using a highway until the damages are assessed or agreed upon, or released in writing.

THIS was an action of trespass *quare clausum fregit* in the Bureau Circuit Court, by appellee against appellants.

The declaration contains one count, in the usual form.

Plea, that the *locus in quo* was a public highway.

Replication to second plea, that a highway had been located over the close in question, but damages not assessed and paid to appellee, who was the owner of said close, etc.

Demurrer to this replication, which was sustained, and leave given to appellee to amend.

An amended replication was thereupon filed in these words, viz.:

"And for a further replication to defendants' plea by leave of the court had and obtained, the said plaintiff says, that he ought not to be precluded from having or maintaining his action aforesaid by reason of any thing alleged in said plea, because he says that the highway set up by said defendants in said plea was located by the commissioners of highways of the town of Bramby, in said county, on the 3rd August, A. D. 1854, through the premises of plaintiff, described in said declaration, without the damage sustained by reason of laying out and opening of said road being assessed, or any decision upon the question of said damages by said commissioners, and their filing a statement thereof with the town clerk of said town, and said damages have not as yet been so assessed or determined, notwithstanding no agreement was made with the owner of said premises, who was a private person in relation to said damages and said owner did not in writing release all claim to damages, nor was there any such agreement or release filed in the office of the town clerk of said town, nor never has been, and this the said plaintiff is ready to verify; wherefore he prays judgment," etc.

To this replication appellants demurred, aud the cause was heard upon said demurrer, and judgment rendered for appellee, the court assessing his damages at five cents ; from which judgment this appeal is taken.

The only error assigned the overruling of the demurrer.

TAYLOR and STIPP, for Appellants.

PETERS and FARWELL, for Appellee.

CATON, J. Under the provisions of the township organization law of 1851, this road was laid out, but no assessment of damages was made, nor was any agreement made with the owner of the land in regard to damages, nor release of damages executed by him. And the question is, whether it became a public highway and subject to the use of the public without such assessment, or agreement, or release of damages. The question is all comprised in the construction of the sixth section of the twenty-fourth chapter of that act. That section is as follows: "The damages sustained by reason of the laying out, or opening, or altering any road, may be ascertained by the agreement of the owners, and commissioners of highways, and unless such agreement be made, or the owners of the land shall in writing release all claims to damages, the same shall be assessed in the manner hereinafter described, before such road shall be opened or used. Every agreement and release shall be filed in the town clerk's office, and shall forever preclude such owners of such lands from all further claims for such damages. In case the commissioners and owners of land claiming damages cannot agree, it shall be the duty of the commissioners to assess the damages at what they may deem just and right to each individual claimant with which they cannot agree, and deposit a statement of the amount of damages so assessed to each individual with the town clerk, who shall note the time of filing the same."

It would seem as if this statute is so framed as to exclude any claim of right in the public to open or use a road laid out under it till the damages are assessed or agreed upon, or released in writing. Till then, the rights of the public to the road, or of the owner of the land to claim or recover damages, do not attach. The former decisions of this court referred to were made under a statute containing no such provision as this, and which implied a release of damages, to which the owner set up no claim. Indeed, this question was more than decided by this court in *Denning v. Matthews*, 16 Ill. 308, where the damages had been actually assessed but not approved, and we held that the public had acquired no right to open and use the road. That decision was made under the law of 1849, but its provisions were substantially the same as this, and the only distinction drawn in argument was, that there no appeal was allowed from the assessment of damages; while here, an appeal is provided for. But we are of opinion that this provision does not weaken the force of the decision on this question.

The judgment must be affirmed.

Judgment affirmed.

WILLIAM S. SEARLS, Appellant, *v.* FRANCIS S. MUNSON, Appellee.

APPEAL FROM LAKE.

The act in relation to changes of venue, applies to parties and causes in the Lake County Court.

An application for a continuance of a cause in that Court, should be granted, as it would be in the Circuit Court.

The attendance of a witness, upon the request of a party, is evidence of diligence on his part.

THIS was an action of assumpsit, brought by the appellee against the appellant in the Lake County Court, said County Court having jurisdiction of the subject matter, by virtue of an act of the General Assembly of this State, entitled "An act to extend the jurisdiction of the County Court of Lake County," approved February 12th, 1853. Declaration upon a promissory note given by appellant to appellee, and the common counts.

Pleas, general issue, set-off, payment, and failure of consideration.

At the January term of said County Court for the year 1854, the appellant (defendant below) entered his motion in said court for a continuance of said cause until the next ensuing term, and, in support of that motion, filed the following affidavit:

"William S. Searls, of said county, being duly sworn, doth depose and say, that he is the defendant in the above entitled cause; that he cannot now safely proceed to the trial of said cause on account of the absence from said county of one Jeremiah Thorn, who is a material witness for said defendant upon the trial of said cause, and who resides in the State of Wisconsin; that the said witness left Waukegan last night, for his home in Wisconsin, where he was called without any notice sufficient to enable this deponent to take his deposition, on account of sickness in his family; and that this deponent expects and verily believes he shall be able to prove by said witness, that this deponent paid to said Francis F. Munson the sum of two hundred dollars, to apply upon the note sued upon in this case, and that said Munson then agreed to indorse it upon the note sued upon in this case, which said Munson has not done. And this deponent further says, that said two hundred dollars form a good and valid set-off to said plaintiff's cause of action; was paid prevous to the commencement of this suit; and that he does not now know of any other person by whom this deponent can prove the same facts. And further, that this deponent was ready for trial of said cause yesterday, at which time said witness could be had

but that he is not now, for the reason that said witness has gone out of the State and out of the reach of this deponent. And further, that said witness was yesterday in attendance on this court, at the request of this deponent, as a witness in this cause, and that this deponent did not know that said witness was going away until he had started on his way, and when it was too late for this deponent to get a subpœna for said witness; and that said witness was sent for on account of the sickness of his family; and that this deponent verily believes that he can produce said witness at the next term of this court, as a witness herein; and that said sum of $200 is over and above any and all sums indorsed upon said note; and that this application is not made for delay, but that justice be done; and that this deponont has used due diligence and every manner to be ready for a trial of this cause at this term of said court, and the not being ready is not his fault."

Which said motion for continuance was overruled by the court. To which the appellant excepted.

Whereupon the appellant moved the court for a change of the venue of said cause, founding said motion upon the following petition verified by affidavit:

"To Hon. John L. Turner, Presiding Judge of theLake County Court, in and for the county of Lake, in the State of Illinois:

"Your petitioner, William S. Searls, the defendant in the above entitled case, respectfully sheweth unto your Honor, that he entertains serious and well grounded fears that he cannot receive a fair and impartial trial of said cause in said County Court, on account of the prejudice that your petitioner believes exists in the mind of the presiding judge of said court, who is now on the bench; and that your petitioner believes those prejudices so great against your petitioner, that he would be unsafe in submitting to a trial of said cause before said judge, to wit, said John L. Turner. And your petitioner further sheweth and states, that the cause above stated for a change of venue of said cause has arisen since the last term of said court, the said presiding judge, to wit, the said John L. Turner, having commenced his official term as judge of said court since that time, and said cause not existing as to the former judge of said court, to wit, William A. Boardman. Your petitioner, therefore, prays that change of the venue of said cause may be granted to some county where the cause aforesaid does not exist.

"And for a further cause for a change of venue in said cause, your petitioner further sheweth unto your Honor that, as he verily believes, the adverse party, to wit, Francis F. Munson, has an undue influence over the minds of the inhabitants of the county of Lake, wherein the above entitled cause is pending, so

that this, your petitioner, cannot receive a fair and impartial trial in said county and in said court; and that your petitioner was not aware of said influence of said Munson until since the last term of said County Court; and that this is the first term of said court since your petitioner learned said fact; and that this is the first term of said court at which this, your petitioner, could have applied for a change of venue since he learned the fact of the influence of said Munson, and since said cause was commenced. Your petitioner, therefore, prays that a change of venue may be awarded in said cause to some county where said cause does not exist."

Which said motion for change of venue was overruled by the court, and excepted to by the appellant. The case was then tried at said term (on the 26th of January, 1854,) by a jury, and a verdict upon all the issues found for the plaintiff, (the appellee,) and the plaintiff's damages assessed at the sum of $138.77. Whereupon the appellant entered his motion for a new trial, and assigned the following reasons for said motion:

1st. The court erred in refusing to grant a continuance in said cause on the affidavit of the defendant.

2nd. The court erred in refusing to grant a change of venue on the petition of defendant.

3rd. The verdict of the jury is contrary to law.

4th. Said verdict is contrary to evidence.

Which said motion was overruled, and judgment rendered in accordance with the verdict, to which appellant excepted, and prayed an appeal to the Circuit Court of said county.

The said cause was taken by said appeal to the Circuit Court of said county, and heard at the October term, 1855, upon the following assignment of errors:

1st. The County Court erred in not granting a continuance in said cause.

2nd. The County Court erred in not granting a change of venue in said cause.

And upon said hearing said Circuit Court affirmed the judgment of the court below. To which appellant excepts and appeals to this court.

This cause was heard in the Circuit Court for Lake county, by MANIERRE, Judge, at October term, 1855.

H. W. BLODGETT, for Appellant.

H. SMITH, for Appellee.

SCATES, C. J. The jurisdiction of Lake County Court is made concurrent with the Circuit Court, except in ejectment, &c.

Acts 1863, p. 263, Sec. 1. By section 2 process shall be issued and executed in the same manner, and the " rules, proceedings and practice," shall conform as near as may be to like rules, &c., in the Circuit Court. An appeal or writ of error lies to the Circuit Court, (Sec. 3,) with many other like provisions conferring the power and jurisdiction of Superior Courts.

Under these provisions, I cannot doubt of the applicability of the act in relation to changes of venue, to parties and causes in this court, and on the same grounds as in the Circuit Court. The petition brings the party within the provision of the statute. There is no apparent reason for a refusal of the change.

The application for a continuance is also full and sufficient, and the cause should have been continued upon it at the plaintiff's request.

It is true, parties neglecting to subpoena witnesses, do so at their risk of non-attendance. But when witnesses actually attend upon request, the party's diligence is as complete as if they attended upon subpoena. They may, or may not, be liable to attachment for not remaining; but no court would attach a witness leaving upon sudden sickness in his family, as is shown here; and so the party's sudden and complete surprise is shown by the departure. The name and residence of witness are given sufficiently, and the facts expected to be shown by him are material and important under the issues. The affidavit was sufficient in every material part, and the cause should have been continued. For this is one of the practices of the Circuit Court, to which the County Court must conform, in the exercise of the enlarged jurisdiction, when proper grounds are presented for it.(*a*)

Judgment reversed and cause remanded.

Judgment reversed.

JAMES WAUGH, Appellant, *v.* THE PEOPLE, Appellee.

APPEAL FROM BUREAU.

Where a sheriff, in a criminal proceeding, takes bail for a larger sum than is directed by the court, the recognizance is a nullity.

THE *scire facias* in this case, recites that appellant and one J. Fittsher came before S. G. Paddock, sheriff of said county—Fittsher having been arrested upon a capias issued from the Circuit Court, for the crime of larceny—and the said Waugh and Fittsher executed and delivered to said sheriff, a bond or recognizance, whereby they severally acknowledged themselves to

(*a*) Downing vs Allen, 2 Scam. R. 455.

owe and be indebted to the people of the State of Illinois, the sum of two hundred dollars each, to be paid to the People if default should be made in the condition following, to wit:

"Whereas, the said sheriff has this day arrested the said Joseph Fittsher, upon a writ of *capias ad respondendum*, issued from the Circuit Court of said county, for and concerning the crime of petit larceny, with which he stands charged, as by a certain bill of indictment preferred against him by the grand jury of said county, filed in our said court in that behalf, appears.

"Now, therefore, if the said Joseph Fittsher shall well and truly be and appear on the first day of the next term of our said Circuit Court, to be holden at the court house in Princeton, in and for said county, on the second Monday, in the month of January next, A. D. 1856, then and there, in our said court, to answer unto the said bill of indictment, and abide the order of the court, and not depart the court without leave, then this recognizance to be void; otherwise to be and remain in full force and virtue."

Which said bond was approved by the said sheriff, and filed of record in the office of the clerk of the Circuit Court of said Bureau county, on the fourteenth day of January, A. D. 1856.

The *scire facias* then recites that at the next term of the Circuit Court, Fittsher did not appear, and his default was entered, and that a judgment was rendered in the following form: "It is therefore considered by the court that the people of the State of Illinois have and recover of the said Joseph Fittsher and James Waugh, the said sum of one hundred dollars, the amount of the penalty in the said recognizance, and the court further considers that a *scire facias* be issued," &c. The *scire facias* commands the defendants to show cause why the People should not have execution against them severally, for the said sum for which they are respectively bound, according to the form, force and effect of their said recognizance.

At the March term, A. D. 1856, of the Circuit Court of said county, Waugh filed the following plea:

"Now comes James Waugh, one of the defendants, by Milo Kendall, his attorney, and defends the wrong and injury, when, &c., and says that said People ought not to have judgment against this defendant, by the said *scire facias*, on said recognizance, and ought not to have execution against him, because he says that at the October term of said Circuit Court, 1855, the said court made an order fixing the sum of one hundred dollars as the amount of bail to be indorsed by the clerk on the said writ of *capias ad respondendum*, in said *scire facias* mentioned and the clerk of said court, on issuing the said capias, indorsed

the said sum of oue hundred dollars on the said process, as the amount of bail ordered by the court, to be taken thereon by the said sheriff; but the said sheriff, instead of taking the said recognizance, in the said sum of one hundred dollars, unlawfully, and contrary to the express order of the said court, took a recognizance for the sum of two hundred dollars; so this defendant says the same is illegal and void, and that no judgment or execution ought to be rendered or awarded thereon or in consequence thereof; and this the defendant is ready to-verify wherefore he prays judgment."

To which plea there was a general demurrer, which was sustained by the court.

The defendant abided by his demurrer.

The court rendered the following judgment:

"It is therefore considered by the court, that the said People have execution against the said defendant, James Waugh, for the collection of the said judgment, for the amount of one hundred dollars, hereinbefore entered against said defendants, together with all their costs and charges herein expended."

Glover and Cook, for Appellant.

W. H. L. Wallace, for Appellee.

Caton, J. This was a *scire facias*, upon a recognizance, taken by the sheriff, in the sum of two hundred dollars, conditioned for the appearance of one Fittsher, at the next term of the Circuit Court, to answer to an indictment preferred against him for the crime of larceny. The *scire facias* shows that the judgment of forfeiture, for one hundred dollars, was entered against the cognizers, and it commands them to show cause why execution should not be issued against them for that amount.

The plaintiff in error appeared, by his attorney, and filed a plea, showing that the Circuit Court, to whom the indictment was preferred, had ordered Fittsher to be held to bail in the sum of one hundred dollars, and that, in pursuance of that order, the clerk had endorsed on the back of the *capias*, on which he was arrested, the sum of one hundred dollars, as the amount of bail required. That he was arrested on. that warrant, and required by the sheriff to give bail in the sum of two hundred dollars, and that accordingly, to procure his release, he had given the recognizance, in the *scire facias* mentioned, for the sum of two hundred dollars.

To this plea a demurrer was sustained by the Circuit Court, which thereupon rendered final judgment, and awarded execu-

tion for the sum of one hundred dollars. In this the court most clearly erred. The sheriff was ordered to take bail in the sum of one hundred dollars, and this was his only authority for taking bail in any amount. This was no more authority for him to require bail in the sum of two hundred dollars, than it was to require him to leave his right hand in pledge for his appearance at court. The sheriff was bound to pursue his authority strictly, and when he departed from it he acted without authority, and the recognizance was as void as if he had no authority whatever to require bail. It is no answer to say that the court only rendered a judgment against him for one hundred dollars, for which the sheriff was authorized to take bail. There is nothing in this record, except the plea, showing that the recognizance was taken in too large a sum; and, after the demurrer was sustained, the court could not rightfully act upon its statements. It was either a good plea or a bad one. If good, then the demurrer should have been overruled, and if bad, the court had no right to reduce the amount of the judgment on the strength of its statements. But there is, in this case, a principle of higher moment. If the sheriff may require the prisoner to give bail in a greater amount than is required by the order of the court, to the extent of one hundred dollars, he may, with the same propriety, require ten thousand, and thus exercise the most intolerable oppression; and, in fact, deprive the party altogether of the right to give bail. It is no satisfactory answer to say that the court may treat the recognizance as if taken for the true amount authorized, for the greater mischief is, in requiring the excessive bail, by which the party may be demanded to give higher bail than he is able to do, and thus compel him to continue in prison, when he might have secured his discharge by giving the bail required by law.(*a*) It is not, and cannot be, denied that the plea showed the recognizance was void as to a part; and if as to a part, then it was void as to the whole. There is no authority for thus reducing the amount for the purpose of giving it vitality. The plea was good, and the judgment must be reversed.

Judgment reversed.

(*a*) Chumasero vs. People, 18 Ill. R. 406.

GEORGE BARNETT *et al.*, Appellants, *v.* GEORGE SMITH, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where it is agreed between A. and B. that B. shall enter into business with A., and receive a specified sum per annum as his share of the profits, upon condition that B. shall devote his whole time to the buisness, they are to the world co-partners; and the sureties to a bond, conditioned for the faithful conduct of a servant who was employed by A. before his association with B., were held to be released as against A. and B., who continued the servant in their joint service, such servant having become delinquent while in such joint service.

THIS was an action of debt. The declaration is as follows: For that whereas on the 19th day of April, A. D. 1850, the defendants made their certain bond or writing obligatory in the sum of five thousand dollars, lawful money, to be paid to George Smith & Co.,—the condition of said bond being such, that if the said Thomas Hamilton Noble (one of the appellants herein,) should well and truly perform the duties assigned to, and trust reposed in, him as teller of said firm, and as long as he should continue in that capacity; or if the said Thomas Hamilton Noble should well and truly perform the duties of every other office, duty, or employment, to which he might be appointed in the office of said firm, and also such other duty or duties as might from time to time be assigned to him by said firm, or by the managing clerk thereof, or undertaken by him in relation to the said firm, then said obligation should be void; otherwise to remain in full force and virtue. That afterwards the said Thomas Hamilton Noble entered upon the duties of teller of said firm of George Smith & Co., and continued in the discharge of such duties for the space of four years and upward; and that on the 10th day of October, A. D. 1854, the said Noble, while in the discharge of the duties of the officer of teller, abstracted and retained from the funds of said George Smith & Co., the sum of $9,579.93 which sum it is alleged was the property of said plaintiff; by means whereof said defendants became liable, &c., to pay said sum of $5,000; yet that said defendants have not paid said sum of $5,000, although, &c., but have hitherto neglected, &c.; to the damage of said plaintiff, of five hundred dollars, and therefore he brings suit.

The defendants, Barnett and Armour, filed three pleas:

1st. That Thomas Hamilton Noble did not, while in the discharge of the duties by him to be performed, in said writing obligatory mentioned, abstract of retain from the funds of the plaintiff the sum of money in said declaration mentioned, or any other sum of money; concluding to the country.

Upon this plea issue was joined.

2nd. That said Thomas Hamilton Noble, at the time of the execution and delivery of the writing obligatory in said declaration mentioned, was employed by the said plaintiff for the term of three years from the 19th day of April, A. D. 1850, and no longer, to perform the duties in said writing obligatory mentioned, and that said Noble did for that time well and truly perform and keep all and singular the articles, clauses, payments, conditions and agreement in the condition of said bond mentioned, and that before any default of said Noble, or any liability of said defendants on said bond had been incurred, the time for which said Noble was employed had elapsed and expired, and this the said defendants are ready to verify, &c.

To this plea there was a general demurrer, which was sustained by the court.

3rd. That before and at the time of the execution and delivery of the wrtiting, the said plaintiff was trading and doing business as a private banker, under the name and style of George Smith & Co., and was the sole and only person composing the said firm of George Smith & Co., and that the said service in the condition of said bond mentioned, was to be performed by said Thomas Hamilton Noble to the said plaintiff in his said business as a private banker; that said Noble, during all the time he continued in the service of said plaintiff alone, did fully perform all things in the condition of said bond required of him; nor did he during that time abstract any sum of money from the funds of said plaintiff. But said defendants aver that on the 19th day of April, 1852, and before any default had occurred, the said plaintiff associated with himself in the said business, a partner, one Elisha W. Willard, and that while said Willard was associated with the said plaintiff as a partner in said business, the said default of said Noble occurred. And that after said Willard was associated with said plaintiff as a partner as aforesaid, the said Noble served the said firm, and did not serve further the said plaintiff alone, and at the time of said default was in the employ of said plaintiff and said Willard, and not of said plaintiff alone; and this the said defendants are ready to verify.

To the defendants' third plea the plaintiff replied: that on the 29th day of November, 1851, he and the said Elisha W. Willard made and entered into a covenant and agreement, setting forth that on said 29th of November, 1851, said defendant was and before that time had been engaged in the general business of banking and exchange, in the city of Chicago, under the name, style and firm of George Smith & Co., and that said party of the second part (the said Willard) being desirous of becoming a member of said firm, it was thereupon agreed between said parties,

1st. The said party of the first part hereby admits and receives the said party of the second part as a member of the firm of George Smith & Co.

2nd. The business to be continued and carried on in the city of Chicago in the name, style and firm of George Smith & Co., and to be a general banking and exchange business, of the same kind and character as has been heretofore done by said party of the first part.

3rd. The partnership hereby entered into is to continue from the first day of December, A. D. 1851, until the first day of December, A. D. 1853.

4th. The capital stock used in said business is to be furnished by said party of the first part.

5th. The said party of the second part is to devote his whole time and attention to said business, and is not to use the name and style of said firm for any other purposes, except such as regularly belong to said business aforesaid.

6th. Said party of the second part is to have and receive from said business the sum of three thousand dollars per annum in full for his services, and in lieu of all other profits or claims upon said party of the first part, the said firm or the business thereof.

7th. The said party of the first part hereby guarantees to the said party of the second part, the payment of the sum mentioned in article number six.

That afterwards, and on the 1st day of June, 1853, by an agreement thereunder written, said articles of copartnership were by said parties "extended for three years from and after they would expire by limitation, upon the same terms, except that the compensation provided for in article six, be from the date hereof $5,000 per annum."

And it is averred in said replication that said plaintiff and said Willard transacted business together only as provided in said agreement; and so the said plaintiff says that the money so abstracted was his money solely, and that notwithstanding said articles of agreement, was abstracted by said Noble while in the service and employ of said plaintiff alone; and so the plaintiff says, that by reason of the premises, he and the said Willard have at no time been partners as is alleged in said plea. Without this, etc., with verification.

To the replication of the plaintiff to the defendants' third plea, the defendants rejoined three several rejoinders:

1. That the said plaintiff, from and after the entering into said articles of agreement, in said replication mentioned and set forth, at all times represented and held himself out to said defendants and to the world at large, as a partner of the said

Willard, as in the said plea alleged, and they, the said defendants, had no knowledge or information of the said articles of agreement, in said replication mentioned and set forth, with verification.

2. That the said plaintiff ought not to be admitted to reply the said replication to said third plea, as to so much thereof as alleges that the said money abstracted as aforesaid, was the property of said plaintiff, and not at any time that of said Willard and said plaintiff; and that the said plaintiff and the said Willard have not at any time been partners as private bankers, as alleged in said third plea, because said defendants say that on the 9th day of July, A. D. 1855, the said plaintiff and the said Elisha W. Willard, as partners, sued the said Thomas Hamilton Noble, in the Cook county Court of Common Pleas, for the same identical money mentioned in said declaration, and afterwards, as such partners, by the consideratian of said court, recovered judgment of the said Thomas Hamilton Noble for the same together with costs.

3. That the said plaintiff ought not to be admitted or received to reply said replication to the defendants' third plea, as so much as sets forth said articles of agreement, because said plaintiff, at all times after entering into the same represented and held himself out to the said defendants and to the world at large, as partner of said Willard; and that said defendants have no knowledge or information of said articles of agreemeet, in said replication mentioned and set forth.

The plaintiff demurred generally to each of the rejoinders, and the demurrer was sustained by the court.

Trial of the issue on the first plea was by the court, without a jury.

On the trial the plaintiff called James Alexander, who testified that Thomas Hamilton Noble, one of the coobligors in the bond sued on, was teller of the firm of George Smith & Co., and that while in said office and in the employment of said plaintiff he abstracted and retained the sum of $9,871.73, the property of the plaintiff which he, said Noble, still owed to plaintiff. The default of Noble, in abstracting and retaining said money, was not discovered until after he went away, which was in July or August, 1854.

The defendants then introduced in evidence the record of a judgment in an attachment rendered by the Cook county Court of Common Pleas, in favor of the plaintiff and Elisha W. Willard against Thomas Hamilton Noble for $9,873.71 damages. The defendants also introduced in evidence the record of a decree in a suit in chancery, rendered by the said court, wherein the plaintiff and said Elisha W. Willard were complainants against

Thomas Hamilton Noble et al. for the sum of $9,873.71, and directing certain property to be sold for the payment thereof. It was admitted that the money mentioned in the testimony of Alexander was the same money in the above suits in favor of Smith & Willard. This was all the evidence in the case. The court found the issue for the plaintiff. The defendants moved for a new trial, which was overruled by the court, and exception taken thereto. Judgment was rendered for the plaintiff for $5,000 debt and $5,000 damages, the debt to be discharged on payment of the damages and costs.

The errors assigned are: 1, in overruling the defendants' motion for a new trial; 2, in sustaining the demurrer to the defendants' second plea; 3, in sustaining the demurrer to the defendants' rejoinders.

This cause was heard before J. M. Wilson, Judge, at the vacation term of the Common Pleas, in April, 1856.

Higgins, Beckwith and Strother, for Appellants.

Burton and Winston, for Appellee.

Caton, J. The question presented by the pleadings in this cause is this: George Smith was doing a banking business under the name of George Smith & Co. And, as such, employed Noble as his teller in the bank. Barnett and Armour executed the bond sued on, to Smith, by the name of George Smith & Co., conditioned that Noble should conduct himself with integrity, &c., in his said appointment, and in any other employment of the obligee. Smith afterwards entered into a contract of copartnership with Willard, in the said banking business, by which it was agreed that he should be a partner in the firm of George Smith & Co., and that Smith should pay him three thousand dollars per annum for his share of the profits in the business, and that he should devote his entire time to the business of the firm. After its expiration this contract of copartnership was renewed, increasing the amount to be paid to Willard, for his share of profits, to five thousand dollars per annum. During all this time, Noble was continued as teller in the banking house, and after Willard was admitted as a partner with Smith, Noble abstracted of the funds of the house nearly ten thousand dollars, for which he failed to account. Smith and Willard sued Noble for this money and obtained a judgment against him, but failing to obtain satisfaction, Smith brought this action against the obligees in the aforesaid bond to him. Barnett and Armour knew that Willard had been admitted as a partner in the house, but did not know of the provision of the contract by which Wil-

lard was to receive a stipulated sum in lieu of profits. The question is, whether they are liable for the misconduct of Noble, after Willard was admitted to the partnership. It was freely admitted, that if Willard had been admitted as a general partner, they could not be liable ; but it is insisted that by the contract between Smith and Willard, he did not become in fact and in law a partner in the house ; that he was an employee of the house upon a stipulated salary, entitled to no profits and liable to no losses. If that were so *inter partes*, it would not follow that such was Willard's position as to the public or third persons. But as between themselves their relations were not those of master and servant. For instance, Willard was bound to devote his time and services to the business of the house, and by that, he was bound to do so when able, but suppose he was sick for a day, a week, or a month, or even a whole year, if he was a clerk on a salary, the salary would stop whenever the services stopped ; but as partner his share of the profits did not stop, nor did his stipulated compensation which he was to receive in lieu of profits. As between themselves then, a different degree of obligation is imposed upon Willard to render the service specified. Again, he could not sue Smith for work and labor, as he could were he at service for a salary. Should he sue Smith for the stipulated sum, he would have to count specially for the price of his share of the profits and not for the services. He did not serve Smith alone, but himself and Smith as partners. As between themselves, their relations differ from those of master and servant. But that is a matter of very little moment in the present inquiry. The question is, what is their position as regards the public and third persons ? To that, there can be but one answer. They are partners. (*a*) The agreement, set out in the pleadings, declares them to be partners ; and as such they held themselves out to the world, by carrying on business in the partnership name. The legal title to all the partnership effects was in Willard and Smith, and all actions to collect their debts had to be prosecuted in their joint names, and both were alike liable for the debts of the house. Willard was just as liable as Smith for all losses, and should Smith fail to meet them, he would be obliged to do so, if necessary, out of his private estate, and look to Smith for indemnity on the contract. In case of the death of Smith, Willard, I apprehend, would have the right to close up the business of the firm as surviving partner, in defiance of Smith's personal representatives.

The money then, which Noble abstracted, was not Smith's, but it belonged to Smith and Willard. Smith alone is the obligor in the bond, and the sureties only undertook for the principal, that he should act with fidelity to Smith, when in his employ

(*a*) Niehoff vs. Dudley, 40 Ill. R. 406.

alone. They never undertook to answer for him when in the employ of Smith and Willard, or of any other person than Smith. While in Smith's employ, self-interest would prompt them to carefully watch the conduct of Noble, but when he left Smith's employ and entered into the service of Smith and Willard, they were no longer called upon to look after him, for they had a right to consider that they were no longer answerable for his conduct. After that, scrutiny into his conduct would have been officious, if not impertinent. We think the rejoinders were good, and that the replication was bad, so that the demurrer should have been overruled as to the rejoinders but sustained to the replication.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

CYRUS P. BRADLEY, Appellant, *v.* MICHAEL GEISELMAN, Appellee.

APPEAL FROM KANE.

A party who has taken the deposition of a witness has a right to read it in evidence, although the witness may be present at the trial. If the opposite party chooses, he may examine the witness.

THIS was an action brought by Michael Geiselman in the Cook county court of Common Pleas, against Bradley, for an alleged trespass in seizing certain personal property.

The plaintiff claimed the property in the declaration mentioned by a sale made to him by Elisha W. King and Henry A. Layton, doing business under the firm of H. A. Layton & Co. The defendant pleaded the general issue, with notices.

The case was taken by change of venue to Kane county. At May term, 1855, of the Kane Circuit Court the cause was tried before I. G. WILSON, Judge, and a jury. The facts connected with the point decided, are stated in the opinion.

WILLIAMS and WOODBRIDGE, for Appellant.

B. C. COOKE and A. M. HERRINGTON, for Appellee.

SKINNER, J. The plaintiff below having closed his evidence, the defendant offered to read to the jury the deposition of one White taken by him in the cause. The plaintiff then produced the witness in person, objected to the reading of his deposition, and the court sustained the objection. The defendant had the

right, under the statute, to take the deposition to be read in evidence on the trial, and the question is, did the production of the witness, by the opposite party, deprive him of the right to use the depositions ? Parties are supposed to go to trial relying upon such legal evidence as they show themselves ready to produce This deposition was a part of the defendant's evidence, and material to his defence. To compel a party to abandon his deposition and resort anew to the witnesses, produced by his adversary, perhaps for the occasion,wonld encourage tampering with them, produce surprise and afford undue advantage. The defendant had a right to rely upon his evidence, as it stood, to use it in the from taken, and could not,by the act of the plaintiff, be driven to the necessity of attempting to impeach his own witness by proof of contrary testimony given by him in his deposition. Nor would it be consistent with justice, to allow the plaintiff, by producing the witness and compelling the defendant to put him on the stand as his witness, the advantage pratically resulting from the cross-examination of eliciting testimoney in chief. If the plaintiff desired to examine the witness, on his part, either in chief or upon the matters to which he had testified in his deposition, he was at liberty to do so, but he could not prevent the defendant from using the evidence upon which he had a right to rely, and went to trial. Phenix *v.* Baldwin, 14 Wend. 62. (*a*)

Judgment reversed and the cause remanded.

Judgment reversed.

NELSON C. RAE, Plaintiff in Error, *v.* WILLIAM HULBERT *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

It is not requisite,in an action upon a judgment of a sister State,to aver that the court which pronounced the judgment had general jurisdiction or special jurisdiction of the subject matter or of the person,if the action is upon a judgment of a court of general jurisdiction.

It is the duty of this court to take the same notice, that the Supreme Court of another State had jurisdiction of the subject matter and of the regularity of its proceedings, that it would take of a domestic judgment.

The question of jurisdiction over the person is rather one of evidence than of pleading.

A judgment is not a contract,within the meaning of the statutes in relation to what may be matters of set-off in this State.

THIS is an action of debt upon a judgment of the Supreme court of the State of New York, commenced in the Cook county court of Common Pleas.

(*a*) Ante. 408.

The declartion alleges that William Hulbert and La Fayette Hulbert, plaintiffs, by their attorneys, complain of Nelson C. Rae, defendant in this suit, of a plea of debt, that he render to the said plaintiffs the sum of twelve thousand dollars, which he owes to and unjustly detains from the said plaintiffs. For that, whereas heretofore, to wit, on the 28th of April, 1854, at a term of the Supreme Court of the State of New York, for the county of New York, held in and for said county in said State, before the honorable the justices of said court, the said plaintiffs, by the consideration and judgment of the said court, recovered against the said defendant as well a certain debt of ten thousand three hundred and forty-two dollars and seventy six cents, as also two hundred and thirty dollars and sixty-nine cents, which, in and by the said court, were then and there adjudged to said plaintiffs for their costs, disbursements, and extra allowance granted by said court, whereof the said defendant was convicted, as by the record and proceedings thereof remaining in said court more fully appears, etc.

To which declaration the defendant pleaded,

1. *Nul tiel* record.

2. Special plea: That said judgment, declared on as aforesaid, was obtained by fraud, and, after the formal part thereof, is in substance as follows, to wit: Because he says that heretofore, to wit, on the 9th day of May, 1853, to wit, at the city and county of New York, in the State of New York, the said plaintiff, contriving and intending to cheat and defraud the said defendant, and obtain an undue advantage over him, unlawfully, knowingly, designedly, and without having any claim or demand in law or equity then subsisting against the said defendant, and did then and there commence an action in the Supreme Court of the said State, against the said defendant in *assumpsit* upon promises, and did then and there unlawfully, knowingly, and designedly, falsely pretend or claim in their complaint in said action damages to the amount of $9,750.69, together with interest thereon from March 1, 1853; that afterwards, to wit, on the 15th day of July, 1853, the said defendant served his answer in said action denying the allegations of indebtedness in said complaint, and claimed and alleged the fact that the said plaintiffs were then and there, at the time of the commencement of said action, indebted unto said defendant in the sum of $10,000 over and above all legal claims and demands which the said plaintiffs then had against him for butter, produce and merchandize had and received by said plaintiffs of and from the said defendant before the commencement of said action, and which said sum of $10,000 the same defendant was

then and there, by the laws of the State of New York, at the time of the commencement of said action and of the rendition of the judgment hereinafter mentioned, available to said defendant by way of set-off or counter claim against the said pretended claim of the said plaintiffs; that afterwards, to wit, on the 2nd day of August, 1853, the said plaintiffs filed a replication to said answer, denying the allegations therein, and issue being thereupon joined, afterwards, to wit, on the 29th day of August, 1853, said cause was duly referred to a sole referee pursuant to the rules and practice of said court. And the said defendant further says, that a time and place for the hearing of said action was fixed by the referee therein, at which time and place the said defendant appeared with his counsel and witness to try said cause, and the said defendant avers that he was then and there prepared to establish, and could then and there have established, by the legal and competent evidence of said witness, had the trial of said action then and there proceeded, the fact, that the said plaintiffs then had no valid subsisting claim or demand in law against him, the said defendant, but that, on the contrary thereof, they, the said plaintiffs, were indebted to him, the said defendant, which facts were then and there well known to and understood by the said plaintiffs; but the said plaintiffs, contriving and intending to cheat and defraud the said defendant in that behalf, and to obtain an undue advantage over him in said suit, did then and there unlawfully, knowingly and designedly falsely pretend and represent to said defendant, that they were desirous of settling said suit upon just, fair and reasonable terms with said defendant, and did then and there propose and offer to settle and discontinue the same upon payment, by said defendant to said plaintiffs, of a certain nominal sum in money then and there agreed upon by and between the said plaintiffs and said defendant, as soon as the said defendant could make the necessary arrangement to pay the same through his father, then living at Cortland county and State of New York. And the said defendant further says, he then and there accepted said proposition and offer of the said plaintiffs, and agreed to pay said sum of money so agreed upon as aforesaid upon the terms and conditions aforesaid; and confiding in the false pretences and fraudulent representations made by the said plaintiffs as aforesaid, and being deceived thereby, was induced, by reason thereof, to dismiss his said witnesses and allow them to depart and go home, a distance of five hundred miles from said court; also to depart himself, and go immediately and at once to the county of Cortland aforesaid, a distance of three hundred miles

from court, to complete said arrangement and settle said suit upon the terms and conditions aforesaid. And the said defendant further says, that before he had, by ordinary diligence, time to complete said arrangement and settle said suit upon the terms and conditions aforesaid, and before a reasonable time therefor had elapsed, and before he could by possibility again reassemble his witnesses and get ready for trial and try said suit, the said plaintiffs, disregarding their said offer and agreement to settle said suit, which they never intended to settle, but knowingly and fraudulently contriving, as aforesaid, to cheat and defraud the said defendant in that behalf, and obtain against him an unjust and exceedingly large judgment, did, by means of the false pretences and fraudulent representations aforesaid, get the said defendant and his witnesses out of the way as aforesaid, and did then and there, in the absence of said defendant and his said witnesses, press said suit on to trial and try the same before said referee, and did then and there, on the trial of said action, by false evidence, fraudulently, knowingly, and designedly fix and establish before said referee the sum of $10,342.76 against the said defendant, for which sum the said plaintiffs, on filing the report of said referee therefor, did, on the 28th day of April, 1854, in said Supreme Court, recover judgment against the said defendant, together with $230.69 costs of suit, whereas, in truth and in fact, the said defendant, at the time of the trial of said suit and of the rendition of said judgment as aforesaid, was not indebted to said plaintiffs in any sum of money whatever, which the said plaintiffs well knew. And the said defendant avers, that he has always been ready and willing to perform and has offered to perform, his agreement aforesaid to settle said suit within the time and upon the terms and conditions aforesaid, but that the said plaintiffs never intended to perform, said agreement on their part, and have hitherto wholly refused to receive and accept said sum of money agreed upon as aforesaid, and discontinue said suit or vacate said judgment, and still so refuse to accept the same. And the said defendant also avers, that said judgment, thus obtained, is made the foundation of this action, wherefore he says that said judgment was and is void in law, etc.

3. Special plea is in the usual form of a plea of set-off.

To which special pleas the plaintiffs, by their attorneys, interposed a general demurrer, and assigned special causes as follows, to wit: To the first special plea they allege,

1. It does not set forth any such fraud in the obtaining of judgment as this court can take notice of in this suit.

2. It does not appear from said plea but that a long time elapsed between the hearing of the case before the referee and

the filing of his report and final entry of judgment, nor but that the defendant had time and opportunity, before judgment was entered, to have interposed his defence.

3. It does not show but that the defendant was present in court in person or by attorney before and at the time of the entry of said judgment in the case, nor but that he did interpose his defence.

4. That it is multifarious and inconsistent, and is, in other respects, uncertain, informal, and insufficient, etc.

And for special causes of demurrer to second amended special plea, plaintiffs say,

1. It sets up a claim, originating and growing out of the same contract on which suit was brought and the judgment sued on in this cause was recovered, which claim should have been interposed in that suit and cannot be set off in a suit on the judgment.

2. It shows that the demand attempted to be set off accrued before the commencement of the suit in which the judgment sued on was recovered, which denand should have been set off in that snit.

3. That said second amended special plea is in other respects uncertain, informal and insufficient, etc.

That defendant joined in demurrer, and judgment was given therein for and in favor of said Hulberts, and against said Rae, who stood by his said pleas as amended.

The judgment declared upon and introduced in evidence in this cause is as follows:

"SUPREME COURT.

"WILLIAM HULBERT AND LA FAYETTE HULBERT *vs.* NELSON C. RAE. } Judgment.

This action being at issue, and having been duly referred to the Hon. William Kent as sole referee to hear and determine the issue joined therein, and the report of the said William Kent, referee, having been duly filed, whereby he finds to be due from the said Nelson C. Rae to said William Hulbert and La Fayyette Hulbert, the sum of ten thousand three hundred and forty-two dollars and seventy-six cents: Now, on motion of William D. Booth, the plaintiff's attorney, it is hereby adjudged that the said William Hulbert and La Fayette Hulbert, the said plaintiffs, recover of the said Nelson C. Rae, the defendant, the aforesaid sum of ten thousand three hundred and forty-two dollars and seventy-six cents, together with the sum of two hundred and thirty dollars and sixty-nine cents costs, disbursements. and extra allowance granted by this court, amounting in the whole to the sum of ten thousand five hundred and seventy-three dollars and forty-five cents."

The issue of *nul tiel* record was tried and found for said Hulberts, and a general judgment was thereupon rendered in

said Court of Common Pleas for and in favor of said Hulberts, and against said Rae, upon the whole record.

ANDERSON and MCALLISTER, for Plaintiffs in Error.

G. GOODRICH, for Defendant in Error.

CATON, J. This was an action of debt upon a judgment rendered in the Supreme Court of the State of New York. The declaration is in the usual form, averring that the plaintiffs recovered a judgment on the day specified, in the Supreme Court of the State of New York, against the defendant, for his debt and damages adjudged, &c., with profert. The defendant pleaded, first, *nul tiel* record; second, a special plea, that the judgment was obtained by fraud, and, third, a plea of set-off. The plaintiffs took issue on the first plea, and demurred to the second and third, which demurrer was sustained by the court. The court then found the issue on the first plea for the plaintiffs, and rendered judgment for their debt and damages.

The first question presented is, that the declaration is insufficient, and that the demurrer to the plea should have been carried back and sustained to it. It is objected, that there is no averment—that the Supreme Court of New York is a court of general jurisdiction, or that it had special jurisdiction of the subject matter of that suit, and that there is no averment that the court had jurisdiction of the person of the defendant. It is not pretended that these averments are necessary in a declaration upon a domestic judgment of a court of general jurisdiction, nor do we think them necessary where the judgment is rendered in a court of a sister State of general jurisdiction; nor will we now say they are necessary even upon a strictly foreign judgment. (*a*) While for many, if not for most, purposes, the several States of the Union are, as to each other, considered and treated as foreign States, yet it is not strictly so as to the judgments rendered by their several courts. I will not quote from the constitution and laws of the federal government, but from the opinion of this court in the case of Welch *v.* Sykes, 3 Gilman, 199. It is there said, "Under the constitution of the United States, and laws made in pursuance thereof, the judgments *in personam* of the various States are placed on the footing of domestic judgments, and they are to receive the same credit and effect when sought to be enforced in different States, as they, by law or usage, have, in the particular States where rendered." We are then to treat this judgment, or give it the same effect, as if rendered by one of our own courts, or as if this were a proceeding in New York. We do not hesitate to declare that it is our duty

(*a*) Dunbar vs. Hallowell, 34 Ill. R. 168.

to take notice that the Supreme Court of New York had jurisdiction of the subject matter; and the same presumptions arise in favor of the jurisdiction of the person, and of the regularity of the proceeding, that would arise upon a domestic judgment. How far these presumptions arise in favor of the jurisdiction of the person, is not necessary now to discuss particularly, for that is a question rather of evidence than of pleading. Though it may be necessary, when used as evidence, that the record should show such facts as are necessary to give the court jurisdiction of the person of the defendant, or, at least, as raise a presumption of jurisdiction, yet it is not necessary that such facts should be set out in the pleading. It is only necessay to aver that, by the consideration of the court, a judgment was rendered against the defendant. The implication is, that it was a valid judgment, and that is sufficient to lay the foundation for the proof of every fact necessary to show that it was a valid judgment.

It is agued that every fact which is necessary to be proved must be averred. This is not so to the extent contended. All proof must be in support of, and find its foundation in, the pleading, but every distinct fact need not be pleaded. That would be pleading the evidence. In the case above referred to, in 3 Gilman, and in the case of Bimeler *v.* Dawson, 4 Scam. 536, which were actions on judgments from other States, the pleadings are not set out in the reports; but I have examined the original files, and find that, in neither declaration, was there any averment that the court rendering the judgment had jurisdiction of the person of the defendant, but that they, like this declaration, follow the common precedents, averring generally the rendition of the judgment. It is true that, in those cases, the objection was not made, so that it was not expressly passed upon by the court, but they at least serve as approved precedents; and, from the counsel reported as engaged in them, we may well suppose the objection would have been taken had it been deemed tenable. We think the declaration sufficient.

The first special plea avers that the plaintiffs, knowing that they had no just cause of action against the defendant, commenced the suit in the Supreme Court of New York, to which he appeared and filed a plea of set-off; and that, after the issues were formed, the cause was referred to a referee, according to the practice of that court, before whom the parties appeared for trial, when the defendant had his witnesses present, by whom he could have established his set-off to a greater amount than he owed the plaintiffs. That terms of settlement were then agreed upon, by which the defendant was to pay the plaintiffs a certain nominal sum of money in satisfaction of their claim, and they

should dismiss their suit, which sum the defendant was to pay as soon as he could make the necessary arrangement with his father who lived in Cortland county, a distance of three hundred miles. That, on the faith of this agreement, the defendant dismissed his witnesses, and went to his father to complete the arrangement, but that, during his absence, and before he could, by reasonable diligence, complete the arrangement with his father and return, the plaintiffs brought the cause to trial before the referee, and, by false testimony, established a claim before him of $10,-343.76, which amount the referee reported in their favor, and against the defendant, for which a judgment was subsequently rendered against him with damages, interest, costs, &c. And the plea further avers that, in this, the plaintiffs acted fraudulently. To this plea a demurrer was sustained, and we think very properly. In this, there is no such fraud set out as would vitiate a judgment. The agreement for the settlement of the suit was matter properly cognizable before that court, and should have been interposed for the purpose of postponing the trial before the referee, or should have been objected to the report, when judgment was moved thereon; or, if for any cause the defendant could not then present the objection, he should, at the earliest opportunity, have applied to that court to open or set aside the judgment, and enforce the agreement to settle, or to let him in with a defence. Instead of doing this, he waits till he is sued on that judgment in another tribunal, and in another State, and then substantially asks that a new trial be granted him in the original cause. We are referred to a great many authorities declaring that fraud will vitiate any judgment. That is so undoubtedly, when properly understood, but it is not every unfair act that constitutes such a fraud as will render a judgment or even a contract void. Even in case of a contract, the fraud which will render it void, must be in the execution and not in the consideration, as where the party is fraudulently induced to sign one paper supposing it to be another. Had the judgment been fraudulently entered up for a greater amount, for instance, than was awarded by the court, the defendant might every where insist that he was not bound by it. The plea was bad.

It was admitted on the argument that the plea of set-off would not be good at the common law, and we think it equally clear that it is not warranted by our statute. That provides that a defendant, "in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff, may set up the same and have them allowed him upon the trial." We cannot agree with counsel, that a judgment is a contract, within the meaning of this statute. It

is the conclusion of the law upon the rights of the parties, and it is not very common that it is entered up by the agreement of the unsuccessful party, but the reverse is generally the case. In this statute the words "action," "contract" and "agreement," are used in their ordinary sense, and not with the intention of embracing every imaginable litigation upon every cause of action. A judgment is no more a contract than is a tort. In one sense it is true that every member of society impliedly agrees to pay all judgments which may be regularly rendered against him; and, in the same sense, does he impliedly agree to make amends for all torts which he may commit. No one will pretend that actions for torts are within the spirit and intent of the statute, and yet they are certainly as much so as are actions upon judgments. In Keaggy *v.* Hite, 12 Ill. 101, it was decided by this court, that a set-off could not be allowed in an action of trover; and in Woodbury *v.* Manlove, 14 Ill. 216, it was decided that a *scire facias*, to foreclose a mortgage, was not within this statute; and in Sketoe *v.* Ellis, 14 Ill. 75, it was decided that a tenant could not set off a claim against his landlord on a distress for rent, although we have decided that the finding of the court upon that proceeding, under our statute, is a judgment, and conclusive between the parties. We have no doubt the demurrer was properly sustained to this plea, without noticing any of the objections which were urged to its merits.

The judgment of the Circurt Court must be affirmed.

Judgment affirmed.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, *v.* HENRY REEDY, Defendant in Error.

ERROR TO LASALLE COUNTY COURT.

Trespass *vi et armis*, is not the proper form of action for injuries, resulting from the negligence of the servants of a corporation; trespass on the case, is the proper action, of which a justice of the peace has not jurisdiction.

Animals wandering upon the track of an uninclosed railroad, are strictly trespassers, and the company is not liable for their destruction, unless its servants are guilty of wilful negligence, evincing reckless misconduct.

The burden of proof is on the plaintiff, to show negligence. The mere fact that an animal was killed, will not render the company liable.

In order to show the manner in which railroad trains are conducted, witnesses acquainted with their management must be examined.

THIS was an action of trespass begun before a justice of the peace, for killing a steer, by the train of the defendant, running upon the railroad in LaSalle county. Judgment was rendered

for the plaintiff below, for twenty-five dollars and costs. The case was taken by appeal to the LaSalle County Court. The case was submitted to H. G. Cotton, Judge, of the County Court, without the intervention of a jury, who gave judgment for Reedy for thirty dollars and costs. The railroad company thereupon brought the case to the Supreme Court.

There was but one witness examined, who testified that he was plowing on the 5th of May, 1855, when he heard a freight train coming on the Illinois Central Railroad; stopped to look at it, and saw a lot of cattle on the track, all of which left the track, except one steer, he ran before the train about twelve paces, when the locomotive caught him and shoved him along the track and then upon one side, both of his hind legs were broken, and his fore legs severely wounded. The steer died of his wounds. That the value of the steer was thirty dollars.

A motion was made, after the introduction of this evidence, to dismiss the suit, for want of jurisdiction in the justice of the peace, before whom the suit was commenced; which was denied by the County Court.

D. L. Hough, for Plaintiff in Error.

Chumaseron and Eldredge, for Defendant in Error.

Caton. J. I think, very clearly, the motion to dismiss for want of jurisdiction should have been sustained. The proper form of action was not trespass, *vi et armis*, but trespass on the case for the negligence of the servants of the company, of which a justice of the peace has no jurisdiction. Trespass only lies where the party sued does the act directly, or orders it to be done, which produces the injury complained of. There can be no pretence that such was the case here. What did the defendant below do? It built a railroad and put a train of cars upon it, and appointed an engineer and conductor to run it, for the transaction of its business, as it had a right to do, and the presumption is, that those having the charge of the train were instructed to run it in a prudent and proper manner. These acts certainly were not the direct cause of the injury. If those put in charge of the train in conducting it, behaved carelessly, and thereby caused the injury, such carelessness is the direct and immediate cause of the injury, for which they might be made liable in trespass; but the employer, whose act was at the most but the remote cause of the injury, could only be made liable in an action on the case.

But waiving this question as to the form of the action, the evidence does not show such a case of negligence in those having

the charge of the train, as to render the company liable for the injury sustained. The rule laid down by this court in the case of The Chicago and Mississippi Railroad Company *v.* Patchin, 16 Ill. 198, must control this case. It had been previously settled, that the company was not bound to fence the road against, or to prevent the intrusion of stock upon it. In this case it was settled that animals wandering upon the track of an uninclosed railroad were strictly trespassers, and that the company was not liable for their loss while on the track, unless its employees were guilty of willful or wanton injury, or of gross negligence, evincing reckless or willful misconduct. The conduct of the servant must evince a total want of care for the safety of the stock, whereby it is injured, in order to make the company liable for his negligence. In other words, a case of very gross negligence must be shown. Such I understand to be the rule laid down in Patchen's case, above referred to. In that case, also, it is held that the burden of proof is on the plaintiff to show carelessness, and that the bare killing of the stock by the train, is not of itself, sufficient to show negligence in its management. The propriety and public policy of these rules are so well vindicated in that decison, as in nearly all the other courts where the subject has been carefully considered, that I do not feel called upon to do more than to state distinctly what has been, and may now be, considered the settled law of the land.

By applying the law thus settled to the facts as shown in this record, there can be no doubt that the finding of the court is not sustained by the proofs, and no doubt the result would have been different had the decision of this court, in the 16th Ill., above referred to, been published at the time of the trial. But one witness is sworn, who saw the steer killed, and that from a considerable distance. He saw the train passing along the road, and saw a herd of cattle on the track. They all left the track but one steer, which run before the engine some twelve paces, when he was overtaken by the train and killed. This is all the evidence we have relating to the accident. It proves nothing, except the mere fact of killing, which, as before remarked, is not, of itself, any evidence of negligence on the part of the conductors of the train, in such a case as this. We are not informed whether the whistle was sounded, or other means adopted to scare the cattle from the track. We are not advised whether the speed of the train was slackened, or whether it was practicable to check the speed at that place, so as to have prevented the accident. Indeed, there is nothing testified to, showing the least want of care, or that, by the greatest possible exertions, the accident could have been prevented, much less, is there that gross and culpable negligence,

or wanton recklessness shown, which the law requires, in order to render the company liable for the loss of the steer. The burden of proof is on the plaintiff, and it is for him to show by facts and circumstances, and by those acquainted with the management of trains, who could speak understandingly on the subject, that it was practicable and easy to have avoided the collision, and that in not doing so, those in charge of the train were guilty of that measure of carelessness, or willful misconduct, which the law requires to establish the liability of the defendant below. The defendant's train was rightfully on the track, and could go no where else. The plaintiff's steer was there wrongfully. He was wrongfully allowed to be in the most dangerous place which could be found, and where there was every reason to suppose he would be killed. His being there, was not only dangerous to the steer, but to the property of the company and the lives of those upon the train, and courts and juries should not strain the law to encourage the owners of stock, to allow it to run into danger, which exposes not only their own property, but the lives and property of others.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

HENRY B. HUNT *et al.*, Appellants, *v.* HENRY W. BLODGET, Appellee.

APPEAL FROM LAKE.

A conveyance to an infant, for the purpose of defrauding creditors, will be set aside.

THIS was a bill in chancery filed by appellee against the appellants in the Circuit Court of Lake county, setting forth that on or about the 28th day of November, A. D. 1842, Burleigh Hunt purchased of Lake county lots 4, 9, the north half of 5 and the north half of 8, all in block 25, in the town of Waukegan, as marked and designated on the plat of the town made by the county commissioners; that Burleigh Hunt paid said county $45, or thereabouts, for said real estate, and that on the 28th day of November, 1842, said county by its agent conveyed the above described premises, at the instance of Burleigh Hunt, to his son, Henry B. Hunt, who was then an infant of about five years of age; that Henry B. Hunt had never made any conveyance of the property. The bill charges that neither Henry B. Hunt nor any person for him, ever paid any of the consideration for said deed

to Burleigh Hunt or to Lake county, but that the entire consideration, upon which the deed was executed, was paid by Burleigh Hunt, and that the deed was executed as above stated, at the instance of Burleigh Hunt, for his own use and benefit, and for the purpose of defrauding his creditors, to whom he was then largely indebted, and thereby pecuniarily embarrassed. The bill further states, that on the 1st day of September, 1845, James B. Gorton recovered judgment in the Circuit Court of Lake county against Burleigh Hunt for $21 costs, in a suit in chancery of Gorton against Hunt; and on the same day Gorton recovered judgment in the same court against Burleigh Hunt $22 in a suit in chancery of Hunt against Gorton; that on the 27th day of January, 1848, writs of execution were issued on said judgments, directed to sheriff of Lake county, who levied upon the above described premises, and on the 21st day of February, 1848, sold the same to James B. Gorton for $53.39 and executed the usual certificate of sale; that on the 1st day of May, 1849, Gorton, for the consideration of $59.77, assigned the certificate of sale to the orator, and that the sheriff of Lake county, on the 26th day of May, 1849, executed a deed of the premises to the orator in pursuance of said sale.

The bill then charges that, at the time of the rendition of said judgments, Burleigh Hunt was the sole equitable owner of the premises, and that the legal title to the same was vested in Henry B. Hunt, as trustee of Burleigh Hunt; that the orator had succeeded to the equitable rights of Burleigh Hunt, by said sale and purchase, and that Henry B. Hunt then held the legal title in trust for him. The bill further charges that said conveyance was not made to Henry B. Hunt as a gift.

An answer under oath is waived, and the bill prays a release from the defendants of the premises, that they be enjoined from conveying, and for further relief.

Burleigh Hunt filed his answer, therein admitting that on the 28th day of November, 1842, he purchased the above premises of Lake county, and paid said county therefor forty-five dollars, or thereabouts, but says he did not purchase the premises in his own right, but as guardian or trustee of Henry B. Hunt, and shortly after the purchase, as such guardian or trustee, paid to said county the full amount of the purchase money; and further admitting that on the 28th day of November, 1842, Nelson Landon, who was a commissioner of Lake county for that purpose, at the instance of Burleigh Hunt as such guardian, executed a deed of the premises to Henry B. Hunt, an infant child of his of about five years of age. He denied the allegation that no consideration was ever paid by Henry B. Hunt, nor by any person for him, to Burleigh Hunt or to said county, and averred

that the consideration upon which the deed was made, was fully paid by Burleigh Hunt, as guardian or trustee of Henry B. Hunt out of moneys or county orders purchased with moneys furnished by him for the express purpose of purchasing said real estate. He denied that he had or ever had any interest, legal or equitable, in the moneys, county orders or funds, which were paid for the promises, or any interest, legal or equitable, in the premises at the time of the purchase, or at any time thereafter, and averred that he held said county orders and moneys as such guardian or trustee, and made the purchase in that character with such moneys and county orders, which belonged to said Henry B. Hunt, in his own right.

He denied the allegation that the conveyance was made with an intent to defraud creditors, but admits his indebtedness—has no knowledge of the recovery of the judgments, issuing fo executions, levies or sale thereon, nor of the certificate of purchase, assignment of same to orator, or of sheriff's deed. He avers that he has been duly appointed guardian of Henry B. Hunt, and that the assignment to orator of sheriff's certificate was colorable and without consideration; that Blodgett was a mere trustee of Gorton, and prayed that Gorton might be made a party to the bill, and answer the premises

Gorton filed his answer, admitting the allegations of the bill—denying that he had any interest in the controversy—and averring that the sale and assignment of the certificate to Blodgett were bona fide and upon the terms mentioned in the bill.

The proof sustained the allegations of the bill.

The decree was entered by MORRIS, Judge, at October term, 1853, of the Lake Circuit Court,

H. P. SMITH, for Appellants.

C. BECKWITH, for Appellee.

CATON, J. We agree with the Circuit Court that the evidence shows that the premises in question were purchased by Burleigh Hunt for his own benefit, and that he had the conveyance made to his infant son for the fraudulent purpose of putting it beyond the reach of his creditors. In 1841, when the property was purchased from the county, Burleigh Hunt was insolvent, with several very considerable judgments against him. When the lot inl question was offered at public sale, he and Gorton bid upon it tils it was finally struck off to him at two hundred dollars. This wad more than four times the value of the lot, and of course the bi was forfeited. A few days after, he bought the lot at private sale, of the county, for forty-five dollars. He took a bond in

his own name, and at that time mentioned no one else as purchaser, so far as is shown by this testimony, and such is the recollection of the country agents, with whom he did the business. He paid for the land, as is most probable from the evidence, in a kind of scrip or paper which had been issued by the country, and was receivable in payment for country lands. When a conveyance was made of the lot, it was conveyed to his son Henry B. Hunt, who was then a child, four or five years of age. This is the first that any thing reliable is heard of this child in the transaction. There is no appearance here of a bona fide investment of trust funds for the benefit of his infant child. The spirit and competition manifested at the biddings, by which the property was run up to more than four times its real value, is inconsistent with an agency or a trust transaction, acted in good faith. Every feature of the operation shows that this was a purchase made by Burleigh Hunt for himself, and that he took the conveyance to his son, for the purpose of putting it beyond the reach of his creditors.

But the testimony of Hiram Hodger stands in the way of this conclusion, and if it is to be taken as true, and the transaction of which he speaks was a real and *bona fide* gift, and not a mere colorable operation, the better to conceal the intention of Burleigh Hunt in his contemplated purchase of this lot, then it would go very far to show, if it would not satisfactorily establish, that this lot was in good faith purchased with funds belonging to the child, and for his benefit. He states that, a short time before the sale of these lots, he was at the house of Burleigh Hunt and saw a woman, whom he understood to be some connection of B. Hunt's wife, give him fifty dollars for Henry B. Hunt, which he promised to invest in lots at this sale, for, and in the name of, the boy. We may be doing great injustice to Mr. Hodger and to Henry B. Hunt, but we cannot resist the conviction that this is all a fabricated story, or more likely, the facts may be as stated, but the transaction itself a fictitious one, in which the formality of paying over money was gone through with, for the purpose of getting up a defence to just such a case as this, and to enable Burleigh Hunt the more securely to place his property beyond the reach of his creditors. The great facility with which such deceptive appearances may be got up, must always induce a court or jury to look upon them with suspicion, and require the party relying upon them, at least to produce all the proof, which may reasonably be supposed to be in his power, of the reality and fairness of the transaction. Here we have the naked transaction itself testified to, without any corroborating circumstances, and by a witness, too, who shows a disposition to testify altogether too much upon confidence, for he states

in another part of his deposition that he knows this money was invested in the purchase of lots in Waukegan by Burleigh Hunt, while he afterward admits that he does not know when or how the lots were paid for.

Where is this woman who gave this money to Henry B. Hunt? why is she not produced as a witness to vindicate the reality of this transaction? or, at least, why is her absence not accounted for? Or why is not Burleigh Hunt, the father of the boy, produced to show that he had not furnished that same money, to be given back to him, in the presence of a witness, for the purpose of getting up a colorable case? Nothing of this kind was done, and no attempt made in the testimony to show why it was not done. Should we require nothing more than is shown in this case to protect a man's property from the reach of his creditors, we should but invite the continual perpetration of frauds. Transactions surrounded with so many suspicious circumstances, demand at the hands of this court the most rigid scrutiny, and cannot be passed by without the fullest explanation, which at least the party may reasonably be supposed to have in his power to give. If, as was suggested in the written argument, the woman is dead, that could have been shown, and no satisfactory suggestion is even made why the testimony of Burleigh Hunt was not produced. I have laid out of view all the declarations and conduct of Burleigh Hunt, which transpired after the deed was made to Henry B. Hunt, for then the transaction was completed and his agency ceased, and the grantee should not be bound by any thing which he did or said afterwards.

We are satisfied with the decree of the Circuit Court, which must be affirmed.

Decree affirmed.

JOHN OLIVER, Appellant, *v.* THE CHICAGO AND AURORA RAILROAD COMPANY, Appellee.

APPEAL FROM KANE.

If a corporation is made a garnishee, it may answer by its proper officer, but answer must be sworn to.

In an appeal from a justice of the peace, additional interrogatories may be propounded to a garnishee.

THIS was a transcript filed in the Kane Circuit Court, by which it appeared that judgment had been obtained against the corporation as garnishee. On the filing of the transcript from

the justice in the Circuit Court, additional interrogatories were propounded to the garnishee. The case was submitted to a jury by I. G. WILSON, Judge, at July term, 1855, or found for the corporation. An appeal was prayed by Oliver to this court.

D. L. EASTMAN, for Plaintiff in Error.

W. B. PLATO, for Defendant in Error.

CATON, J. On the appeal from the justice of the peace, the Circuit Court properly allowed the plaintiff to file additional interrogatories to be answered by the garnishee, who was the appellant. And the only question which we shall consider is, whether the answer made by the garnishee was sufficient. The garnishee was a corporate company, created by the laws of this State, necessarily performing all its functions and acts through its agents and representatives. The answer was signed by Mr. Hall, the secretary and treasurer of the company, and under its corporate seal,but was not sworn to by any one This was not a compliance with the statute ; that requires the answer to be sworn in all cases. In this case, it is true, the corporation could not, in person, swear to the answer, but it could have been sworn to by the proper officer, or agent of the company knowing the facts, which would have been a substantial compliance with the statute.

The judgment must be reversed, and the cause remanded, with leave to the garnishee to file a proper answer.

Judgment reversed.

DAVID L. HOUGH, Appellant, v. ERASTUS RAWSON, Appellee.

APPEAL FROM LASALLE.

The promise of a person to deliver grain on a certain time at a certain place, to be paid for by another at such times as the same shall be delivered,are dependent undertakings ; the obligations to deliver and to pay are concurrent; and in order to recover for non-delivery, a party must aver his readiness to receive and pay for the grain.

Slight evidence of a readiness to accept and pay, might be held sufficient.

If the legal effect of a contract is the same as the promise alleged, it will not be a material variance.

THIS was an action of assumpsit by Rawson against Hough, begun in the LaSalle Circuit Court. The declaration alleges that, on 19th October, 1850, at LaSalle, plaintiff agreed to

buy of defendant fifteen thousand bushels of corn upon the terms following: That the corn should be good merchantable corn, and of the weight of fifty-six pounds to the bushel; and should be delivered to plaintiff on board canal boat at the city of Chicago, between 20th of May and 20th of July, 1851, and that plaintiff should pay defendant for said corn at such times as the same should be delivered, at the rate of thirty cents per bushel. And plaintiff agreed to allow defendant to draw upon him at any time after February 1st, 1851, for such sums as defendant should desire, (not exceeding ten cents per bushel for the amount of corn Hough should have purchased at the time of drawing,) and plaintiff would pay such draft at one day's sight. That in consideration of the premises, and that plaintiff had promised defendant to accept said corn at, etc., and to pay for the same at the rate aforesaid, defendant then and there promised that he would, between the 20th of May and 20th of July, 1851, deliver to plaintiff "on board canal boat at Chicago, the said quantity of corn, of such weight as aforesaid." That the time had elapsed, and that plaintiff was, during that time, ready and willing to have accepted a delivery of such corn, and to have paid defendant for the same at the rate in that behalf aforesaid, at the place aforesaid, of which defendant then had notice. Yet defendant had not delivered any of said corn of such weight, or any other corn, but has wholly neglected, to plaintiff's damage.

Hough filed two pleas: 1st, non-assumpsit, on which issue was joined; and 2ndly, a special plea that whatever contract was made was in writing; that before the making of the said written contract, one William Martin had been managing Hough's business in contracting about the sale of corn, etc., and that before and at the time of the writing, plaintiff falsely and fraudulently represented to defendant that defendant's said agent had, as such, made with plaintiff a bargain in substance and effect as set out in the writing, when in truth and in fact such parol agreement was for a lower price; and that defendant, relying upon the truth of such false statements, signed said supposed written agreement; and that plaintiff knew such statements to be false when, etc., and therefore said written agreement was not binding.

Replication to second plea: That plaintiff did not make the representations attributed to him in the second plea; and on this, issue was joined.

On the trial plaintiff offered in evidence a writing as follows:

"This agreement, made and entered into this 19th day of October, 1850, between David L. Hough, of LaSalle, LaSalle county, Illinois, and Erastus Rawson, of Chicago, Illinois, witnesseth, that said Hough, in consideration of the agreement

hereinafter made with said Rawson, has agreed and does agree with said Rawson to deliver to him, the said Rawson, on board canal boat at said city of Chicago between the 20th of May, 1851, and the 20th of July, 1821, fifteen thousand bushels of good merchantable corn, at the rate of thirty cents per bushel. And said Rawson, in consideration of the above agreement made by Hough, does hereby agree with said Hough to pay him, the said Hough, for any and all of said corn at such times as the same shall be delivered as above, at the rate of thirty cents per bushel of fifty-six pounds; and said Rawson further agrees to allow Hough to draw on him at any time after the 1st of February, 1851, for such sum or sums as Hough may desire; provided said sum or sums shall not exceed in amount an amount equal to ten cents per bushel for the amount of corn said Hough may have purchased at the time of making any such draft. And Rawson does hereby agree to pay at one day's sight any draft which may be drawn upon him by Hough as aforesaid.

"In witness whereof they have hereunto set their hands (the said Hough and Rawson) the day and year first above written.'

To the introduction of which in evidence defendant objected, upon the ground of a variance between the contract produced and the contract described in the declaration; and also upon the ground of a variance between the contract produced and the copy filed with the declaration as a copy of the instrument sued on; and then and there produced to the court the copy filed with the declaration, which is set out in the bill of exceptions at large, and by a comparison of which it appears that it is not a verbatim copy, but varies in this, that the word "with" reads "by" in said copy; and instead of the words "pay him," in the contract produced, the copy reads "pay to him"; and instead of the words "provided said sum" in the paper offered, the copy reads "provided always said sum"; and instead of the words of attestation as above shown in the paper offered in evidence, the copy has the following: "In witness whereof the said Hough and Rawson have hereunto set their hands the day and year first above written." Which objections of defendant were overruled by the court, and said contract permitted by the court to be read in evidence, and defendant excepted.

This cause was tried before Leland, Judge, at May term, 1855, of the LaSalle Circuit Court.

T. L. Dickey, for Appellant.

Chumasero and Eldredge, for Appellee.

Skinner, J. This was an action of assumpsit by Rawson against Hough, upon a written contract for the delivery of corn by Hough to Rawson at a particular time at Chicago, at a stipulated price per bushel, to be paid for on delivery. The

declaration alleges for breach the non-delivery of the corn, and that Rawson was ready and willing to accept and pay for the corn according to the terms of the contract. Verdict and judgment for plaintiff below.

The court instructed the jury for the plaintiff, "that if the defendant contracted with plaintiff to deliver to him in Chicago fifteen thousand bushels of corn, he was bound to offer to deliver the same in accordance with the terms of the contract, or pay the damages occasioned by the non-performance." "That it is incumbent on defendant, under such a contract, to show an offer of performance, or some sufficient excuse for non-performance on his part, to excuse himself from liability to pay damages." "If the defendant has not shown such offer or excuse for non-performance, then the jury must find for the plaintiff; that is, if there is such a contract as stated in the first instruction."

The court refused to instruct on the part of the defendant, "That unless the plaintiff has proven that he was ready to pay for the corn at the place of delivery, he cannot recover." "That unless he has proven a readiness on his part to perfrom his part of the contract, he cannot recover."

Although the language of the instructions asked by defendant and refused may be objectionable, as calculated to mislead the jury, yet the substantial question presented to the court on both sides is, whether the plaintiff, to maintain his action, should satisfy the jury by evidence that he was ready to perform his part of the contract. The promise on the part of the defendant to deliver the corn to the plaintiff at a time and place, and the promise on the part of the plaintiff to accept and pay the defendant for the corn at the price agreed on such delivery, are dependent undertakings. The obligation to deliver, and the obligation to pay, are concurrent. If Rawson was not ready to accept and pay for the corn, Hough was not bound to deliver it. Where in a contract like this the defendant undertakes to convey and deliver at a particular time and place, to be paid for on such delivery at a stipulated price, the plaintiff to maintain his action must aver and prove that he was ready to receive and pay for the property according to his undertaking. (*a*) He must not be in default himself, but must show a readiness to perform on his part before he can compel the defendant to show performance, or respond in damages. Dickhut *v.* Durrell, 11 Ill. 72; 1 Chitty's Pl. 297; Cook *v.* Ferrel, 13 Wend. 285; Dox et al. *v.* Day, 3 Wend. 356; Porter *v.* Rose, 12 John. 209; Saunders' Pl. and Ev. 127, 128, and cases there cited.

An offer or tender of performance on the part of the plaintiff was not necessary—the contract contemplating the carrying and

(*a*) For assault and battery, when; St. A. L. R. R. Co. vs. Dalby, 19 Ill. R. 374.

delivery by defendant of the corn to the plaintiff at Chicago. In such case a readiness to perform only is required. Saunder's Pl. and Ev. 127, 128, and cases there cited; 1 Chitty's Pl. 297. The court therefore erred in instructing the jury upon the law of the case. From the nature of the transaction it would be difficult for the plaintiff to prove that he was ready to pay for the corn, and undoubtedly slight evidence of readiness to receive and pay for it on delivery, would be sufficient to justify a recovery by the plaintiff. The declaration states the contract according to its supposed legal effect; and in doing so, alleges a promise to deliver corn "of the weight of fifty-six pounds to the bushel." The language of the contract read in evidence is, "per bushel of fifty-six pounds." If the legal effect of the language of the contract is the same as the promise alleged, there can be no material variance in law between the allegation and proof. 1 Chittys' Pl. 306, 307, 316; Ferguson *v.* Harwood, 7 Cranch, 408. The statute provides that "the bushel of corn shall consist of fifty-six pounds." Statutes of Illinois, 1187. The statement therefore of the declaration and the language of the contract are of the same legal effect and operation, each amounting to a description of a legal bushel of corn. The contract was therefore properly admitted is evidence under the declaration.

Judgment reversed and cause remanded.

Judgment reversed.

GEORGE C. BESTOR, Plaintiff in Error, *v.* WILLIAM H. PHELPS *et al.*, Defendants in Error.

ERROR TO PEORIA.

In an action by an indorsee against the indorser of a promissory note, it is not necessary to prove its execution by the maker.

THIS was an action brought on a promissory note against the plaintiff in error as indorser. The note sued for was as follows:

$300. ST. LOUIS, NOV. 26, 1852.
Eight months after date I promise to pay to the order of Geo. C. Bestor three hundred dollars, value received, payable at the office of Phelps & Bourland, Peoria, Illinois. H. A. FOSTER."

Indorsed, "Pay Phelps & Bourland, GEO. C. BESTOR."

The declaration contained special counts, and also common

counts for money lent, paid, had and received, and account stated. Defendant in the suit below pleaded the general issue. Trial was had before a jury, O. PETERS, Judge, at May term, 1855, of the Peoria Court.

The note was offered in evidence under the special count, which was objected to, for the reason that it was inadmissible under that count. The plaintiff then offered the note in evidence under the common money count, (the signature of the indorser, Bestor, being admitted as genuine,) which was objected to by the defendant below, which objection the court overruled, and admitted the note in evidence to the jury, to which decision of the court the defendant excepted.

The plaintiff further proved that suit had been commenced against Foster, the maker of the note, at the September term of the Peoria Circuit Court, A. D. 1853, which term commenced September 12, 1853. Judgment was rendered March 23, 1854, at March term, which term adjourned April 1st, 1854. Execution issued April 27, 1854, and was returned, "no property." Also proved that Foster left this State in September, 1853; that he made an assignment to Wm. A. Willard; that the effects of said Foster will pay not over fifty cents on the dollar, and that he was reported insolvent. The court instructed the jury as follows:

"1. If the jury find from the evidence that, at the time the note became due, the maker of the note was so far insolvent that the note could not, by ordinary diligence, have been made from him, they will find for the plaintiffs in this case, and the measure of damage is the amount of the note and interest, subject to the qualification contained in the instructions for the defendant.

"2. If plaintiffs commenced suit on the note in question at the first term of the circuit court after the note became due, and pursued said suit to judgment in due course of law, and issued execution, and failed to make the amount from the maker of the note, the plaintiffs are entitled to recover the amount of the note and interest from the defendant.

"If at any time pending the suit at law the maker of the note became and continued to be insolvent, and removed from the State of Illinois, so that further prosecution of the said suit would have been useless, and so that no legal steps would have availed to collect the note from the maker, then such steps, or any further legal steps, were not necessary on the part of the plaintiffs, and they are entitled to recover of the defendant."

To all which instructions the said defendant excepted.

The jury brought in a verdict for the plaintiffs in said suit,

upon which verdict said circuit court rendered judgment for the amount of said note and interest.

MANNING and MERRIMAN, for Plaintiff in Error.

COOPER, for Defendants in Error.

CATON, J. This was an action by the assignees against the assigned of a promissory note. On the trial, the assignment on the note, by the defendant below, was admitted to be genuine; but it was objected that the execution of the note by the maker was not proved. The court overruled the objection, and admitted the note in evidence, which is now assigned for error. This identical question was brought before this court by a person of the same name as the present plaintiff in error, in the case of Bestor v. Walker et al., 4 Gilman, 3, in which the court said: "But there is no rule of law, and never has been, requiring the indorsee of a note, in a suit against the indorser of it, to prove the execution of it by the maker. The indorser, having negotiated and put it into circulation, exhibits a degree of assurance without a parallel, when he demands proof of its genuineness of the man to whom he has indorsed it. Neither reason nor law sanctions such a proceeding." (a) It is unncessary for me to add any thing to the language of this court above quoted, to show that the decision of the court was correct.

The instructions asked and given as to when and what degree of diligence the assignee was required to use to collect the note of the maker, do but reiterate the decisions of this court in numerous cases on the subject, which are perfectly familiar to most of the profession, and to which I do not feel called upon to refer particularly.

The judgment is affirmed.

Judgment affirmed.

SAMUEL S. PORTER, Plaintiff in Error, v. WILLIAM H. BOARDMAN *et al.*, Defendant in Error.

ERROR TO COOK.

The clause of the second section of the Practice Act, giving jurisdiction in the county where the contract may have specifically been made payable, does not apply to contracts other than for the payment of money, to be performed in the county where the suit is brought

(a) P. & O. R.R. vs. Niell, 16 Ill. R. 270.

A. contracts with B. for the delivery of a quantity of wheat in Cook county. A. sued B. in Cook county for breach of the contract, and sent summons to Tazewell county, the residence of the defendant: *Held*, that the court in Cook county had not jurisdiction.

THIS was an action of assumpsit, brought by the defendants in error against the plaintiff in error, to the March term, 1859, of the Cook Circuit Court. The declaration contains two counts. The first count is upon a contract made by the plaintiff in error with the defendants in error, to deliver to the defendants in error five thousand bushels of wheat, in Chicago, on the 15th of August, 1855, to be paid for on delivery, and alleges, as a breach of such contract, the non-delivery of the said wheat.

The second count was substantially like the first, with the exception that there was an averment that the contracts upon which this suit was brought were specifically made payable in Chicago, in the county of Cook, and claims $2,500 damages.

On the 30th day of January, 1856, a summons was issued by the clerk to the sheriff of Tazewell county, Illinois and served on the defendant, in Tazewell county, on the 27th of February, 1856.

To the foregoing declaration the defendant, at the return term of the writ, filed his plea in abatement to the jurisdiction of the said circuit court of Cook county, alleging that the plaintiffs below were not residents of said Cook county, but residents of New York, and that the defendant below resides in the county of Tazewell, Illinois, and not in the county of Cook; that the writ of the plaintiffs below was issued to the sheriff of Tazewell county, and served on the defendant below in Tazewell county; and the supposed contract upon which the plaintiffs sued was not specifically made payable in said county of Cook.

To this plea the plaintiffs below filed their replication, alleging that the contract sued upon was specifically made payable in Chicago, Cook county, Illinois; upon which issue was joined to the country.

At the May term, 1856, MANIERRE, Judge, presiding, the cause was, by consent of all parties, submitted to the court upon said issue joined in said plea in abatement, and the following was the evidence: "Rufus S. King being sworn, deposed—My place of business is Chicago; that, as agent for plaintiffs, he made a contract with the defendant to deliver to the plaintiffs in Chicago [on board of vessels free of charge] five thousand bushels of good white winter merchantable wheat, to be delivered in Chicago on or before the 15th of August, 1855, at one dollar and forty-five cents per bushel, to be paid for on delivery; that defendant wholly failed to deliver the wheat at any time; that, on the 15th day of August, 1855, the quality of wheat described was worth one dollar and sixty-five cents per bushel." The

court found the issue on the plea in abatement for the plaintiffs below, and assessed their damages at one thousand dollars, to which finding of the court the defendant below at the time excepted, and brought the case to this court on writ of error.

CLEMENTS and ROBERTS, for Plaintiff in Error.
FARNSWORTH and BURGESS, for Defendants in Error.

CATON, J. This suit is brought in Cook county, and the summons sent to Tazewell county, the residence of the defendant below, for the breach of a contract for the sale and delivery of wheat in Cook county, which was not the residence of the plaintiffs below. A plea in abatement presents the question of the right of the party to bring the suit in Cook county. This depends upon a proper construction of our Practice Act. The second section of that act provides, "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 cases where the debt, contract or cause of action, accrued in the county of the plaintiff, or where the contract may have specifically been made payable." Here the legislature has provided for two classes of cases, where the defendant may be sued out of the county where he resides or may be found. First, where the debt, contract or cause of action accrued in the county of the plaintiff, when the suit may be brought in the plaintiff's county. These expressions are broad enough to include all manner of causes of action for which a party may be sued for the recovery of a debt or damages. Second, where the contract is specifically made payable in a particular place, there the suit may be brought, though neither party resides there. This language is much more limited in its signification. (*a*) It is only where something is specifically made payable at a particular place, that the undertaking is brought within this last clause. A *payment* must be made, which implies a satisfaction of a past consideration, and widely differs from a contract for the performance of simultaneous or dependent acts, as the delivery of wheat and taking pay therefor. In such a case the delivery of the wheat can, in no just sense, be said to be a payment for the money which the purchaser has agreed to pay therefor; and yet we must so hold, in order to bring this contract within the last provision. I confess this seems to me simply absurd. I cannot think the legislature ever used this language with such a meaning. They understood payment to mean something else than the delivery of wheat, for which the seller was the party to be paid. It has been well suggested in argument, that this suit is not brought for the recovery of the

(*a*) Hungate vs. Rankin, 20 Ill. R. 641; Funk vs. Hough, 29 Id. 145· Lassen vs Mitchell, 41 Id. 104.

wheat, which is the only thing the party agreed to deliver in Chicago, but it is for the recovery of damages in money, which the law awards the party for the breach of the contract, for the non-delivery of the wheat, or, if you please, upon the implied undertaking of the party to pay the damages in money should he fail to deliver the wheat. He nowhere agreed to pay this money, which is sued for as damages, in Cook county. Should we hold that this contract is included in the first clause, then we must hold that the last embraces all contracts. and is as comprehensive as the first, except as to torts. We are of opinion that such was not the intention of the legislature, and that judgment should have been given for the plea.

The judgment must be reversed and the cause remanded.

Judgment reversed.

MILO WINCHELL, Plaintiff in Error, v. GEORGE STRONG, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

In an action for slander, a party may show that he offered an explanation of the offensive words, if the explanation was part of the same conversation and before the same auditory, and in reference to the same subject.

The declaration is in case for slander, and comprises two counts.

The first count states that in a colloquin on 16th May, 1855, wrth the defendant, in the hearing of one Stephen Lamb and others, the plaintiff falsely and maliciously spoke and published of and concerning the defendant, the false, scandalous, malicious and defamatory words following, that is to say: "You," meaning the said defendant, " stole the timber to build the Alison bridge. You," meaning the defendant, "stole the timber to build the Alison bridge, and I can prove it."

The second count states the words to be: "You," meaning the defendant, "stole the timber to build the bridge with," meaning a certain bridge, commonly called the Alison bridge, "and I can prove it without going out of this shop," meaning the shop in which certain citizens and the plaintiff and defendant then were. Damages $5,000.

Plea, not guilty, and *similiter.*

The trial was had before a jury, in the Cook County Court of Common Pleas, at October term, 1855, and a verdict of guilty rendered with $500 damages, J. M. WILSON, Judge, presiding.

At the trial the defendant produced A. N. Peets, who, on his direct examination, testified that he knew the parties; was their neighbor, and had known them a number of years; he was at Mr. Roquet's last spring when the parties came there; they were conversing about bridges; William Strong said he had given $50 toward the Alison bridge; defendant said, "you stole the timber to build it with;" repeated it twice; said he could prove it; defendant told him that he did not believe it; plaintiff said he did, and he could prove it; defendant said he would prosecute him; Winchell repeated it; Mr. Woolworth, Mr. Lamb, two Mr. Roquets, Mr. Edwards and witness, were present; there might have been some others; defendant and plaintiff were there when witness got there; they were pretty much through talking on the subject when witness left; it was fifteen or twenty minutes before witness left, which was fifteen or twenty minutes after the charges.

On cross-examination, the witness testified that Winchell did not say where he stole the timber from; did not say the stealing consisted in cutting on other people's land, and cutting the timber without their knowledge or consent; that they were talking about bridges when witness got there; Mr. Strong callee them to witness what Mr. Winchell said; when witness entered, both parties were cool; that, at the same meeting, and after the speaking of the words, but before witness left the meeting, plaintiff made a statement to defendant respecting his meaning of the words; that such statement might have been fifteen ar twenty minutes after the speaking of the words. Whereupon defendant's counsel objected to the admission of said statement in evidence. Plaintiff's counsel then stated that the statement he intended to prove, was as follows: "What I mean to be understood as saying, is this: that you entered upon other peonle's land and cut down and hauled away their timber without their knowledge or consent; if the law calls that stealing, I call that stealing; if the law calls it trespass, I call it trespass; and he also stated that, on the defence, he could prove the truth of the fact stated, namely; the cutting down and hauling away of the timber to build the above bridge with, without the knowledge or consent of the owner." The objection was sustained and exception taken.

The defendant also produced E. A. Allen, who testified that he knew the parties; had resided at Wheeling several years; was a little acquainted with the parties; Mr. Strong said he had built the Alison bridge for so much; Mr. Winchell said "yes, and made $100 out of it, and stole the timber to build it with;" he stated it two or three times; there were quite a number of persons present; could not tell how many.

On cross-examination, witness stated he was present at the beginning of the meeting; Winchell claimed he had property in the bridge; they thought of vacating the Winchell bridge; Mr. Strong did not contradict him; he said he thought when the donation was made it became the property of the town; when plaintiff first accused defendant with stealing the timber to build the bridge with, I think Mr. Strong told him he was excited, and could not mean what he said; Mr. Winchell talked loud; had not been loud talk previous to the accusation; Mr. Winchell did not say, in this conversation, that Strong had entered on other people's land and stole the timber; and if the law called it stealing, he did; and if the law did not, he did not; but he did make such a statement fifteen or twenty minutes afterward.

The defendant also produced Mr. Woolworth, who testified that he had lived in Wheeling some time, and knew the parties; was present at the meeting spoken of; Mr. Winchell said Mr. Strong was a man of not much public spirit; plaintiff claimed a part of the bridge they were going to vacate; Mr. Strong thought it belonged to the public; Winchell said, "You stole all the timber to build the Alison bridge with;" Mr. Strong said, "You do not mean that;" plaintiff repeated it two or three times; said he could prove it.

On cross-examination, witness stated that plaintiff did not explain what he meant by charging defendant with stealing—he did not in the same conversation—he did fifteen or twenty minutes after; the plaintiff objected to such explanation, as not being in the same conversation; he said nothing in that conversation about other people's land. Wintess did not understand Winchell to mean, by the charge, either that Strong cut down growing timber or took it after it was down.

On re-examination, witness testified that he understood defendant to mean stealing, or he would not have said so; he did not understand him as meaning any thing about cutting growing timber.

The defendant also produced Mr. Lamb, who testified: That he had lived at Wheeling since 1840; parties were there when he went; he was present at the meeting; plaintiff said Strong had stole the timber to build the bridge, or a bridge; Strong denied the charge; Winchell said he had stole the timber, and he could prove it; some few minutes after, he qualified it; Mr! Strong then said, "You try to back out of it;" it was some ten or fifteen minutes; he had accused him of stealing the timber, as many as three times; before this; there was nothing about standing timber at the beginning; that Mr. Winchell owned a farm, and was represented to be worth ten or fifteen thousand dollars.

On cross-examination, he said both were some excited; not apparently so until after the accusation.

On the defence, the plaintiff in error produced, as a witness, Francis Edwards, who testified that he resided at Wheeling; was present at the meeting—the last part of it; Mr. Strong told Winchell he had lost $50 or $100 in building the Alison bridge; Winchell said he mode $100, and stole part of the timber to build it with; Mr Strong said to the bystanders, "I want you all to take notice, he accuses me of stealing;" Mr. Winchell immediately turned to them and said, "I mean to be understood, that Mr. Strong entered upon other people's land and cut and hauled timber to build it with, without their knowledge or consent."

The plaintiff also produced George Tallner, who corroborated the evidence of defendant's witnesses.

The plaintiff also produced John Roquet, who testified that he was present at the meeting; that Winchell said Strong had stole the timber to build the Alison bridge of, and he could prove it; Strong told him he would put him in a way to prove; Winchell then said, if the law called it stealing, he did; he had been on another man's land and cut the timber to build the bridge with; they were excited.

The defendant hen recalled Allen, Peet, Woolworth and Lamb, who all testified, that Strong did not call Winchell a lair.

On the part of the defendant, the following instructions were asked and given, and excepted to.

1st. If the jury shall believe, from the evidence, that the plaintiff made the charge against the defendant, substantially as laid in the declaration, and thereby intended to charge upon the plaintiff the crime of stealing, the defendant is entitled to recover in this action; and the jury may, in estimating the damages, take into consideration the plaintiff's pecuniary circumstances, and may give, in their discretion, exemplary damages.

2nd. Although the jury shall believe, from the evidence, that, after the defendant made the charge stated in the declaration and was threatened with a suit by the plaintiff, the plaintiff made the explanation stated by the witness, Edwards, yet if they shall further believe it was not intended as an honest retraction of the charge of stealing, but rather for his own protection against the consequences of his previous charge, it ought not to mitigate the damages.

On the part of the plaintiff, the following instructions were asked and given:

1st. That if the words were spoken in the heat of passion, the law is for plaintiff.

2nd. That the words impute a felony; in law, cutting down

and taking away growing timber, is not a felony; the language of defendant is to be taken by the jury in the sense he meant to use it; and that, if plaintiff intended to charge a cutting down and carry away growing timber, there is a fatal variance between the declaration and proof, and the law is for plaintiff.

DAVIS and MARTIN, Attorneys for Plaintiff in Error.

G. GOODRICH, for Defendant in Error.

CATON, J. That the explanation which the defendant below offered to prove on the trial, and which was rejected, was proper, as tending to explain the meaning of the words uttered as charged in the declaration, there can be no doubt, if that explanation was made in such connection with the charge as to form a part of the same transaction or interview. To determine this properly, may frequently be a matter of some difficulty. The explanation should no doubt be a part of the same interveiw or conversation with the charge, but it need not be in the same breath or sentence, nor yet in the same speech. Regard must be had to the nature and character of the conversation, in order to determine the question. Where substantially the same auditors are present and the subject matter, in the discussion of which the charge is made, is still under consideration or dispute the whole must be considered as the same conversation, and an explanation made in any part of it is so connected with the charge as to be admissible, although a very considerable time and much conversation may intervene between the charge and explanation. This may be especially so, when the charge is made at a public meeting where the subject, in reference to which the charge is made, is undergoing discussion, as was the case here. In such a case, while the particular subject is under discussion, and the parties are present and taking part in it, the conversation may be said to continue.

This charge was made at a public meeting where the subject of a certain bridge, which Stong had built, was under discussion In the course of the discussion a controversy arose between those parties, in which the defendant acused Strong of stealing the timber, with which he had built the bridge. The witness states, "That at the same meeting, and after the speaking of the words but before witness left the meeting, defendant made a statement to plaintiff respecting the meaning of the words. That such statement might have been fifteen or twenty minutes after the speaking of the words." This statement the defendant offered to prove, but it was ruled out by the court. In this we think the court erred. We are well satisfied that it should have gone

to the jury as a part of the same transaction or conversation in which the charge was made, and that the statement and charge should both have been considered by the jury together, for the purpose of ascertaining what was the real intention of the defendant when he used the word charged. If the jury should believe that the defendant only intended to charge the plaintiff with a trespass, and so explained himself to the party and those who heard the original charge, then, the whole being taken together, the averments in the declaration were not sustained; but if the jury should believe that the defendant, when he uttered the words, actually intended to charge him with a larceny, and that he subsequently changed his mind as to what charge he would make against the plaintiff, and for the purpose of avoiding the responsibility of the original charge, and to falsely create the impression that he, all the time, intended to charge only a trepass, he made the statement which he offered to prove, then such statement or explanation would not change the legal effect of the original charge. The words as uttered, with the actual intent to charge a felony would still be actionable. We think the testimony should have been admitted.

The judgment must be reversed and the cause remanded.

Judgment reversed.

JONATHAN K. GREENOUGH, *et al.*, Plaintiffs in Error, *v.* EDMUND D. TAYLOR *et al.*, Defendants in Error.

ERROR TO COOK.

In a proceeding against the representatives of a decedent, the holder of a note, an indorsement upon it, written with a pencil, indicating a payment, raises a strong presumption of its truth, which the holder should explain away if it is to be avoided.

In such a case, if demands, which were specified in a mortgage given by the decedent, have been paid by the mortgagee, he should make proof thereof, in a proceeding against the representatives of the decedent, to foreclose the mortgage. Strict proof must be made in a proceeding affecting the rights of infants.

ON the 12th June, 1838, James Whitlock was indebted to Taylor, Breese & Payne, $ 3,537.65, for merchandize sold him in 1836, for which he gave his notes and a mortgage on certain real estate, payable in one and two years, with six per cent., bearing date on the said 12th June, 1838, which debt and notes are recited in the mortgage as due and unpaid. The mortgage also recites that Taylor, Breese & Payne have agreed to pay, for Whitlock, to Peter Pruyne & Co., and to Edward Doolittle, Hall & Lewis, and Kinze, Davis & Hyde, out of the avails of

the property mortgaged, in a ratable proportion, the several amounts due them from Whitlock; and conditioned to be void in case said several debts and claims were paid.

After the execution of the mortgage, Whitlock died, leaving heirs—some minors. The bill alleges that Whitlock, in his life time, and his heirs and representitives since, *neglected* to pay any portion of the purchase money.

That the debt due to them is wholly unpaid, and is still due with the interest—$3,537.65.

Interest from June 12, 1838.

That they	paid	E. Doolittle, - - - - - - - - -	$307 58
"	"	Kinzi, Davis & Hyde,- - -	124 30
		Interest from Oct. 1, 1842.	
"	"	Peter Pruyne & Co., - - - - -	395 31

Interest from April 27, 1842.

The bill was taken as confessed as against the adult defendants. A guardian *ad litem* was appointed for the minor heirs, who filed his answer, and the matter was referred to the master in chancery, who reported the evidence, and that there was due to complainant the sum of $4,117. 51.

The report of the master shows that he had computed the amount due to the complainants, and found due to them the sum of sixteen hundred and three dollars and three cents, for interest, and the further sum of $2,513.48, for principal, making, together, $4,116.51. The report then sets out the mortgage at length, and also the note described in the mortgage, as indorsed in blank, and states that on the back of the note is an indorsement made with pencil, to wit: "Rec'd, Archer, $1,800." The several claims before referred to are also stated, with their respective assignments, and receipts given for their payment by Seth Payne.

This report was confirmed by the court, and a decree entered accordingly by Hugh T. Dickey, Judge, of the Cook Circuit Court.

C. Beckwith, for Plaintiffs in Error.

N. H. Purple, for Defendants in Error.

Caton, J. The proof in this case is entirely insufficient to warrant the master's report of the amount due the complainant, or to justify the decree of the court, as against the infant defendants. In the first place, the words indorsed in pencil on the back of the principal note, "Received, Archer, $1,800," required explanation, before the master refused to allow that as a credit on the note. The maker of the note was dead and the suit was prosecuted against his representatives, a part of whom were infants. This note is produced with this indorsement

upon it, which, if not absolute proof of payment to that amount, raises a strong presumption of payment. It must have been put there while in the hands of the holder, who shaould have the means of explaining it, if it was not intended as evidence of payment. Indeed, it is difficult to conjecture for what other purpose it could have been put here. These infant defendants, as to whom full proof is required, cannot be presumed to know any thing of the transaction, and cannot be expected to explain it. Unexplained, we think the complainant should be held bound by an indorsement, which the law presumes was made by him, or with his consent and direction. Again, several other sums were allowed the complainant as payments made by Taylor, Breese & Co., to Harman and Loomis, to E. Doolittle, and to Kinzie, Davis and Hyde, without a particle of legal proof to sustain the report of the master. He reports copies of papers showing that those parties profess to have received the several amounts reported, of Seth Payne, on account of demands which they held against James Whitlock. But there is no proof that they were just debts against James Whitlock, or that he had directed them to be paid. It is true the mortgage authorized Taylor, Breese & Co., to pay debts of Whitlock to those parties and stood as a security for the repayment of advances thus made. But this did not authorize them to pay any account which those parties might present against Whitlock. If they paid a claim without his express sanction, they necessarily must take the responsibility of proving that the amount was actually due from Whitlock. Again, admitting that those debts were justly due those parties, and that the receipts produced were actually executed by them, of which there is no proof, still the payments do not appear to have been made by Taylor, Breese & Co., who were the parties authorized to make the payments, and indemnified by the mortgage, for the payments thus to be made. Nor do they show that the payments were made of funds belonging to Taylor, Breese & Co., or on their account,or for their benefit. The receipts show that the payments were made by Seth Payne, who, for aught that appears, was a total stranger to the mortgage, and who may as well be presumed to have made the payments, out of his own funds, or of money belonging to Whitlock in his hands, as of the moneys of Taylor, Breese & Co. When we remember that nothing could be taken for granted against these infants, but that every thing was required to be proved, as much as if every thing had been denied by the adult defendants in their answers, it will be apparent that the proof was defective, in every particular, to sustain the decree,

The decree must be reversed, and the suit remanded.

Decree reversed.

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ABATEMENT,

SEE PLEADING.

ACTION.

1. A mortgagor in possession of property exempt from execution, may maintain an action against an officer who improperly levies thereon. *Vaughan* v. *Thompson*, 78.
2. Where a minor makes an exchange of a horse belonging to his father, and the father apparently acquiesces in the bargain for a considerable time after it has been made, he cannot recover the horse his son has exchanged, in an action of replevin. *Hall* v. *Harper*, 82.
3. After a partnership is settled and a balance is struck, if a surplus remains with one copartner, he may be liable to the other in an action for money had and received. *Ridgway* v. *Grant*, 117.
4. Until this is done, one copartner must seek his remedy against the other, by action of account, or by bill in chancery. *Ibid*. 117.
5. In an action for corn sold and delivered, it is for the jury to determine from the evidence the quantity sold, and the plaintiff need not necessarily prove the exact quantity delivered. *Dickerson* v. *Sparks*, 178.
6. The competency of evidence is for the court to decide, and the jury will pass upon it according to its weight and preponderance when it has been submitted to them. *Ibid*. 178.
7. An action for flooding lands is local, and must be brought within the jurisdiction where the lands lie. *Eachus* v. *Trustees of Canal*, 534.

SEE RAILROADS, DAMAGES, CORPORATIONS.

ADMINISTRATOR.

1. An administrator takes no estate, right, title or interest in realty. He takes only a power. *Smith* v. *McConnel*, 135.
2. An administrator cannot in equity obtain relief by the removal of adverse apparent titles to the lands of his intestate, or convert an equitable into a legal title. *Ibid*. 135.
3. Where a sole plaintiff dies and the cause of action survives, an administrator should be substituted in the cause, and all subsequent proceedings should be had in his name. *Thorpe* v. *Starr*, 199.
4. Accruing rent descends to the heirs, and the administrator has no concern with it. *Foltz* v. *Prouse*, 487.
5. Where an administrator shows by his report that he has given an unauthorized preference to creditors in the payment of assets, it is sufficient to justify his removal. *Ibid*. 487.

ADVERSE POSSESSION.

1. Adverse possession is not to be made out by inference, but by clear and positive proof. The possession must be such as to show clearly that the party claims the land as his own, openly and exclusively. *McClellan* v. *Kellogg*, 498.

AGENTS.

1. Corporations are presumed to have agents and servants acting for them in the usual course of dealing within their powers; and their acts should bind their principals. *Ryan* v. *Dunlap*, 40.
2. A mortgagee, being a banking institution by its agent and servants, may do all such acts in respect to the debt as usually may be done in money transactions, verbally or in writing, without regard to the morgage security. *Ibid.* 40.
3. An agent is a competent witness to establish his relation to his principal, and a contract made for him, unless the agent has a direct interest in the result of the suit. *Cadwell* v. *Meek*, 220.
4. If an agent is equally liable to either of the parties, he is a competent witness, and his supposed preferences will affect his credibility only. *Ibid.* 220.
5. To bind the principal by the acts of his agent, he must be fully and fairly informed of all the material facts and circumstances of the transactions. *Ibid.* 220.
6. The usual course of dealing by a party, cannot vary or control a contract. *Ibid.* 220.
7. Power to act generally in a particular business, or a particular course of trade, will constitute a general agency, if this is so indicated, no matter what the private instructions of an agent may be. *Doan* v. *Duncan,* 272.
8. The extent of the authority of an agent should not be confounded with the nature of the agency; but his action will bind his principal, in either case, within the general scope of the authority which the world has been permitted to suppose he possesses. *Ibid.* 572.
9. The authority of an agent may be shown by his acts about the business of his principal, while under direction, or by acquiescence in them when made known to the principal. *Ibid.* 272.
10. The previous course of dealing, by or through an agent, is proper evidence for the jury, as tending to show the existence of an agency and its extent. *Ibid.* 272.
11. The authority to the agent to sell land need not be in writing to take it out of the statute of frauds; and the agent may execute a contract to bind his principal, if his authority was ample, and his conduct was correct. *Johnson* v. *Dodge,* 433.
12. The power to convey land must be in writing, and of equal dignity with the act to be executed. *Ibid.* 433.
13. Where a person purchases property as the agent of another, though he may have the deed or contract of sale made out in his own name, the principal from the moment of the purchase, acquires an equitable title thereto, subject to all the incidents attaching to such an estate, and the agent holds it in trust for the principal. *Follansbe* v. *Kilbreth*, 522.
14. An equitable title derived under such circumstances may be divested out of the *cestui que trust* otherwise than by alienation, before the trust is actually performed. If the trustee has practiced any fraud towards his *cestui que trust*, the latter may, when he discovers the fraud, repudiate the acts and purchase of the trustee and thus divest himself of his equitable title, or he may waive the fraud and claim his rights as *cestui que trust*; or before he has discovered the fraud, he may treat the purchase as his own by selling his equitable title. The *cestui que trust* may also divest himself of his equitable title by laches, fraud, or by agreement. *Ibid.* 522.
15. A court of equity will not permit a *cestui que trust* to show a speculative disposition towards his trustee. If a *cestui que trnst* discovers facts which would give him a right to repudiate the acts of his trustee, and has investigated them, or had a reasonable time to do so, he is bound to declare whether he will avail himself of the right or not, and cannot lie by in a position to affirm the bargain, if a profitable one, and repudiate it if it is a losing one. *Ibid.* 522.
16. Where a *cestui que trust*, having a right to repudiate a transaction, laid by for three years, and suffered his trustee to go on and make payments for the property: *Held*, he was not entitled to relief. *Ibid.* 522.

SEE POWER OF ATTORNEY.

AGREED CASE.

1. The Supreme Court, except in certain specified cases, has only appellate jurisdiction. *Crull* v. *Keenr*, 246.
2. The Supreme Court will not take jurisdiction of a case certified, or an agreed case, unless there has been a final judgment entered in the court below. *Ibid.* 246.
3. A case cannot be heard in the Supreme Court until after final judgment in the court below. *Cunningham* v. *Loomis*, 555.

AMENDMENTS.

1. Upon an application to amend the record of judgment, by making a new party, such party when brought into court, should be ruled to plead, before he is adjudged. Nor should the judgment be entered *nunc pro tunc*, so as to give it any retro-active effect. *Loomis* v. *Francis*, 206.

APPEALS.

1. The application for a certiorari to take an appeal from a judgment rendered before a justice of the peace, must show the facts required by the statute; the allegations of the petitioner showing his conclusion will not be sufficient. *Russel* v. *Pickering*, 31.
2. Clerks of the Circuit Court are not bound to take appeals on Sunday. *Ibid.* 31.
3. Taking an appeal, executing a bond, &c., are in the nature of process to remove a case from an inferior to a superior court; and if these should be irregular, and objection is not made in the first instance after appearance, the irregularity is waived. *Mitchell* v. *Jacobs*, 236.
4. An appearance in a case, except to object to the process or service, is a waiver of all irregularity in them. *Ibid.* 235.

ASSIGNMENT.

1. A certificate of sale of lands is assignable, and title may pass under an assignment of it so defective as would not enable the holder to compel the officer to execute a deed, yet if he does execute one, it will be good. *McClure* v. *Engelhardt*, 47.
2. A note made payable to A. B. or bearer, cannot be transferred by mere delivery, so as to vest the legal title in the bearer. *Roosa* v. *Crist*, 450.
3. The same rule will hold, although the note may have been transferred by delivery in a State where such transfer would carry the legal right with it. *Ibid.* 450.

ATTACHMENT.

1. Where an affidavit for an attachment alleges that a defendent is about to remove his property from this State to the injury of the plaintiff, and this allegation is traversed by a plea in abatement, it is not error on the trial of such a plea to instruct, that unless the jury believe, from the evidence, that the defendent was at that time about to remove his property as alleged, that they should find for the defendant. *Ridgway* v. *Smith*, 33.
2. Such a plea should conclude to the country, and a common similiter forms the issue; the burden of proof is on the plaintiff to maintain the allegation of his affidavit; and if the verdict is for the defendant, the writ is quashed, and he is ont of court. *Ibid.* 33.
3. The surety in a forth-coming bond, cannot plead that the property levied upon by an attachment, was not the property of the defendant, thereby to discharge himself from the obligation of the bond. *Gray* v. *MacLean*, 404.
4. A bond, under the provisions of the twenty-ninth section of the attachment act, conditioned for the payment of the judgment, may be assigned, as well as a bond given for a return of the property, under the ninth section. *Carpenter* v. *Hoyt*, 529.

ATTORNEY.

1. The attorney should state in his precipe, for a writ of error, the names in full of all the parties to the controversy, and their position in the record. *Napper* v. *Short*, 119.
2. In matters of gift or contract between client and attorney, the greatest fairness is exacted, and the burden of proof, as to the rectitude of the transaction, is on the latter; and upon failure to make proof, equity treats it as one of constructive fraud. *Jennings* v. *McConnel*, 148.
4. Where real estate is conveyed to an attorney, to save him harmless, as against his liability as bail, without an intention to sell, an actual sale by the attorney will not change the character of the proceeds, but these will descend to the heirs, and do not go to the administrator. *Ibid.* 148.
4. The appointment of one party to act for another, where it is coupled with an interest, is irrevocable. The interest, coupled with the power, must be in the thing itself, upon which the power is to operate, or the power must be created upon a valuable consideration. *Bonney* v. *Smith*, 531.
5. Where the person empowered to act for another has only an interest arising out of its execution, as in the proceeds as for compensation, the power is revocable. But if the power is expressed to be irrevocable, and the attorney has an interest in its execution, it will remain irrevocable. *Ibid.* 531.

See POWER OF ATTORNEY.

ARBITRATION. AWARD.

1. To authorize a justice of the peace to enter a judgment upon an award, it must be made in a suit pending before him, upon a reference by the parties. *Weinz* v. *Dopler*, 111.
2. Judgment cannot be entered in courts of record upon awards, unless the submission to arbitrators is made in pursuance of the statute. *Ibid.* 111.
3. An award, made upon a submission which is not in pursuance of the statute, must be enforced by common law remedies. *Ibid.* 111.
4. Upon a reference to arbitrators, by order of court, of matters in a pending suit, by agreement, judgment should be entered upon the award, as in a case of verdict by a jury. *Thorpe* v. *Starr*, 199.
5. Separate signatures to a submission to arbitration does not change the relation of co-partners. *Haywood* v. *Harmon*. 477.
6. Whether an award is made within a reasonable time, within the intention of the parties, is a question of the jury. *Ibid.* 477.
7. Notice to one of several co-partners, where they have signed a submission separately, is sufficient. *Ibid.* 477.
8. A substantial statement of an award in a declaration in assumpsit, showing the obligation to pay money, is sufficient. *Ibid.* 477.
9. All reasonable intendments will pe indulged in support of an award, where no fraud, corruption or unfairness is shown. *Ibid.* 477.
10. If an award is obtained by fraud, or is, for any cause, vicious, it may be set aside upon application in the original suit without recourse to chancery. *Wiley* v. *Platter*, 538.

BAIL.

1. Where a sheriff, in a criminal proceeding, takes bail for a larger sum than is directed by the court, the recognizance is a nullity. *Waugh* v. *People*, 561.

See RECOGNIZANCE.

BAILMENT.

1. A bailee without reward, is required to use such care and discretion in the performance of a duty, as may be expected of all men of common prudence in their own affiars; and will be liable only for bad faith or gross negligence. *Skelley* v. *Kahn*, 170.
2. If he undertake to convey or pay money, he is bound to perform his undertaking, with the care and responsibility incident to such an obligation. *Ibid*. 170.
3. The question of negligence, is a question of fact, to be passed upon by the jury. *Ibid*. 170.
4. Guests at an inn, although they know that an iron safe is provided for that purpose, are not bound to deposit their money therein or with the innkeeper. *Johnson* v. *Richardson*, 302.
5. Innkeepers are bound to protect the property of their guests, and in case of loss or injury to it, can only absolve themselves from liability by showing that they were not in fault. The burden of the proof is upon the innkeeper. *Ibid*. 302.
6. If the guest should unnecessarily expose his money to danger, or carry too large a sum with him, a different rule might prevail. *Ibid*. 302.

SEE INNKEEPER.

BANK OF ILLINOIS.

1. Under the act of the 25th February, 1843, the officers of the Bank of Illinois had all necessary powers to settle up and close up its affairs, by receiving and releasing debts due to it. *Ryan* v. *Dunlap*, 40.
2. The power given the trustee to close up the affairs of the Bank of Illinois, by making such settlements and compromises as he might deem most advantageous, is subject to the revision and control of a count of equity; which will inquire, not only into the good faith, but into the propriety of his acts; revoking or confirming them at its discretion. *Morris* v. *Thomas*, 112.

BILL OF EXCEPTIONS.

1. Proceeding to trial without a formal issue, is, after verdict, treated as a waiver of the plea or issue. *Armstrong* v. *Mock*, 166.
2. Exceptions to the refusal of the court to give instructions, must be taken at the trial, and this must be shown by the record, or this court will not examine them. *Ibid*. 166.
3. Where a bill of exceptions does not show what the question propounded to a witness was, it is difficult for this court to say that the Circuit Court erred in refusing to permit the witness to answer it. *Warner* v. *Manski*, 234.
4. The statute of 1853, regulating practice in certain courts in Cook county, does not intend to make the service of a copy of declaration and rule to plead, a part of the record; these should be incorporated into a bill of exceptions if objection to them is taken. The absence of them from the record will not be taken as evidence that they were not served. *Iglehart* v. *Pitcher*, 307.
5. A bill of exceptions, which shows that all the evidence in the case is set forth in it, will be sufficient. *Reed* v. *Bradley*, 321.

BILL OF EXCHANGE.

1. A plea which avers that a bill of exchange was drawn to a bank in Illinois, made payable in New York, with express reference to the laws of New York, but bearing twelve per cent. interest, besides the price of exchange between the two places, and was therefore void by the statutes of New York setting them out, is not an immaterial plea, as such a plea, if true, presents a good defence to a suit on the bill. *McAllister* v. *Smith*, 328.

SEE PROMISSORY NOTE.

BLACK LAWS.

1. In a proscution under the act to prevent the immigration of free negroes into this State, it is erroneous to instruct the jury to disregard the statements of the negro, if such were contradictory of his acts, as to his intention to be a resident; both should be considered, giving such weight to each as they might deserve. *Torrey* v. *People*, 105.
2. The affidavit for an arrest under this statute. should aver that the negro has come into the State within the time prohibited; and he has a right to demand the nature and cause of the accusation against him, and if this does not show an offence against the law he should be discharged. *Ibid.* 105.

BOND.

1. A bond, under the provisions of the twenty-ninth section of the attachment act, conditioned for the payment of the judgement, may be assigned, as well as a bond given for a return of the property, under the ninth section. *Carpenter* v. *Hoyt*, 529.

BOUNDARIES.

1. Where A. and B. owned adjoining premises, and fixed a corner, as indicating the boundary, between them, and A. afterward built a house, which, if the corner agreed upon was the true one, would have been upon his own land, but a line was run by the county surveyor, which placed the house upon the land of B., whereupon A. bought the strip of land, so as to include his house, and then filed his bill to recover back his purchase money, and to rescind the sale, alleging that the survey by the county surveyor was wrong, and that the corner agreed upon in the first instance was the true boundary; *Held*, that this was not such a case of mistake of facts as would authorize a decree in favor of A., who was seeking an undue advantage of his bill. *Biehl* v. *Glieck*, 35.

BOUNTY LANDS.

1. Congress has power and jurisdiction over land granted as bounties to soldiers of the war of 1812, for the purposes of protection, disposition and investiture of title, so long as the title remains in the United States. *Ross* v. *Buckland*, 309.
2. The limitations and prohibition sof the act of Congress of 1812, as also the act of 1842, in relation to bounty lands, restricting the sale and transfer of such lands, are constitutional, and do not infringe the rights of the States. All assignments or conveyances of such bounty lands, or of warrants therefor, prior to the issuing of the patent, are void. *Ibid.* 309.

CASHIER.

SEE AGENT.

CERTIORARI.

1 The application for a certiorari to take an appeal from a judgment rendered before a justice of the peace, must show the facts required by the statute; the allegations of the petitioner showing his conclusion will not be sufficient. *Russell* v. *Pickering*, 25.
2. Clerks of the Circuit Conrt are not bound to take appeals on Sunday. *Ibid.* 25.

CESTUI QUE TRUST.

SEE AGENT, TRUSTEE.

CHANCERY.

1. Where A. and B. owned adjoining premises and fixed a corner, as indicating the boundary between them, and A. afterward built a house, which, if the corner agreed upon was the true one, would have been upon his own land, but a line was run by the county surveyor, which placed the house upon the land of B., whereupon A. bought the strip of land, so as to include his house, and then filed his bill to recover back his purchase money, and to rescind the sale, alleging that the survey by the county surveyor was wrong, and that the corner agreed upon in the first instance was the true boundary: *Held*, that this was not such a case of mistake of facts as would authorize a decree in favor of A., who was seeking an undue advantage by his bill. *Biehl* v. *Glick*, 35.

2. A petition for the assignment of dower is a chancery proceeding; and the record should show the evidence upon which the decree was founded; and, where the answer to the petition admits the right, and no evidence is furnished of the release of it, this court will presume that a decree which does not assign dower, is erroneous. *Osborne* v. *Horine*, 92.

3. Parties to suits in chancery should be described by their proper names, if known; if their names are unknown, they must be made parties in the manner prescribed by the forty-first section of the twenty-first chapter of the Revised Statutes. *Kirkham* v. *Justice*, 107.

4. In chancery proceedings a trustee may state facts explanatory of a transaction, and interpose denials and objections, with a view to negative his own transactions as charged, and to require full proofs of complainant. *Morris* v. *Thomas*, 112.

5. Although a remedy at law may exist, yet if a complaint is one of equitable jurisdiction, chancery will sometimes take cognizance of it, where its aid is more effectual. *Ibid.* 112.

6. In matters of trust funds, &c., courts of law might enforce bargains which equity would set aside, as being in violation of the trust. *Ibid.* 112.

7. Equity will not enforce an agreement made by a trustee in gross violation of his trust to take land in satisfaction of a judgment. *Ibid.* 112.

8. The holder of a legal title not in actual possession, cannot, as a general rule, maintain a bill to quiet his title, and compel a relinquishment of adverse claims. Equitable titles, which cannot be enforced at law, may stand differently. *Smith* v. *McConnel*, 135.

9. An administrator cannot in equity obtain relief by the removal of adverse apparent titles to the lands of his intestate, or convert an equitable into a legal title. *Ibid.* 135.

10. A court of equity has general powers over estates, administration, &c. *Jennings* v. *McConnel*, 148.

11. A mistake in fact may be a ground for equitable jurisdiction, if the mistake is made to appear satisfactorily. But this does not extend to mistakes in the law of the contract, or in the intention of one of the parties, or the mistakes of legal terms agreed upon between the parties, without fraud. *Ruffner* v. *McConnel*, 212.

12. The remedy by injunction to prevent the obstructing of a public highway, is effective, and where the facts are easy of ascertainment, and rights resulting therefrom freed from difficulty, equity will grant relief, at the suit of the public, or of the citizen having an immediate interest therein. *Green* v. *Oakes*, 249.

13. Although the statute of limitations may not in terms apply to courts of equity, yet by analogy equity will act upon the statute and will refuse relief where the bar is complete at law. *Manning* v. *Warren*, 267.

14. A party has a right to the same remedies to enforce the collection of a decree in chancery, for a specific sum of money, that he has to enforce a judgment at law; and he may remove fraudulent conveyances out of the way of his execution. *Weightman* v. *Hatch*, 281.

15. A bill may be filed to remove fraudulent incumbrances or conveyances, as soon as judgment is obtained, without proceeding to obtain satisfaction out of other property. *Ibid.* 281.

16. Equity will decree a specific performance of a contract for the sale of land, if the proof supports a transaction which is fair. *Johnson* v. *Dodge*, 433.

17. Two instruments executed as parts of the same transaction, whether at the same or a different time, will be construed together. *Stacy* v. *Randall*, 467.
18. Obligations which are exhibited as collateral evidences of indebtedness to support a bill for foreclosure, should be established by proof; they do not come within the 14th Section of the Practice Act. *Ibid.* 467.
19. Exhibits and proofs in support of a decree should be preserved in the record. *Ibid.* 467.
20. To avoid expense and the encumbrance of a record with proofs of matters that might be admitted, the court may compel an admission or denial of all such allegations as require proof. *Ibid.* 467.
21. A court may refuse the continuance of a chancery cause where it appears there is a want of diligence in the party asking the continuence. *Wiley* v. *Platter*, 538.
22. A party cannot obtain a continuance, where the original case is ripe for hearing, by filing a cross-bill, and having the same answered, without showing sufficient cause for delay. *Ibid.* 538.

CHATTEL MORTGAGE.

1. If a debtor has no more property in his hands than the law exempts from execution, he is not required to turn out one piece of it for an officer to levy upon, as the condition upon which he may retain the residue. *Vaughan* v. *Thompson*, 78.
2. A mortgage of property by a person who does not hold more than the amount exempted by law, is not in fraud of creditors. *Ibid.* 78.
3. Property exempted by law may be sold or exchanged by the debtor, without subjecting it or its equivalent to execution. *Ibid.* 78.
4. A mortgagor in possession of property exempt from execution, may maintain an action against an officer who improperly levies thereon. *Ibid.* 78.
5. Where a third person, after execution issued, pays off a mortgage given by the judgment debtor, and takes possession of the goods and sells them, they will still be subject to the execution. The satisfaction of the mortgage by the third party did not invest him with any interest in the mortgage debt or the mortgaged property. *Woods* v. *Gilson*, 218.

CIRCUIT CLERKS.

1. Circuit clerks assuming to discharge the duties of that office without proper qualifications, will be held to the same accountability as if they were qualified, but knowingly neglected their duties. *Napper* v. *Short*, 119.

CIRCUIT COURTS.

1. Records from the Circuit Courts should be legibly written and the proceedings be stated in proper consecutive order. *Napper* v. *Short*, 119.

CLAIM AND COLOR OF TITLE.

1. Claim and color of title, within the meaning of the statute of limitations, is the same as that given to those words by the courts, when applied to support an adverse possession. *McClellan* v. *Kellogg*, 498.
2. Color of title may commence without any writing; and, if founded upon a writing, such writing need not show on its face a *prima facie* title, but may be good as a foundation for color, however defective otherwise. *Ibid.* 498.
3. Adverse possession is not to be made out by inference, but by clear and positive proof. The possession must be such as to show clearly that the party claims the land as his own, openly and exclusively. *Ibid.* 498.

COMMON CARRIERS.

1. The driver of a stage coach, in an action against the proprietor by a passenger for injuries sustained, by upsetting the coach, may testify as to its condition at the time of the accident. *Frink* v. *Potter*, 406.
2. A stage proprietor will be liable for injuries to a passenger, although it should appear that the injuries resulted from the breaking of an axle, from the effects of frost. *Ibid.* 406.
3. Carriers of passengers are held to strict care and vigilance, and are liable for the consequences of slight neglect or want of care. The law imposes upon them the duty of carrying passengers safely, so far as by human agency, in view of the particular mode adopted and all attending circumstances, is reasonably practicable. *Ibid.* 406.
4. If the carrier knew, or might have known by the exercise of extraordinary care and attention, that danger would result from using a coach, in the manner and under the circumstances to which it was applied, and this danger could have been avoided, he will be liable. *Ibid.* 406.
5. A passenger in or upon a stage coach may leap from it. to extracate himself from peril, occassioned by the fault of the carrier, if he does so without rashness. *Ibid.* 406.
6. In an action on the case for injuries against several, as stage proprietors, the plaintiff need not prove that all the defendents were joint owners of the stage line. *Ibid*.506.
7. The rules applying to actions *ex delicto* determine the rights of parties, where the gist of the action is a breach of duty, not depending upon a contract, and the allegations show that the law raises the duty by reason of the calling of the defendent. *Ibid*. 406.
8. Common carriers of passengers are not insurers against all injury or damage. Nor does the law require of them unreasonable or impracticable vigilance. *Ibid*. 406.
9. A passenger in a railroad car need only show that he has received an injury, to make a *prima facie* case against the carrier; the carrier must rebut the presumption, in order to exonerate himself. *Galena and Chicago Union R. R. Co.* v. *Yarwood*, 509.
10. Negligence is a question of fact, which the jury should pass upon. *Ibid*. 509.
11. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for them and leaves the circumstances of their conduct to the jury. *Ibid*. 509.

See RAILROADS.

CONSTRUCTION OF STATUTES.

1. The act repealing the Municipal Court of the city of Chicago was absolute and unqualified. *Newkirk* v. *Chapron*, 344.
2. Courts must look to the act repealing, rather than to the repealed act, to fix upon the powers and duties which remain in existence. *Ibid*. 344.

CONTESTED ELECTION.

1. In contested elections, the intention of the voters in casting their ballots should control; and effect must be given to that intention. *Akin* v. *Matteson*, 167.
2. In this State, "police magistrates" and "police justices" are equally within the meaning of the constitution, and the intention of the law, passed for the better government or towns and cities, approved February 28th, 1854; and votes given for persons to fill those offices, under either designation, should be counted and returned in favor of the persons for whom they have been cast. *Ibid*. 167.
3. The right of a party to exercise an office, should be determined by quo warranto. *Ibid*. 167.

CONTRACT.

1. Mutual demands arising out of the same subject matter, although one arises *ex contractu* and the other *ex delicto*, capable of being balanced against each other, may be adjusted in one action. *Brigham* v. *Hawley*, 38.
2. Where work is done under a special contract fixing the price to be paid, the contract will control the price, whether it be reasonable or not. The contract must govern where it can be made to apply. *Ibid.* 38.
3. Each count of a declaration must truly set out the contract and cause of action, and, if the evidence does not sustain the count, the actions fails; a party cannot, in any subsequent pleading, change the contract so as to present a new or different cause of action. *Hite* v. *Wells*, 88.
4. Parties may make valid contracts, though not in writing, to pay the debt of, or services rendered for, another; but the new or original contract must be declared on; and this must be founded upon a new and original consideration moving to the party making the promise, and the debt of the original debtor must not be the consideration for the promise. *Ibid.* 88.
5. The statute of frauds is the plain law of the land, and it is the duty of courts to enforce its provisions. The statute requires the promise to be in writing, and the common law makes a consideration necessary to the legal obligations of the promise. *Ibid.* 88.
6. A. B., a land officer, employed C. D. as his clerk, who was to receive for his services one-half the salary and compensation allowed to A. B.; this compensation was increased retrospectively: *Held*, that C. D. was entitled to one-half the increased compensation. *Adair* v. *Maxwell*, 98.
7. Where an agreement was made between A. and B., that the latter was to haul railroad ties, with two teams, for six months, and A refused to furnish ties for a part of that time, so that B. could not work his teams: *Held*, that B. was entitled to recover damages, and that a receipt at the end of the first month, in full of all demands to date, did not preclude B. from recovering damages for the residue of the time, the contract still remaining between the parties. *Lucas* v. *Driver*, 109.
8. A contract for wood " now delivered and being hauled and piled," " to be piled eight feet high, and delivered when called for," will be understood as identifying the wood, but not as then delivering it, so as to change the property and possession without some further act. *Illinois Central R. R. Co* v. *Cassell*, 389.
9. The meaning of the contract must be gathered from itself; and is not to be explained by parol. *Ibid.* 389.
10. Juries find the fact that a contract was made; but the intents and obligations of it they find under the instructions of the court; and any mistake in such instructions is error. *Ibid.* 389.
11. Where a contract is for a certain quantity, it cannot be changed by any ulterior understandings of one of the parties. *Ibid.* 389.
12. The authority to the agent to sell lands need not be in writing to take it out of the statute of frauds; and the agent may execute a contract to bind his principal, if his authority was ample, and his conduct was correct. *Johnson* v. *Dodge*, 433.
13. The power to convey land must be in writing, and of equal dignity with the act to be executed. *Ibid.* 433.
14. Equity will decree a specific performance of a contract for the sale of land, if the proof supports a transaction which is fair. *Ibid.* 433.
15. Where a party is bound by contract to perform certain work, it is presumed that if any part of it is to be omitted, there should be a reasonable deduction from the contract price for the work omitted, unless a different intention is shown by the evidence. *Holmes* v. *Stummel*, 455.
16. The main inquiry, under the statute of frauds, where one person is called upon to pay the debt of another, is, whether promise is an original and independent, or, whether it is collateral to, and dependent upon, the debt or liability of another. *Eddy* v. *Roberts*, 505.
17. If the liability of the original debtor continues, the promise of another to pay his debt should be in writing. *Ibid.* 505.

18. A consideration is necessary to support all promises, and, without it, no action can be maintained upon the promise, whether it is in writing or nct. *Ibid.* 505.
19. Where one enters into a simple contract with another, for the benefit of a third person, such third person may maintain an action for the breach, and such a contract is not within the statute of frauds. *Ibid.* 505.
20. The promise of a person to deliver grain on a certain time at a certain place, to be paid for by another at such times as the same shall be delivered, are dependent undertakings; the obligations to deliver and to pay are concurrent; and in order to recover for non-delivery, a party must aver his readiness to receive and pay for the grian. *Hough* v. *Rawson*, 588.
21. Slight evidence of a readiness to accept and pay, might be held sufficient. *Ibid.* 588.
22. If the legal effect of a contract is the same as the promise alleged, it will not be a material variance. *Ibid.* 588.

CO-PARTNERS.

1. After a partnership is settled and a balance is struck, if a surplus remains with one co-partner, he may be liable to the other in an action for money had and received. *Ridgway* v. *Grant*, 117.
2. Until this is done, one co-partner must seek his remedy against the other, by action of account, or by bill in chancery. *Ibid.* 117.
3. The affidavit of one of several defendants, denying the existence of a partnership, or the execution of the instrument sued on, renders it necessary, as to him, that proof of partnership, or of the hand writing, should be made. Co-defendants are not entitled to any direct benefit from such affidavit. *Davis* v. *Scarritt*, 202.
4. One partner has not the power to convey the realty of the firm by deed or assignment, nor make contracts about it specifically enforcible against the others. *Ruffner* v. *McConnel*, 212.
5. Lands belonging to a partnership are liable for payment of its debts, and go into joint account on settlement of profit and loss; but they must be conveyed in the mode recognized for the transfer of real estate. *Ibid.* 212.
6. Where two are sued as co-partners, and the general issue is filed, not sworn to, it is not error to exclude evidence tending to prove they were not partners. *Haywood* v. *Harmon*, 477.
7. Separate signatures to a submission to arbitration does not change the relation of co-partners. *Ibid.* 477.
8. Whether an award is made within a reasonable time, within the intention of the parties, is a question for the jury. *Ibid.* 477.
9. Notice to one of several co-partners, where they have signed a submission separately, is sufficient. *Ibid.* 477.
10. Where it is agreed between A. and B. that B. shall enter into business with A., and receive a specified sum per annum as his share of the profits, upon condition that B. shall devote his whole time to the business, they are to the world co-partners; and sureties to a bond, conditioned for the faithful conduct of a servant, who was employed by A. before his association with B., were held to be released as against A. and B., who continued the servant in their joint service, such servant having become delinquent while in such joint service. *Barnett* v. *Smith*, 565.

CORPORATIONS.

1. Corporations are presumed to have agents and servants acting for them in the usual course of dealing within their powers; and their acts should bind their principals. *Ryan* v. *Dunlap*, 40.
2. The manufacture of lumber, flour and meal is within the meaning of the act of 1849, authorizing "the formation of corporations for manufacturing, agricultural, mining, or mechanical purposes." *Cross* v. *Pinckneyville Mill Co.* 54.

3. A certificate of the Secretary of State to the effect that a duplicate of the certificate of organization of a company under the above act, had *not* been filed in his office, is not evidence. Nor does it seem that the omission to file such certificate would defeat the organization. *Ibid.* 54.
4. Payment of subscriptions to stock made before the organization of a company under the above act of 1849, will be enforced, if the organization is afterward perfected. *Ioid.* 54.
5. Where stock owned by the State, in a railroad corporation, was legally sold and a certificate thereof given, assigned by the Governor, by indorsement thereon, the purchaser and assignee of such stock had a right to vote thereon for the election of Directors, unless some statute of the State or by-laws of the company prescribed some other mode of conveyance or additional formality. *People ex rel.* v. *Devin*, 84.
6. An action for damages resulting from negligence will lie against a municipal corporation, if the duty to make repairs is fully declared, and adequate means are not within the power of the corporation to perform the duty. *Browning* v. *City of Springfield*, 143.
7. Where an instrument made by a corporation is duly executed by one having authority, the seal affixed will be presumed to be the proper seal, unless the contrary is shown. *Phillips* v. *Coffee*, 154.
8. Where a corporation is authorized to execute a mortgage, and the exigency of its affairs and its interests demanded that one should be made, of which it should be the proper judge, it will be sustained. *Reed* v. *Bradley*, 321.
9. The seal of a corporation is *prima facie* evidence of the assent of the company. *Ibid.* 321.
10. A mortgagee of a telegraph company who has advanced money in good faith, to organize and maintain its business, having taken the management of its affairs upon himself, to secure the repayment of his loan, can maintain replevin for the mortgaged property ; although a circular may have been issued in the name of the company, soliciting business, he could only use the franchise in the name of the corporation, and such circular would not conclude his rights. *Ibid.* 321.
11. A subscription to stock may be collected, although amendatory acts have been supsequently passed, affecting the original charter, by extending its powers. *Peoria and Oquawka R. R. Co.* v. *Elting*, 429.
12. Remedy by action to recover subscriptions is not impaired by the fact that the company has the power to declare a forfeiture of stock. *Ibid.* 429.

See RAILROADS.

COSTS.

1. In a case for divorce, where a bill is dismissed, it is erroneous to enter a judgment against the wife for costs. *Thatcher* v. *Thatcher*, 66.
2. Costs must depend not upon the merits of the case as it was presented, but as it appeared at the final hearing. *Turley* v. *County of Logan*, 151.
3. If bail, by means of a capias on the indictment found, can produce the principal, so as to procure their own discharge from *scire facias*, by a surrender of the principal, the costs under the capias are not properly chargeable as costs under the proceedings by *scire facias*. *People* v. *Phelps*, 200.

COUNTY COURTS.

1. The judgments of county courts are final and conclusive, as to all matters within their jurisdiction. And these courts have all the judicial powers formerly vested in the probate courts, or probate justices of the peace. *Hanna* v. *Yocum*, 387.
2. The act in relation to changes of venue, applies to parties and causes in the Lake County Court. *Searls* v. *Munson*, 558.
3. An application for a continuance of a cause in that court, should be granted, as it would be in the Circuit Court. *Ibid.* 556.

CRIMINAL LAW.

1. An indictment which declares the offence to be, the selling "of one gill of spirituous liquors," being, &c., less than one quart, is sufficiently certain under the license laws of the State. *Zarresseller* v. *People*, 101.

2. An indictment for a violation of the license laws, which concludes "against the peace and dignity of the people of the State of Illinois," is within the meaning of the constitution. *Ibid*. 101.

3. In cases of misdemeanor, if the defendent waives a jury and puts himself upon the court for trial, he cannot assign for error that the court tried the issue. *Ibid*. 101.

4. When statutes create offences, indictments should contain proper and sufficient averments to show a violation of the law, and to enable the accused to meet the charge; beyond this, particularity of specification, may furnish a means of evading the law, rather than defending against an accusation. *Cannady* v. *People*, 158.

5. In an indictment for selling whisky in a less quantity than one gallon, the name of the purchaser, or an averment that he was unknown, is not necessary. *Ibid*. 158.

6. The general averment of an illegal sale is sufficient; the kind of liquor sold need not be specified. *Ibid*. 158.

7. The lien, created by the criminal code, upon the real and personal property of convicts, takes effect from and during the entire day on which the arrest is made or the indictment found. *Hitchcock* v. *Roney*, 231.

8. A change of venue will not effect any change in the operation of this lein; which is not limited to the county in which the judg ment is rendered. *Ibid*. 231.

9. A stranger to the record and proceedings in such a case cannot interfere, by motion, to quash a levy, sale and execution, had at the instance of the people. *Ibid*. 231.

10. If the owner of goods, alleged to have been stolen, voluntarily parts with the possession and title, then neither the taking or conversion is felonious. But if he parts with the possession, expecting that the identical thing will be returned, or that it shall be disposed of on his account, or in a particular way, then the thing may be feloniously converted, and the bailee be guilty of a larceny. *Welch* v. *People*, 339.

11. The question in such case is, did the owner *voluntarily* part with the legal title to the thing, and did it become vested in the accused ? *Ibid*. 339.

12. After the case has been declared closed by both parties, it is discretionary with the court, and not assignable for error, whether the case shall be again opened, and further evidence offered to the jury. *Ibid*. 339.

13. To constitute the offence of resisting an officer, he must be authorized to execute the process, which must be a legal one; and it must be so alleged and proved. *Bowers* v. *People*, 373.

14. The averment that the officer was in the due execution of his duty, as constable, attempting to serve a legal process, will sufficiently declare the validity of the process, and the official authority to serve it. *Ibid*. 373.

15. A sentence to imprisonment in the Bridewell of the city of Chicago is legal. *Ib*. 373.

16. An indictment for incest which charges that the acts were upon the person of A. B., the said A. B. then and there being the daughter of him, the said C. D., sufficiently avers the relationship between the parties. *Bergen* v. *People*, 426.

17. The admission of the father, that the person with whom he had sexual intercourse, was his daughter, by a former wife, was competent evidence. *Ib*. 426.

18. It is not proper to permit proof of what a living but absent witness testified to on a former trial of the same cause. *Ib*. 426.

19. The confession of a party accused of crime, which is uncorroborated by any circumstance inspiring belief in its truth, arising out of the conduct of the accused, or otherwise, is insufficient to convict. *Ib*. 426.

20. If a sheriff takes bail in a larger sum that is directed by the court, the recognizance is a nullity. *Waugh* v. *People*, 561.

See INDICTMENT, HIGHWAYS.

DAMAGES.

1. Where an agreement was made between A. and B., that the latter was to haul railroad ties, with two teams, for six months, and A. refused to furnish ties for a part of that time, so that B. could not work his teams; *Held*, that B. was entitled to recover damages, and that a receipt at the end of the first month, in full of all demands to date, did not preclude B. from recovering damages for the residue of the time, the contract still remaining between the parties. *Lucas* v. *Driver*, 109.

2. An action for damages resulting from negligence will lie against a municipal corporation, if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform the duty. *Browning* v. *City of Springfield*, 143.

3. A stage proprietor will be liable for injuries to a passenger, although it should appear that the injuries resulted from the breaking of an axle, from from the effect of frost. *Frink* v. *Potter*, 406.

4. Carriers of passengers are held to strict care and vigilance, and are liable for the consequences of slight neglect or want of care. The law imposes upon them the duty of carrying passengers safely, so far as by human agency, in view of the particular mode adopted, and all attending circumstances, is reasonably practicable. *Ib.* 406.

5. If a carrier knew, or might have known, by the exercise of extraordinary care and attention, that danger would result from using a coach, in the manner and under the circumstances to which it was applied, and this danger could have been avoided, he will be liable. *Ib.* 406.

6. A passenger in or upon a stage coach may leap from it, to extricate himself from peril, occassioned by the fault of the carrier, if he does so without rashness. *Ib.* 406.

7. In an action on the case for injuries against several, as stage proprietors, the plaintiff need not prove that all the defendants were joint owners of the stage line. *Ib.* 406.

8. The rules applying to actions *ex delicto* determine the rights of parties, where the gist of the action is a breach of duty, not depending upon a contract, and the allegations show that the law raises the duty by reason of calling of the defendent. *Ib.* 406.

9. Common carriers of passengers are not insurers against all injury or damage. Nor does the law require of them unreasonable or impracticable vigilance. *Ib.* 406.

10. The law makes a distinction in the liability of railroad carriers, between injuries to persons and property transported, and injuries to persons and property coming upon a railroad track, without the intervention of the company. *Central Military Tract R. R. Co.* v. *Rockafellow*, 541.

11. Railroads are not common highways in the sense of public wagon roads. *Ib.* 541.

12. In passing public highways and streams, where others have common rights, railway companies must exercise the same care, and their liability will correspond with that of all others passing and doing business on them. *Ib.* 541.

13. In an action against a railroad company for killing an animal, it is erroneous to charge the jury, that if the animal was running at large, and went upon the road where the same was unfenced, that it was lawfully there, and if killed by any want of ordinary care and diligence, then the railroad is liable for the destruction; or that if said animal was killed, because the engineer in charge of the train was not keeping a proper look out in advance of the engine, without regard to his other duties, then it was such negligence as wluod make the company liable. *Ib.* 541.

14. A railroad company has a right to run its cars upon its track, without obstruction, and an animal has no right upon the track without consent of the company; and if suffered to stay there, it is at the risk of the owner of the animal. *Central Military Tract R. R. Co.* v. *Rockafellow*, 541.

15. An allegation of negligence in the management of the train, is not supported by proof that too heavy a train was fastened to the locomotive. *Ibid.* 541.

See RAILROAD.

DECEIT.

1. Where a judgment debtor agrees to give notes and mortgages to secure his creditors, representing his title to the property to be mortgaged, as being clear and indisputable, and they receive the mortgages, relying upon his statement, but ascertaining subsequently that they have been deceived, they may refuse to acquiesce in such arrangement, and issue execution on their judgments, and he cannot restrain them. *Jones* v. *Smith*, 263.

DEDICATION.

1. Where a public road has been used for twenty years, the owner of the land over which it passes acquiescing therein, the law presumes a dedication. *Green* v. *Oakes*, 249.

A highway may be established and proved by prescription, by dedication, and by laying out the same as directed by statute. *Alvord* v. *Ashley*, 363.

The public is an ever existing body, capable of taking as grantee for public uses; and its interests are a sufficient consideration to support the grant, which may be manifested by express or implied consent, from aquiescence in the user; and the user does not depend upon any fixed period of time. *Ibid.* 363.

4. The dedication is a mixed question of law and fact, as also the quantity of land included by it, to be submitted to the jury. *Ibid.* 363.

5. The actual use and repairing of a highway by the public, is evidence of its acceptance for such purpose. *Ibid.* 363.

6. A party will be estopped from denying a dedication, by the acquiescence in it of his grantors. *Ib.* 363.

7. The jury may infer and find the width of a road, or a dedication of so much of it as was actually used. *Ib.* 363.

8. On the trial of an indictment for obstructing a highway, the existence of the highway may be proved by prescription from user. And unless it is assumed by the pleadings, documentary proof of the location of the highway is not indispensable. *Dimon* v. *People*, 416.

9. A highway may be legally laid out and established by public use, and recognition of it by the proper authorities, and by acquiescence; and this, without regard to governmental or individual ownership of the land across which the road runs. *Ib.* 416.

See HIGHWAYS AND STREETS.

DEEDS.

1. A purchaser at sheriff's sale, who is not a party to the proceedings, having a good deed, will not be defeated in his title by any defect or irregularity; he relies upon the judgment, levy and deed; all other questions are between the parties to the judgment and officer. *Phillips* v. *Coffee*, 154.

2. Such a purchaser has nothing to do with the return of the officer to the execution. *Ib.* 154.

3. A misrecital of the judgment in the deed will not destroy the title. *Ib.* 154.

4. A stranger to the proceedings cannot collaterally question the regularity of them. *Ib.* 154.

DEFAULT.

1. A default should not be taken upon publication, without a return of summons "not found." *Cost* v. *Rose*, 276.
2. Motions to set aside defaults are addressed to the sound discretion of the court, and that discretion will not be interfered with, unless it is greatly abused. *Greenleaf* v. *Roe*, 474.

See PRACTICE.

DEMURRER.

1. A demurrer to a good plea in bar will estop a plaintiff from raising the same issue in another suit. *Vanlandingham* v. *Ryan*, 25.
2. A judgment upon a demurrer, for defect in the pleadings, will not bar another action for the same cause. *Ib.* 25.

See PLEADING.

DESCENT.

1. The heir is owner of the lands of an intestate and the rents and profits derived therefrom, until divested by an order of sale or decree for the purpose of paying debts. *Smith* v. *McConnel*, 135.
2. An administrator takes no estate, right, title or interest in realty. He takes only a power. *Ib.* 135.
3. Posthumous children take by descent with the antecedent children, or with other heirs. *Ib.* 135

See HEIRS.

DILIGENCE.

1. Where one of three defendants asked to have a judgment set aside, upon the ground that his co-defendants, who assented to a trial, were sureties for him on the note sued on, and did not know his defence, and that he had been too sick to attend court and make his defence, which was denied, it is held by this court that proper diligence was not shown, and that the application to the Circuit was properly overruled. *Stetham* v. *Shoultz*, 99.
2. The attendance of a witness, upon the request of a party, is evidence of diligence on his part. *Searls* v. *Munson*, 558.

See PRACTICE, WITNESS.

DIVORCE.

1. On application for divorce, if the jury find the allegations of the bill true, except that the plaintiff had been a dutiful wife, it entitles her *prima facia* to a decree. *Thatcher* v. *Thatcher*, 66.
2. In such a case, if the court thinks the finding wrong, it should set aside the verdict and order a new trial, or, perhaps, reform the verdict and enter a decree contrary to it. *Ib.* 66.
3. The verdict of a jury in such a case, where the evidence is not preserved in the record, shows that the proof sustained the allegations in the bill, and the court must so consider. *Ib.* 66.
4. In a case for a divorce, where a bill is dismissed, it is erroneous to enter a judgment against the wife for costs. *Ib.* 66.
5. In contemplation of law the residence of the wife follows that of the husband. *Ashbaugh* v. *Ashbaugh*, 476.

6. Desertion for the period of two years, by the husband, residing in this State, although commenced in a foreign jurisdiction, will enable a wife to obtain a divorce. *Ashbaugh* v. *Ashbaugh*, 476.

DOWER.

1. A petition for the assignment of dower is a chancery proceeding; and the record should show the evidence upon which the decree was founded ; and, where the answer to the petition admits the right, and no evidence is furnished of the release of it, this court will presume that a decree which does not assign dower, is erroneous. *Osborne* v. *Horine*, 92.

DYING DECLARATIONS.

1. Dying declarations are such as are made, relating to the facts of an injury of which the party afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance and without hope of escaping the impending danger. *Starkey* v. *People*, 17.
2. The court should determine upon the admissibility of such declarations, upon hearing proof of the condition of mind of the deceased at the time they were made. Which proofs, it is advised, should not be taken in the hearing of the jury impanneled to try the accused. *Ib*. 17.
3. The substance of dying declarations may be given in evidence to the jury; and, if necessary, through interpreters. *Ib*. 17.
4. If dying declarations are permitted to go to the jury, then also may they hear the whole evidence as to the condition of mind of the deceased and other circumstances at the time they were made, and pass upon their credibility and weight. *Ib*. 17.

EJECTMENT.

1. In ejectment a defendant who holds under the same grantor with the plaintiff, cannot deny title in him, or set up an adverse title in himself or another. *McClare* v. *Engelhardt*, 47.
2. A husband made certain bequests to his wife, among others, certain lands, " to dispose of at her death to any person she may think best to live with her, and take care of her ;" she conveyed these lands, and it was held that the grantee in an action of ejectment might offer his deed in support of his title ; and that evidence of a tenancy of defendant under his grantor, with a view of estopping him from denying title in plaintiff, is proper. *Christie* v. *Pulliam*, 59.
3. The power conferred on the wife by the will, may be executed by deed or will, or other simple writing, if sufficient to convey the subject matter of it ; the intention of the devisor, by the power conferred on the wife, is too plain to admit of restriction. *Ib*. 59.
4. If, at the time a conveyance is made, the premises conveyed are actually in the possession of a third party, claiming under a paramount title, it amounts to an eviction *eo instanti*. *Moore* v. *Vail*, 185.
5. Upon the common covenant that the vender, his heirs, &c., "will warrant and forever defend the title to said lots to," &c., there must not only be a want of title in the vender, but there must be an ouster under paramount title, before action will lie. *Ib*. 185.
6. Such ouster may be established by showing that there was, at the time the covenant was made, a person in possession, holding under a paramount title. A party is not required to take actual possession of premises ; but may even yield his possession, where another claims the premises under such a title if presented and insisted upon. *Ib*. 185.
7. A covenantee, if he relinquishes possession, must take the burden of showing the necessity for doing so. *Ib*. 185
8. Where lands are unoccupied, as may be in this State, the legal title draws, after it constructive possession, which will continue until actual eviction; and when possession is actually taken by one having paramount title, an action arises under the covenant, and the limitation commences to run from that time. *Ib*. 185.

9. To recover in ejectment, the claimant must have such an estate in the land as entitles him to the present possession ; and where there is an outstanding life estate in the land claimed, or where a valid sale of it has been made, to pay the debts of the ancestor, the heirs cannot maintain such action. *Batterton* v. *Yoakum*, 288.
10. A second new trial in ejectment will not be granted because the defendant alleges he can make further proof, which proof was accessible to him on the other trial, and is merely cumulative, when he does not show any satisfactory reason for not having produced it. *Lafflin* v. *Herrington*, 399.
11. The judgment of the court below, in refusing such new trial, unless it is clearly shown that error was committed, will not be disturbed. *Ib*. 399.

ELECTION.

1. In contested elections, the intention of the voters in casting their ballots should control; and effect must be given to that intention. *Akin* v. *Matteson*, 167.
2. In this State "police magistrates" and "police justices" are equally within the meaning of the constitution, and the intention of the law, passed for the better government of towns and cities, approved February 28th, 1854 ; and votes given for persons to fill those offices, under either designation, should be counted and returned in favor of the persons for whom they may have been cast. *Ib*. 167.

See CONTESTED ELECTION.

ERROR.

1. Where the record does not show an exception taken to the decision of the Circuit Court in overruling a motion for a new trial, the decision cannot be assigned for error. *Smith* v. *Kahill*, 67.
2. In a case of misdemeanor if a jury is waived, it cannot be assigned for error. *Zarresseller* v. *People*, 101.
3. Exceptions to the refusal of the court to give instructions, must be taken at the trial, and this must be shown by the record, or this court will not examine them. *Armstrong* v. *Mock*, 166.
4. The Supreme Court will not reverse a judgment as being against evidence, unless the finding of the jury is clearly so. *Booth* v. *Rives*, 175.
5. If a court has jurisdiction of the subject matter, however erroneous a decree or judgment may be, it can only be avoided by a direct proceding for that purpose, and cannot be attacked for error in another and independent proceeding. *Weiner* v. *Heintz*, 259.
6. It is erroneous to exclude from the jury evidence which tends to show that a plaintiff, by whatever name he sues, is not the person holding the legal interest in the notes sued on. *Simons* v. *Waterman*, 371.
7. To proceed to trial on other issues, without noticing a plea of payment, is error. *Sammis* v. *Clark*, 398.
8. A default cannot be taken while there is a plea or demurrer unanswered. *Ib*. 398.

See WRIT OF ERROR.

EVICTION.

1. If, at the time a conveyance is made, the premises conveyed are actually in the possession of a third party, claiming under a paramount title, it amounts to an eviction *eo instanti*. *Moore* v. *Vail*, 185.
2. Upon the common covenant that the vender, his heir,s &c. "will warrant and forever defend the title to said lots to," &c., there must not only be a want of title in the vender, but there must be an ousterun derparamount title, before action will lie. *Ib*. 185.

3. Such ouster may be established by showing that there was, at the time the covenant was made, a person in possession, holding under a paramount title. A party is not required to take actual possession of premises; but may even yield his possession, where another claims the premises under such a title, if presented and insisted upon. *Moore* v. *Vail*, 185.
4. A covenantee, if he relinquishes possession, must take the burden of showing the necessity for doing so. *Ib.* 185.
5. Where lands are unoccupied, as may be in this State, the legal title draws after it construtive possession, which will continue until actual eviction; and when possession is actually taken by one having paramount title, an action arises under the covenant, and the limitation commences to run from that time. *Ib.* 185.

EVIDENCE.

1. Dying declarations are such as are mad e, relating to the fact of an injury o which the party afterwards dies, under the fixed belief and the moral conviction that immediate death is inevitable, without opportunity for repentance and without hope of escaping the impending danger. *Starkey* v. *People*, 17.
2. The court should determine upon the admissibility of such declarations, upon hearing proof of the condition of the mind of the deceased at the time they were made. Which proof, it is advised, should not be taken in the hearing of the jury impanneled to try the accused. *Ib.* 17.
3. The substance of dying declarations may be given in evidence to the jury; and, if necessary, through interpreters. *Ib.* 17.
4. If dying declarations are permitted to go to the jury, then also may they hear the whole evidence as to the condition of mind of the deceased and other circumstances at the time they were made, and pass upon their credibility and weight. *Ib.* 17.
5. A certificate of the Secretary of State to the effect that a duplicate of the certificate of organization of a company under the above act, had *not* been filed in his office, is not evidence. Nor does it seem that the omission to file such certificate would defeat the organization. *Cross* v. *Pinckneyville Mill Co.* 54.
6. A husband made certain bequests to his wife, among others, certain lands, "to dispose of at her death to any person she may think best to live with her, and take care of her;" she conveyed these lands, and it was held that the grantee in an action of ejectment might offer his deed in support of his title; and that evidence of a tenancy of defendant under his grantor, with a veiw of estopping him from denying title in plaintiff, is proper. *Christie* v. *Pulliam*, 59.
7. The power conferred on the wife by the will, may be executed by deed or will, or other simple writing, if sufficient to convey the subject matter of it; the intention of the devisor, by the power conferred on the wife, is too plain to admit of restriction. *Ib.* 59.
8. A. sued B. before a justice of the peace, to recover back money which B. alleged had been over paid to A. on a contract for ferriage. Both were sworn at the trial: A. affirmed the existence of a contract, which B. denied. A. then charged B. with perjury and had him arrested, and, on examination, he was discharged, for which B. brought an action for malicious prosecution against A. *Held*, that on the trial of the action for malicious prosecution, A. should be permitted to show in his defence the testimony given by him upon the hearing of the prosecution, touching the existence and character of the alleged contract. *Richey* v. *McBean*, 63.
9. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged, is probable cause to be shown in defence of an action for malicious prosecution. *Ib.* 63.
10. In an action for work and labor, the certificate of a foreman of the defendant, showing the number of days' labor performed, accompanied by evidence tending to prove that the person signing the certificate was foreman, is proper for the consideration of the jury. *Smith* v. *Cahill*, 67.
11. Where objection is made to the introduction of parol evidence in the Circuit Court to prove a contract, the effect of that evidence cannot be avoided. *Ib* 67.

12. The laws of the forum must govern the pleadings and evidence. *Bond* v. *Bragg*, 69.
13. All public acts of Congress in relation to the public lands, and the acts of such officers to whom execution of them is confided, as are required to make and keep public records in relation thereto, may be shown by the public record, or by copies duly authenticated, and these are admissible in evidenced. *Lane* v. *Bommelmann*, 95.
14. If a record shows that a court had jurisdiction of the subject matter and the person, the judgment rendered by the court cannot be collaterally questioned for errors of substance or form. *Ib.* 95.
15. A certified copy of a patent for land issued by the United States, may be offered in evidence. *Ib.* 95.
16. Where an instrument made by a corporation is duly executed by one having authority, the seal affixed will be presumed to be the proper seal, unless the contrary is shown. *Phillips* v. *Coffee*, 154.
17. In an action for corn sold and delivered, it is for the jury to determine from the evidence the quantity sold, and the plaintiff need not necessarily prove the exact quantity delivered. *Dickerson* v. *Sparks*, 178.
18. The competency of evidence is for the court to decide, and the jury will pass upon it according to its weight and preponderance when it has been submitted to them, *Ib.* 178.
19. The affidavit of one of several defendants, denying the existence of a partnership, or the execution of the instrument sued on, renders it necessary, as to him, that proof of partnership, or of the hand writing, should be made. Co-defendants are not entitled to any direct benefit from such affidavit. *Davis* v. *Scarritt*, 202.
20. An agent is a competent witness to establish his relation to his principal, and a contract made for him, unless the agent has a direct interest in the result of the suit. *Cadwell* v. *Meek*, 220.
21. If an agent is equally liable to either of the parties, he is a competent witness, and his supposed preferences will affect his credibility only. *Ib.* 220.
22. To bind the principal by the acts of his agent, he must be fully and fairly informed of all the material facts and circumstances of the transaction. *Ib.* 220.
23. The usual course of dealing by a party, cannot vary or control a contract. *Ib.* 224.
24. Where counsel for defendant found a lease among the papers in the cause not marked filed, which was an important piece of evidence for plaintiff, and annexed it to a dedimus and sent it out of the State, it was held that secondary evidence of its contents should be admitted. *Mitchell* v. *Jacobs*, 235.
25. The admissions of a person in possession, claiming property, are proper testimony as against his own title. An exception to this rule arises, under the statute, in the trial of right of property which excludes the testimony of the defendent in execution. *Waggoner* v. *Cooley*, 239.
26. In determining the weight of testimony between two witnesses, the preponderance should be given to the one whose advantages for being correctly informed as to the matters in controversy, are the best. *Brady* v. *Thompson*, 270.
27. The authority of an agent may be shown by his acts about the business of his principal, while under direction, or by acquiescence in them, when made known to the principal. *Dean* v. *King*, 272.
28. The previous course of dealing, by or through an agent, is proper evidence for the jury, as tending to show the existence of an agency and its extent. *Ib.* 272.
29. Power to act generally in a particular business, or a particular course of trade, will constitute a general agency; if this is so indicated, no matter what the private instruction of the agent may be. *Ib.* 272.
30. The extent of the authority of an agent should not be confounded with the nature of the agency; but his action will bind his principal, his either case, within the general scope of the authority which the world has been permitted to suppose he possesses. *Ib.* 272.

31. The seal of a corporation is *prima facie* evidence of the assent of the company. *Reed* v. *Bradley*, 321.
32. A notarial certificate of protest is not of itself evidence of that fact. *McAllister* v. *Smith*, 328.
33. The law of evidence of this State will be enforced when a plea of usury is set up as a defence, so far as to permit the party pleading it to give testimony in its support. *Ib*. 328.
34. It is erroneous to exclude from the jury, evidence which tends to show that a plaintiff, by whatever name he sues, is not the person holding the legal interest in the notes sued on. *Simons* v. *Waterman*, 371.
35. The deposition of a witness may be read on a trial, although the witness is present. The other party may make the witness his own, and examine him if he chooses. *Frink* v. *Potter*, 406.
36. The driver of a stage coach, in an action against the proprietor by a passenger for injuries sustained, by upsetting of the coach, may testify as to its condition at the time of the accident. *Ib*. 406.
37. The admission of the father, that the person with whom he had sexual intercourse, was his daughter, by a former wife, was competent evidence. *Bergen* v. *People*, 426
38. It is not proper to permit proof of what a living but absent witness testified to on a former trial of the same cause. *Ib*. 426.
39. The confession of a party accused of crime, which is uncorroborated by any circumstance inspiring belief in its truth, arising out of the conduct of the accused, or otherwise, is insufficient to convict. *Ib*. 426.
Holmes v. *Stateler*, 453.
40. A party may show, where a witness resided in a particular county for several years, that his character for truth was bad; although the witness may have been roving for some years preceding the trial at which his character was impeached.
41. The question of jurisdiction over the person is rather one of evidence than of pleading. *Rae* v. *Hulbert*, 572,
42. In an action of slander, a party may show that he offered an explanation of the offensive words, if the explanation was part of the same conversation and before the same auditory, and in reference to the same subject. *Winchell* v. *Strong*, 597.
43. In a proceeding against the representatives of a decedent, the holder of a note with an indorsement upon it, written with a pencil, indicating a payment, raises a strong presumption of its truth, which the holder should explain away if it is to be avoided. *Greenough* v. *Taylor*, 602.
44. In such a case, if demands, which were specified in a mortgage given by the decedent, have been paid by the mortgagee, he should make proof thereof, in a proceeding against the representatives of the decedent, to foreclose the mortgage. *Ib*. 602.
45. Strict proof must be made in a proceeding affecting the rights of infants. *Ib*. 602.

See WITNESS.

EXCEPTIONS.

1. Where objection is not made to the introduction of parol evidence in the Circuit Court to prove a contract, the effect of that evidence cannot be avoided. *Smith* v. *Kahill*, 77.
2. Exceptions may be taken to the decision of a Circuit Court, trying a case without the intervention of a jury, but they must be taken at the time; and then error can be assigned, not otherwise. *Parsons* v. *Evans*, 238.

See ERROR.

EXECUTION.

1. The levy of an execution upon land in a different county from that in which the judgment was rendered, will operate as a lien; and a sale under it, would perfect the title, by relation back to the levy. *McClure* v. *Engelhardt*, 47.
2. If a certificate of a levy upon execution from a foreign county is not filed in the recorder's office, the levy will not take effect as a lien; and creditors or purchasers, without notice intervening between the levy and sale, may hold against the levy. But if a certificate of sale is filed, it will operate as a constructive notice from that date; and will pass to the purchaser all the interest of the judgment debtor. *Ib.* 47.
3. If a debtor has no more property in his hands than the law exempts from execution, he is not required to turn out one piece of it for an officer to levy upon, as the condition upon which he may retain the residue. *Vaughan* v. *Thompson*, 78.
4. Property exempted by law may be sold or exchanged by the debtor, without subjecting it or its equivalent to execution. *Ib.* 78.
5. To disqualify a deputy sheriff from serving an execution, either he or his principal must have been plaintiff in the action, entitled to the money to be made by a sale under it, or have a direct interest in the process. *Woods* v. *Gilson*, 218.
6. Where a third person, after execution issued, pays off a mortgage given by the judgment debtor, and takes possession of the goods and sells them, they will still be subject to the execution. The satisfaction of the mortgage by the third party did not invest him with any interest in the mortgage debt or the mortgaged property. *Ib.* 218.
7. A fee bill, when designed to be used as a levy and sale, must issue as process of, and under seal of, the court, and run in the name of the people. The debt and damages in a case cannot be included in it; nor can a clerk issue an execution, by which to collect his fees; nor has an officer of the court control over an execution because his fees are included in it. *Newkirk* v. *Chapron*, 344.
8. A fee bill becomes an execution when issued for the collection of fees for the benefit of the officers to whom they belong. *Ib.* 344.
9. An execution against William K. cannot bind the goods of Benjamin K. against a purchaser in good faith, although the judgment and execution were intended for Benjamin, as the real person. *Shirley* v. *Phillips*, 471.
10. An amendment of the judgment cannot retro-act against such purchaser, or affect intervening rights acquired between the rendition and amendment of the judgment. *Ib.* 471.
11. If a defendant dies between the *teste* of an execution and its delivery to the sheriff, he cannot proceed to make a levy under it. *People* v. *Bradley*, 485.

See Fee Bill.

EXECUTORS.

1. In a suit against an executor, after the expiration of two years from the date of his letters testamentary, upon a demand which had not been presented for allowance within that time, the judgment should direct the levy to be made out of property belonging to the estate which has not been inventoried, whether found previous or subsequent to the judgment. *Bradford* v. *Jones*, 93.

FAILURE OF CONSIDERATION.

1. A plea of failure of consideration should set out what the consideration was, or in what particular it failed. *Vanlandingham* v. *Ryan*, 25.

FEE BILLS.

1. A fee bill, when designed to be used as a levy and sale, must issue as process of, and under seal of, the court, and run in the name of the people. The debt and damages in a case cannot be included in it; nor can a clerk issue an execution, by which to collect his fees; nor has an officer of the court control over an execution because his fees are included in it. *Newkirk* v. *Chapron*, 344.
2. A fee bill becomes an execution when issued for the collection of fees for the benefit of the officers to whom they belong. *Ib.* 344.

See Execution.

FORCIBLE ENTRY AND DETAINER.

1. An action of forcible entry and detainer cannot be maintained against two or more, who hold in severalty. *Reynolds* v. *Thomas*, 207.
2. Courts of law will not take cognizance of separate causes of action against different parties in the same suit. *Ib.* 207.

FOREIGN JUDGMENT

1. A judgment of another State will be conclusive in this, if it appear that the court of such State had properly acquired jurisdictisn of the person and the subject matter. *Smith* v. *Smith*, 482.
2. A want of jurisdiction in the court need not be pleaded, where the fact affirmatively appears on the record produced. *Ib.* 482.
3. Where a foreign judgment was rendered against two, one of whom was not served with process, and suit is brought against the party served, as upon a joint judgment, he may show the variance upon a proper plea, and so exclude the record when offered for proof. *Ib.* 482.
4. It is not requisite, in an action upon a judgment of a sister State, to aver that the court which pronounced the judgment had general jurisdiction or special jurisdiction of the subject matter, or of the person, if the action is upon a judgment of a court of general jurisdiction. *Rae* v. *Hulbert*, 572.
5. It is the duty of this court to take the same notice, that the Supreme Court of another State had jurisdiction of the subject matter and of the regularity of its proceedings, that it would take of a domestic judgment. *Ib.* 572.
6. The question of jurisdiction over the person is rather one of evidence than of pleading. *Ib.* 572.
7. A judgment is not a contract, within the meaning of the statutes in relation to what may be matters of set-off in this state. *Ib.* 572.

FORFEITURE.

1. While the court will not administer the penal exactions of a foreign law by enforcing forfeitures, it will, when a contract is void by the law of the place where it is made, hold it to be void here; although the same contract, had it been made here, would be held valid. *McAllister* v. *Smith*, 328.

FRAUD.

1. A mortgage of property by a person who does not hold more than the amount exempted by law, is not in fraud of creditors. *Vaughan* v. *Thompson*, 78.
2. In matters of gift or contract between client and attorney, the greatest fairness is exacted, and the burden of proof, as to the rectitude of the transaction, is on the latter; and upon failure to make proof equity treats it as one of constructive fraud. *Jennings* v. *McConnel*, 148.
3. As between vendor and vendee, a fraudulent sale may be good, but void as between each of them and creditors. *Waggoner* v. *Cooley*, 239.
4. A creditor, in failing circumstances, has not the right to transfer his assets to an agent, with power to sell, and prefer creditors. *Ib.* 239.

5. Creditors who, to secure a debt, take title by purchase, from a fraudulent vendee, with knowledge of his title, take only such title as their vendee had, and other creditors may assail the whole transaction for fraud. *Waggoner* v. *Cooley*, 239.
6. If an award is obtained by fraud, or is, for any cause, vicious, it may be set aside upon application in the original suit without recourse to chancery. *Wiley* v. *Platter*, 538.
7. A conveyance to an infant, for the purpose of defrauding creditors, will be set aside. *Hunt* v. *Blodgett*, 583.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

1. A party has a right to the same remedies to enforce the collection of a decree in chancery, for a specific sum of money, that he has to enforce a judgment at law; and he may remove fraudulent conveyances out of the way of his execution. *Weightman* v. *Hatch*, 281.
2. A bill may be filed to remove fraudulent incumbrances or conveyances, as soon as judgment is obtained, without proceeding to obtain satisfaction out of other property. *Ib.* 281.
3. A conveyance to an infant, for the purpose of defrauding creditors, will be set aside. *Hunt* v. *Blodgett*, 583.

See FRAUD, CHANCERY.

GARNISHEES.

1. Where persons are regularly summoned as garnishees, and make default, they admit an indebtedness to the defendant equal to the amount recovered against them. *Whiteside* v. *Tunstall*, 258.
2. If a corporation is made a garnishee, it may answer by its proper officer, but the answer must be sworn to. *Oliver* v. *Chicago and Aurora R. R. Co.* 587.
3. On an appeal from a justice of the peace, additional interrogatories may be propounded to a garnishee. *Ib.* 587.

GUARANTY.

1. The holder of a negotiable note, indorsed in blank, may fill up the blank with such undertaking as is consistent with the nature of the instrument and the intention of the parties. *Webster* v. *Cobb*, 459.
2. The signature of a third person in blank, on the back of a note in the hands of the payee, is presumptive evidence that it was placed there as a guaranty, at the time of the execution of the note. *Ib.* 459.
3. A guaranty may be written over such a signature, at the trial of a suit upon it. *Ib.* 459.
4. Upon an action upon such a guaranty, the party may show, after proving payment to the payee, that it was assigned under such circumstances as make it colorable, and defeat a recovery. *Ib.* 459.

HEIRS.

1. Heirs, who are made parties to a proceeding for the sale of the land of their ancestor, although personal service of notice of the proceeding is not required to be made upon them, may sue out a writ of error to review such proceeding; but they must sue out the writ in their own names, or by their guardians or next friends, if they are still minors. *Napper* v. *Short*, 119.
2. Posthumous children take by descent with the antecedent children, or with other heirs. *Smith* v. *McConnel*, 135.
3. The heir is owner of the lands of an intestate and the rents and profits derived therefrom, until divested by an order of sale or decree for the purpose of paying debts. *Smith* v. *McConnel*, 135.

4. Where real estate is conveyed to an attorney, to save him harmless, as against his liability as bail, without an intention to sell, an actual sale by the attorney will not change the character of the proceeds; but these will descend to the heirs, and do not go to the administrator. *Jennings* v. *McConnel*, 148.
5. Accruing rent descends to the heirs, and the administrator has no concern with it. *Foltz* v. *Prouse*, 487.
6. Where an administrator shows by his report that he has given an unauthorized preference to creditors in the payment of assets, it is sufficient to justify his removal. *Ib.* 487.

See INFANT.

HIGHWAYS AND STREETS.

1. The remedy by injunction to prevent the obstructing of a public highway, is effective, and where the facts are easy of ascertainment and the rights resulting therefrom free from difficulty, equity will grant relief, at the suit of the public or of the citizen having an immediate interest therein. *Green* v. *Oakes*, 249.
2. Where a public road has been used for twenty years, the owner of the land over which it passes acquiescing therein, the law presumes a dedication. *Ib.* 249.
3. Where, upon a proceeding by town authorities, to condemn lands for opening streets, they describe said lands in all their proceedings, as being the land of A., they cannot afterward deny his right to be heard on the question of damages, upon the ground of his want of title. *Mount Sterling* v. *Givens*, 255.
4. A highway may be established and proved by prescription, by dedication and by laying out the same as directed by statute. *Alvord* v. *Ashley*, 373.
5. The public is an ever existing body, capable of taking a grantee for public uses; and its interests are sufficient consideration to support the grant, which may be manifested by express or implied consent, from acquiescence in the user; and the user does not depend upon any fixed period of time. *Ib.* 363.
6. The dedication is a mixed question of law and fact, as also the quantity of land included by it, to be submitted to the jury. *Ib.* 363.
7. The actual use and repairing of a highway by the public, is evidence of its acceptance for such purpose. *Ib.* 363.
8. A party will be stopped from denying a dedication, by the acquiescence in it of his grantors. *Ib.* 363.
9. The jury may infer and find the width of a road, or a dedication of so much of it as was actually used. *Ib.* 363.
10. On the trial of an indictment for obstructing a highway, the existence of the highway may be proved by prescription from user. And unless it is assumed by the pleadings, documentary proof of the location of the highway, is not indispensable. *Dimon* v. *People*, 416.
11. A highway may be legally laid out and established by public use, and recognition of it by the proper authorities, and by acquiescence; and this, without regard to governmental or individual ownership of the land across which the road runs. *Ib.* 416.
12. Under the provisions of the law of 1851, for township organization, the public is excluded from opening or using a highway until the damages are assessed or agreed upon, or released in writing. *Norton* v. *Studley*, 556.

See DEDICATION.

HUSBAND AND WIFE.

1. Where land descends to the wife, it should, on partition, be set off to the husband and wife in right of the wife, or to her alone, not to them jointly and in fee *Cost* v. *Rose*. 276.
2. In contemplaton of law the residence of the wife follows that of the husband. *Ashbaugh* v. *Ashbaugh*, 476.

3. Desertion for the period of two years, by the husband, residing in this State, although commenced in a foreign jurisdiction, will enable a wife to obtain a dismissal.. *Ashbaugh* v. *Ashbaugh*, 476.

INDICTMENT.

1. An indictment which declares the offence to be, the selling "of one gill of spirituous liquors," being, &c., less than one quart, is sufficiently certain under the license laws of this State. *Zarresseller* v. *People*, 101.
2. An indictment for a violation of the license laws, which concludes " against the peace and dignity of the people of the State of Illinois," is within the meaning of the constitution. *Ib.* 101.
3. When statutes create offences, indictments should contain proper and sufficient averments to show a violation of the law, and to enable the accused to meet the charge; beyond this, particularity of specification, may furnish a means of evading the law, rather than defending against an accusation. *Cannady* v. *People*. 158.
4. In an indictment for selling whisky in a less quantity than one gallon, the name of the purchaser, or an averment that he was unknown, is not necessary. *Ib*. 158.
5. The general averment of an illegal sale is sufficient; the kind of liquor sold need not be specified. *Ib*. 158.
6. When statutes create offences. indictments should contain proper and sufficient averments to show a violation of the law, and to enable the accused to meet the charge; beyond this, particularity of specification may furnish a means of evading the law, rather than defending against an accusation. *Ib*. 158.

See CRIMINAL LAW.

INCUMBRANCE.

1. If the decree directs the sale of land subject to an incumbrance for notes not then due, the purchaser takes the land subject to the incumbrance, and cannot sue to recover the amount of the notes; they are paid by operation of law. *Weiner* v. *Heintz*, 259.
2. If the mortgagee acquires the fee in the land, the debt is merged in the land; and unless some contrary intention is manifest, the debt is extinct. *Ib*. 259.

See MORTGAGE.

INDEMNITY.

1. There is no right of contribution as between tort-feasors or trespassers. *Nelson* v. *Cook*, 443.
2. An express promise of indemnity is void, as against a trespass, crime or wrong. But in a question of doubt as to ownership of property, and when the act to be done is not apparently wrong, or known to be so, and indemnity for an act done in relation to it may be implied, and a suit will lie. *Ib*. 443.
3. There is no implication of indemnity to a sheriff for the execution of a process, put into his hands, without direction to execute it in a particular manner. *Ib*. 443.

JURISDICTION.

1. If a court has jurisdiction of the subject matter, however erroneous a decree or judgment may be, it can only be avoided by a direct proceeding for that purpose, and cannot be attacked for error in another and independent proceeding. *Weiner* v. *Heintz*, 259.
2. Where courts of equity have concurrent jurisdiction with courts of law, and the party proceeds in equity, if barred at law he will also be barred in equity. *Manning* v. *Warren*, 267.
3. In serving process by copy, the return of the officer must show a strict compliance with the statute, or the court will not obtain jurisdiction of the person. *Cost* v. *Rose*, 276.

4. Where an inferior court has full jurisdiction over highways, the superior court will presume in favor of the judgment of the inferior, that a road was of the proper width. *Morgan* v. *Green*, 395.
5. And if the proceeding of an inferior court is collaterally attacked, a like presumption will be indulged, and the proof will be thrown upon the attacking party. *Ib.* 395.
6. An action for flooding lands is local, and must be brought within the jurisdiction where the lands lie. *Eachus* v. *Trustees of Canal*, 534.
7. The clause of the second section of the Pratice Act, giving jurisdiction in the county where the contract may have specifically been made payable, does not apply to contracts other than for the payment of money, to be performed in the county in which the suit is brought. *Porter* v. *Boardman*. 594.
8. A. contracts with B. for the delivery of a quantity of wheat in Cook county. A. sued B. in Cook county for beach of contract, and sent summons to Tazewell county, the residence of the defendant; *Held*, that the court in Cook county had not jurisdiction. *Ib.* 594.

INDORSER. INDORSEE.

1. The law of the place where a promissory note is made, and in that where it is indorsed, will govern the contract and fix the liability of the several parties. *Bond* v. *Bragg*, 69.
2. To fix the liability of an indorser, it was necessary to demand payment and give notice of its refusal. *Ib.* 69.
3. In an action by an indorser against the indorsee of a promissory note, it is not necessary to prove its execution by the maker. *Bestor* v. *Phelps*, 592.

See Promissory Note.

INFANTS.

1. An infant under ten years of age may maintain an action, by her next friend, for slanderous words charging her with theft. *Stewart* v. *Howe*, 71.
2. A decree of partition should not be rendered against infants without proof of the case made by the bill; which proof should be preserved in the record. *Cost* v. *Rose*, 276.
3. In such a case, if demands, which are specified in a mortgage given by the decedent, have been paid by the mortgagee, he should make proof thereof, in a proceeding against the representatives of the decedent, to foreclose the mortgage. *Greenough* v. *Taylor*, 602.
4. Strict proof must be made in a proceeding affecting the rights of infants. *Ib.* 602.

See Heirs.

INFERIOR COURTS.

1. The constitution does not restrict the power of the legislature as to the number of justices of the peace which may be created. That body may create as many districts for, and prescribe the jurisdiction of, justices of the peace as public policy requires, and without making their jurisdiction uniform. *Welch ex parte*, 161.
2. The Recorder's Court of the City of Chicago is a constitutional tribunal, not repealed or affected by the Act of the 27th February, 1854, providing for the better government of towns and cities. *Ib.* 161.
3. Where an inferior court has flul jurisdiction over highways, the superior court will presume in favor of the judgment of the inferior court that a road was of the proper width. *Morgan* v. *Green*, 395.
4. And if the proceedings of an inferior court is collaterally attacked, a like presumption will be indulged, and the proof will be thrown upon the attacking party. *Ib.* 395.

See County Courts.

INNKEEPERS.

1. Guests at an inn, although they know that an iron safe is provided for that purpose, are not bound to deposit their money therein or with the innkeeper. *Johnson* v. *Richardson*, 302.
2. Innkeepers are bound to protect the property of their guests, and in case of loss or injury to it, can only absolve themselves from liability by showing that they were not in fault. The burden of the proof is on the innkeeper. *Ib.* 302.
3. If the guest should unnecessarily expose his money to danger, or carry too large a sum with him, a different rule might prevail. *Ib.* 302.

See Bailment.

INTEREST.

1. Any rate of interest which is authorized by the law of the place where a contract is made or the place where it is to be performed or paid, will be recognized and enforced in the courts of other governments, whose laws would otherwise make such rates of interest usurious. *McAllister* v. *Smith*, 321.
2. When a note is made payable in a particular locality, it will be presumed that the parties intended to adopt the laws of that locality in reference to the rate of interest. *Ib.* 321.
3. While the court will not administer the penal exactions of a foreign law by enforcing forfeitures, it will, when a contract is void by the law of the place where it is made, hold it to be void here; although the same contract, had it been made here, would be held valid. *Ib.* 321.
4. The law of evidence of this State will be enforced when a plea of money is set up as a defence, so far as to permit the party pleading it to give testimony in its support. *Ib.* 321.

JOINT STOCK.

1. Where stock owned by the State in a railroad corporation, was legally sold and a certificate thereof given, assigned by the Governor, by indorsement thereon, the purchaser and assignee of such stock had a right to vote thereon for the election of directors, unless some statute of the State, or by-laws of the company prescribed some other mode of conveyance or additional formality. *People ex rel.* v. *Devin*, 34.
2. A subscription to stock may be collected, although amendatory acts have been subsequently passed, affecting the original charter, by extending its powers. *Peoria and Oquawka R. R. Co.* v. *Elting*, 429.
3. Remedy by action to recover subscriptions is not impaired by the fact that the company has the power to declare a forfeiture of stock. *Ib.* 429.

See Corporations.

JUDGMENT.

1 In a suit against an executor, after the expiration of two years from the date of his letters testamentary, upon a demand which had not been presented for allowance within that time, the judgment should direct the levy to be made out of property belonging to the estate, which had not been inventoried, whether found previous or subsequent to the judgment. *Bradford* v. *Jones*, 93.
2. Where one of the three defendants asked to have a judgment set aside, upon the ground that his co-defendants, who assented to a trial, were sureties for him on the note sued on, and did not know his defence, and that he had been too sick to attend court and make his defence, which was denied, it is held by this court that proper diligence was not shown, and that the application to the Circuit was properly overruled. *Stetham* v. *Shoultz*, 99.

3. To authorize a justice of the peace to enter a judgment upon an award, it must be made in a suit pending before him, upon a reference by the parties. *Weinz* v. *Dopler*, 111.
4. Judgment cannot be entered in courts of record upon awards, unless the submission to arbitrators is made in pursuance of the statute. *Ib.* 111.
5. An award, made upon a submission which is not in pursuance of the statute, must be enforced by common law remedies. *Ib.* 111.
6. Upon a reference to arbitrators, by order of court, of matters of a pending suit, by agreement, judgment should be entered upon the award, as in a case of verdict by a jury. *Thorpe* v. *Starr*, 199.
7. An execution against William K. cannot bind the goods of Benjamin K. against a purchaser in good faith, although the judgment and execution are intended for Benjamin, as the real person. *Shirley* v. *Phillips*, 471.
8. An amendment of the judgment cannot retro-act against such purchaser, or affect intervening rights acquired between the rendition and amendment of the judgment. *Ib.* 471.
9. A judgment is not a contract, within the meaning of the statutes in relation to what may be matters of set-off in this State. *Rae* v. *Hulbert*, 572.

JUDGMENT DEBTOR AND CREDITOR.

1. Where a judgment debtor agrees to give notes and mortgages to secure his creditors, representing his title to the property to be mortgaged, as being clear and indisputable, and they receive the mortgages, relying upon his statement, but ascertaining subsequently that they have been deceived, they may refuse to acquiesce in such arrangement, and issue execution on their judgments, and he cannot restrain them. *Jones* v. *Smith*, 263.

JURIES.

1. Juries find the fact that a contract was made; but the intent and obligation of it they find under the instructions of the court; and any mistake in such instructions is error. *Illinois Central R. R. Co.* v. *Cassell*, 389.

JUSTICE OF THE PEACE.

1. To authorize a justice to enter judgment on an award, it must be made in a suit pending before him, upon a reference by the parties. *Weinz* v. *Dopler*, 111.
2. The constitution does not restrict the power of the legislature as to the number of justices of the peace which may be created. That body may create as many districts for, and prescribe the jurisdidtion of, justices of the peace as public policy requires, and without making their jurisdiction uniform. *Welch, ex parte*, 161.
3. An official bond of a justice of the peace is obligatory from the time it is left with the clerk for approval, it it is not rejected by him, although he omits to approve. *Green* v. *Wardwell*, 278.
4. The sureties upon an offitial bond of a justice of the peace will be held liable so long as he performs the duties of the station, without reference to the regularity of his election, commission, or eligibility. *Ib.* 278.
5. The board of supervisors, where township organization is adopted, legally succeeds to the County Commissioners' Court, and may bring suit on the bond of a justice of the peace. *Ib.* 278.
6. The official bond of a justice of the peace *de facto*, is an obligatory instrument. *Ib.* 278.

LEGISLATIVE ACTS.

1. The act of the General Assembly, which declares that a county seat shall not be changed, unless upon a petition of a majority of the voters, is merely advisory, and does not deprive the legislature of the right so to do without petition. *Turley* v. *County of Logan*, 151.

2. That a law appears on the statute book, properly signed, is not conclusive that it was passed by a constitutional vote; this may be tested by the journals. *Turley* v. *County of Logan*, 151.
3. The same legislature which passed a law, may correct its journals, at the same or a subsequent session, so as to make the truth appear; and this shows that a law received the proper vote for its passage. *Ib.* 151.
4. The several acts of the General Assembly since 1839 have kept alive the succession in the several officers appointed as agents for the inhabitants; and the present trustees may sue and recover upon a judgment in favor of a school commissioner which was rendered at that time. *Trustees of Schools* v. *Douglas*, 209.
5. It is within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum. *Illinois Central R. R. Co.* v. *County of McLean*, 291.
6. The provision in the charter of the Illinois Central Railroad Company, exempting its property from taxation, upon the payment of a certain proportion of its earnings, are constitutional. *Ib.* 291.
7. The act of the 12th February, 1853, regulating practice in courts of Cook county, was clearly within the constitutional power of the legislature to enact. *McDonald* v. *Olwell*, 375.

LETTER OF ATTORNEY.

See Power of Attorney.

LEVY.

1. The levy of an execution upon land in a different county from that in which the judgment was rendered, will operate as a lien; and a sale under it, would perfect the title, by relation back to the levy. *McClure* v. *Engelhardt*, 47.
2. If a certificate of a levy upon execution from a foreign county is not filed in the recorder's office, the levy will not take effect as a lien; and creditors or purchasers, without notice intervening between the levy and the sale, may hold against the levy. But if a certificate of sale is filed, it will operate as a constructive notice from that date; and will pass to the purchaser all the interest of the judgment debtor. *Ib.* 47.

See Execution, Sheriff.

LICENSE.

1. The act for the supression of intemperance, approved February 12th, 1855, did not repeal prior laws, providing for the granting of licenses for selling spirituous liquors, and penalties for selling without license. *Zarresseller* v. *People*, 101.
2. No portion of this act was to take effect until after the people should decide by a vote to adopt it. *Ib.* 101.
3. In construing a statute, the intention of the legislature will be considered; and to this end the whole act, the law existing prior to its passage, the motive for its passage, and the mischief to be remedied or avoided, will be carefully weighed. *Ib.* 101.

See Indictment, Liquor Law,

LIEN.

1. The lien, created by the criminal code, upon the real and personal property of convicts, takes effect from and during the entire day on which the arrest is made or the indictment found. *Hitchcock* v. *Roney*, 231.

2. A change of venue will not effect any change in the operation of this lien; which is not limited to the county in which the judgment is rendered. *Hitchcock* v. *Roney*, 231.
3. A stranger to the record and proceedings in such a case cannot interfere, by motion, to quash a levy, sale and execution, had at the instance of the people. *Ib.* 231.
4. A mechanics' lien, as created by the statute, is not upon the specific thing furnished, nor upon the interest alone of the party in the land, for whom furnished, but against the land, to be satisfied in any way consistent with the statute and the principles of equity. *Steigleman* v. *McBride*, 300.
5. Generally, although all the materials furnished upon which the lien accrues are destroyed or removed, the lien still continues against the land. *Ib.* 300.
6. In a proceeding under this lien against a party in possession, though he should not be the owner, the land may be sold, and the purchaser will take the title as against him; and whatever interest he had in the land will vest in the purchaser. *Ib.* 300.
7. Persons not parties to the proceeding will not be affected by it. *Ib.* 300.
8. If the work done, or the materials furnished, is so furnished or done upon distinct premises, the lien must be against each of the several premises, according to the value of work and materials, and not against both for the aggregate amount. *Ib.* 300.
9. The lien does not follow the materials furnished, from place to place, but is upon the land; severed from the land, they become personal property until again united or merged in the land. *Ib.* 400.

LIFE ESTATE.

1. A husband by his last will gives to his wife all his estate, except so much of a described piece of land as it might be necessary to sell to pay all his just debts, to own as long as she should remain his widow; this will invest her with a life estate, if she continues unmarried. *Batterton* v. *Yoakum*, 288.
2. Such a will is not to be understood as creating a charge of the debts of the deceased upon the life estate. *Ib.* 288.
3. To recover in ejectment, the claimant msut have such an estate in the land as entitles him to the present possession; and where there is an outstanding life estate in the land claimed, or where a valid sale of it has been made, to pay the debts of the ancestor, the heirs cannot maintain such action. *Ib.* 288.

LIMITATION.

1. A party who holds land under paper title, purporting to convey the same, and pays taxes for seven successive years, will be protected. *McConnel* v. *Street*, 253.
2. That the title of a party originated in good faith and that he holds under it, will be presumed until the contrary is shown. *Ib.* 253.
3. Good faith, (under the act of 1839, to quiet possession,) is understood to be the opposite of fraud, and of bad faith; and its non-existence msut be established by proof. *Ib.* 253.
4. Where courts of equity have concurrent jurisdiction with courts of law, and the party proceeds in equity, if barred at law he will also be barred in equity. *Manning* v. *Warren*, 267.
5. Although the statute of limitations may not in terms apply to courts of equity, yet by analogy equity will act upon the statute and will refuse relief where the bar is complete at law. *Ib.* 267.
6. A mortgage became forfeited in 1837; an undivided portion of the mortgaged lands, conveyed prior but recorded subsequent to the mortgage, which were soon after partitioned between the mortgagor and his vendee; the parties who subsequent to the partition acquired from the vendee of the mortgagor and held the land in actual possession over seven years and paid taxes, were held to be protected under the statute of limitations against the application by bill of the mortgagee to foreclose his mortgage; the possession under paper title and payment of taxes for seven years being a bar to equity relief against the lands so held under the mortgagor. *Manning* v. *Warren*, 267.

7. Claim and color of title, within the meaning of the statute of limitations, is the same as that given to those words by the courts, when applied to support an adverse possession. *McClellan* v. *Kellogg*, 498.
8. Color of title may commence without any writing; and, if founded upon a writing, such writing need not show on its face a *prima facie* title, but may be good as a foundation for color, however defective otherwise. *Ib.* 498.

See Claim and Color of Title.

LIQUOR LAWS.

2. The act for the suppression of intemperance, approved February 12th, 1855, did not repeal prior laws, providing for the granting of licenses for selling spirituous liquors, and penalties for selling without such license. *Zarresseller* v. *People*, 101.
2. No portion of this act was to take effect, until after the people should decide by a vote to adopt it. *Ib.* 101
3. In construing a statute, the intention of the legislature will be considered; and to this end the whole act, the law existing prior to its passage, the motive for its passage, and the mischief to be remedied or avoided, will be carefully weighed. *Ib.* 101.
4. In an action for debt for violation of a town ordinance against selling liquor, in order to justify a recovery, it should be shown that the liquor had been sold after the ordinance took effect. *Newlan* v. *Town of Aurora*, 379.

See Indictment, License.

MALICIOUS PROSECUTION.

1. A. sued B. before a justice of the peace, to recover back money which B. alleged had been overpaid to A. on a contract of ferriage. Both were sworn at the trial; A. affirmed the existence of a contract, which B. denied. A. then charged B. with perjury and had him arrested, and, on examination, he was discharged, for which B. brought an action for malicious prosecution against A. *Held*, that on the trial of the action for malicious prosecution, A. should be permitted to show in his defence the testimony given by him upon the hearing of the prosecution, touching the existence and character of the alleged contract. *Richey* v. *McBean*, 63.
2. A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of offence with which he is charged, is probable cause to be shown in defence of an action for malicious prosecution. *Ib.* 63.

MANDAMUS.

1. The grant to a railroad company, to construct a road, with such appendages as may be deemed necessary for the convenient use of the same, will authorize them to acquire land by condemnation for work-shops, &c.,—these being necessary appendages. *Chicago, Burlington and Quincy R. R. Co.* v. *Wilson*, 123.
2. This power is not exhausted by an apparent completion of the road, if an increase of business shall demand other appendages, or more room for tracks. *Ib.* 123.
3. On an application to a judge for the appointment of commissioners to condemn lands, he is compelled to act, if such a case is made as the statute directs. He is rather a ministerial than a judicial officer. *Ib.* 123.

MARKETS OVERT.

1. *Markets overt*, as known to the common law, making distinctions in the sale of stolen property, are not recognized in this State. *Newkirk* v. *Dalton*, 413.

MECHANICS' LIEN.

1. A mechanics' lien, as created by the statute, is not upon the specific thing furnished, nor upon the interest alone of the party in the land, for whom furnished, but against the land, to be satisfied in any way consistent with the statute and the principles of equity. *Steigleman* v. *McBride*, 300.
2. Generally, although all the materials furnished, upon which the lien accrues, are destroyed or removed, the lien still continues against the land. *Ib.* 300.
3. In a proceeding, under this lien, against a party in possession, though he should not be the owner, the land may be sold, and the purchaser will take the title as against him; and whatever interest he had in the land will vest in the purchaser. *Ib.* 300.
4. Persons not parties to the proceeding will not be affected by it. *Ib.* 300.
5. If the work done, or the materials furnished, is so furnished or done upon distinct premises, the lien must be against each of the several premises, according to the value of work and materials, and not against both for the aggregate amount. *Ib.* 300.
6. The lien does not follow the material furnished, from place to place, but is upon the land; severed from the land, they become personal property until again united or merged into the land. *Ib.* 300.
7. In enforcing a mechanics' lien, all persons interested in the land should be made parties to the suit, or the rights of those not made parties will not be affected by the decree. *Williams* v. *Chapman*, 423.
8. Where two parties have acquired title to land, one under proceedings for a mechanics' lien, the other under proceedings to foreclose a mortgage, if the mortgagee or others interested were not made party to the suit enforcing the lien, and were ignorant of it, the title to the land derived through the mortgage will be superior. *Ib.* 423.
9. The mechanics' lien will attach from the delivery of the materials upon the premises, and the use of them by connecting them to the freehold, not from the date of contract. *Ib.* 423.

See LIEN.

MISDEMEANOR.

1. In cases of misdemeanor, if the defendant waives a jury and puts himself upon the court for trial, he cannot assign for error that the court tried the issue. *Zarresseller* v. *People*, 101.

See CRIMINAL LAW.

MORTGAGE.

1. The cashier of a bank acting in conformity with the pratice and rules of the institution, may release a debt secured by mortgage in its favor. Nor need such release be under seal. *Ryan* v. *Dunlap*, 40.
2. A mortgagee, being a banking institution, by its agents and servants may do all such acts in respect to the debts as usually may be done in money transactions, verbally or in writing without regard to the mortgage security. *Ib.* 40.
3. A transfer of a debt secured by mortgage, by assignment or delivery, would generally carry the mortgage in equity, and payment of the debt will discharge the lien. *Ib.* 40.
4. Payment of a debt secured by mortgage may be made otherwise than by the delivery of money, and the entry of satisfaction on the margin of the record of the mortgage is not required as prescribing a rule of evidence. *Ib.* 40.
2. If a decree directs the sale of land subject to an incumbrance for notes not then due, the purchaser takes the land subject to the incumbrance, and cannot sue to recover the amount of the notes; they are paid by operation of law. *Weiner* v. *Heintz*, 259.

6. If the mortgagee acquires the fee in the land, the debt is merged in the land; and unless some contrary intention is manifest, the debt is extinct. *Weiner* v. *Heintz*, 259.
7. Although equity may grant relief by a strict foreclosure, the practice should not be encouraged. *Ib.* 259.
8. The right of redemption continues until barred by lapse of time, by strict foreclosure, or by judicial sale. But such right of redemption ceases after a sale under a decree to pay the debt. *Ib.* 259.
9. A suit at law to coerce payment of a balance remaining due, after applying the proceeds of the sale, does not open the sale and entitle the mortgagor to redeem, except within the time limited by the statute. *Ib.* 259.
10. A mortgage became forfeited in 1837; an undivided portion of the mortgaged lands, conveyed prior but recorded subsequent to the mortgage, which were soon after partitioned between the mortgagor and his vendee; the parties who subsequent to the partition acquired from the vendee of the mortgagor, and held the land in actual possession over seven years and paid taxes, were held to be protected under the statute of limitations against the application by bill of the mortgagee to foreclose his mortgage; the possession under paper title and payment of taxes for seven years being a bar to equity relief against the lands so held under the mortgagor. *Manning* v. *Warren*, 267.
11. Where a corporation is authorized to execute a mortgage, and the exigency of its affairs and its interests demanded that one should be made, of which it should be the proper judge, it will be sustained. *Reed* v. *Bradley*, 321.
12. A mortgagee of a telegraph company who has advanced money in good faith, to organize and maintain its business, having taken the management of its affairs upon himself, to secure the payment of his loan, can maintain replevin for the mortgaged property; although a circular may have been issued in the name of the company, soliciting business, he could only use the franchise in the name of the corporation, and such circular would not conclude his rights. *Ib.* 321.

See CHATTEL MORTGAGE.

MUTUAL DEMANDS.

1. Mutual demands arising out of the same subject matter, although one arises *ex contractu*, and the other *ex delicto*, capable of being balanced against each other, may be adjusted in one action. *Brigham* v. *Hawley*, 38.

NEGLIGENCE.

1. A bailee without reward, is required to use such care and discretion in the performance of a duty, as may be expected of all men of common prudence in their own affairs; and will be liable only for bad faith or gross negligence. *Skelley* v. *Kahn*, 170.
2. If he undertake to convey or pay money, he is bound to perform his undertaking, with the care and responsibility incident to such an obligation. *Ib.* 170.
3. The question of negligence is a question of fact, to be passed upon by the jury. *Ib.* 170.

See COMMON CARRIERS, RAILROADS.

NEGRO.

1. In a prosecution under the act to prevent the immigration of free negroes into this State, it is erroneous to instruct the jury to disregard the statements of the negro, if such were contradictory of his acts, as to his intention to be a resident; both should be considered, giving such weight to each as they might deserve. *Torrey* v. *People*, 105.
2. The affidavit for an arrest under this statute should aver that the negro has come into the State within the time prohibited; and he has a right to demand the nature and cause of the accusation against him, and if this does not show an offence against the law, he should be discharged. *Ib.* 105.

NEW TRIAL.

1. In a case for divorce, if the court thinks the finding wrong, it should set aside the verdict and order a new trial, or, perhaps, reform the verdict, and enter a decree contrary to it. *Thatcher* v. *Thatcher*, 66.
2. The verdict of a jury in such a case, where the evidence is not preserved in the record, shows that the proofs sustained the allegations in the bill, and the court must so consider. *Ib*. 66.
3. Where the record does not show an exception taken to the decision of the Circuit Court in overruling a motion for a new trial, the decision cannot be assigned for error. *Smith* v. *Kahill*, 67.
4. A second new trial in ejectment will not be granted because the defendant alleges he can make further proof, which proof was accessible to him on the other trial, and is merely cumulative, when he does not show any satisfactory reason for not having produced it. *Laflin* v. *Herrington*, 399.
5. The judgment of the court below, in refusing such new trial, unless it is clearly shown that error was committed, will not be disturbed. *Ib*. 399.

See PRACTICE.

NONSUIT.

1. Where a case is submitted to the court for trial, the plaintiff may take a nonsuit after the court has announced his opinion, and before a note thereof is entered. *Howe* v. *Harroun*, 494.

See PRACTICE.

OFFICE. OFFICER.

1. A director of the State institution for the education of the deaf and dumb appointed by the Governor with the advice of the Senate, holds an "office of honor," within the meaning of the twenty-ninth section of the third article of the constitution, which will be vacated by an acceptance of an appointment as marshal by authority of the United States. *Dickson* v. *People*, 191.
2. A judgment of ouster upon a proceeding by quo warranto will not be reversed, because formal leave to file the information had not been first obtained, if it appears that there was an acquiescence in the proceeding. *Ib*. 191.
3. A director in the same institution (for the education of the deaf and dumb) has sufficient interest to entitle him to make the information in such proceeding. *Ib*. 191.
4. The several acts of the General Assembly since 1839 have kept alive the succession in the several officers appointed as agents for the inhabitants; and the present trustees may sue and recover upon a judgment in favor of a school commissioner which was rendered at that time. *Trustees of Schools* v. *Douglas*, 209.

OFFICIAL BOND.

1. An official bond of a justice of the peace is obligatory from the time it is left with the clerk for approval, if it is not rejected by him, although he omits to approve. *Green* v. *Wardwell*, 278.
2. The sureties upon an official bond of a justice of the peace will be held liable so long as he performs the duties of the station, without reference to the regularity of his election, commission or eligibility. *Ib*. 278.
3. The board of supervisors, where township organization is adopted, legally succeeds to the County Commissioners' Court, and may bring suit on the bond of a justice of the peace. *Ib*. 278.
4. The official bond of a justice of the peace *de facto*, is an obligatory instrument. *I* . 278.

OUSTER.

See EVICTION.

PARTIES.

1. Parties to suits in chancery should be described by their proper names, if known; if their names are unknown, they must be made parties in the manner prescribed by the forty-first section of the twenty-first chapter of the Revised Statutes. *Kirkham* v. *Justice*, 107.

PARTITION.

1. No default should be taken against infants in a petition for partition; a gaurdian *ad litem* should be appointed for them before any steps are taken, wherein they are entitled to be heard. *Cost* v. *Rose*. 276.
2. A decree of a partition should not be rendered against infants without proof of the case made by the bill; which proof should be preserved on the record. *Ib*. 276.
3. Where land descends to the wife, it should, on partition, be set off to the husband and wife in right of the wife, or to her alone, not to them jointly and in fee. *Ib*. 276.

See INFANTS, HUSBAND AND WIFE.

PATENT.

1. The assignment of an interest in a patent, granted for an ornamental design for an "horological cradle," is a sufficient consideration to enable a party to recover on promissory notes given therefor, although the invention may be practically of but little value. *Myers* v. *Turner*, 179.
2. That although the assignment described the patent as being for "an horological cradle," it will be understood as of the thing patented, without reference to all the parts which constitute a cradle. *Ib*. 179.
3. Where the patent assigned is referred to by date, it may be presumed the purchaser examined it for himself. The maxim of "*caveat emptor*" would apply to such a transaction. *Ib*. 179.
4. The Act of Congress, requiring a transfer of letters patent to be recorded in the Patent Office within three months, is directory only as between the parties. *Hildreth* v. *Turner*, 184.

PAYMENT.

1. A transfer of a debt secured by mortgage, by assignment or delivery, would, generally carry the mortgage in equity, and payment of the debt will discharge the lien. *Ryan* v. *Dunlap*, 40.
2. Payment of a debt secured by mortgage may be made otherwise than by the delivery of money, and the entry of satisfaction on the margin of the record of the mortgage is not required as prescribing a rule of evidence. *Ib*. 40.

PLEADING.

1. A plea of failure of consideration should set out what the consideration was or in what particular it failed. *Vanlandingham* v. *Ryan*, 25.
2. Whatever the parties choose to present in issue, by their pleadings and proofs, whether of law or fact, ought to conclude them from another suit, if such pleadings and proofs present the merits of the controversy. *Ib*. 25.
3. A demurrer to a good plea in bar will estop a plaintiff from raising the same issue in another suit *Ib*. 25.

4. A judgment upon a demurrer, for defect in the pleadings, will not bar another action for the same cause. *Vanlandingham* v. *Ryan*, 25.

5. When, by a defect in pleading, the merits of an action or defence were not presented, a plea of former recovery will not be a bar to a second action. *Ib.* 25.

6. But if the cause of action is well set forth, and a judgment proceed upon the ground that the action will not lie, the party will be concluded and barred by the issue of law raised by his pleading. *Ib.* 25.

7. Where an affidavit for an attachment alleges that a defendant is about to remove his property from this State to the injury of the plaintiff, and this allegation is traversed by a plea in abatement, it is not error on the trial of such a plea to instruct, that unless the jury believe, from the evidence, that the defendant was at the time about to remove his property as alleged, they should find for the defendant. *Ridgway* v. *Smith*, 33.

8. Such a plea should conclude to the country, and a common similiter forms the issue; the burden of proof is on the plaintiff to maintain the allegation of his affidavit; and if the verdict is for the defendant, the writ is quashed, and he is out of court. *Ib.* 33.

. The laws of the forum must govern the pleadings and evidence. *Bond* v. *Bragg*, 69.

10. Each count of a declaration must truly set out the contract and cause of action, and if the evidence does not sustain the court, the action fails; a party cannot, in any subsequent pleading, change the contract so as to present a new or different cause of action. *Hite* v. *Wells*, 88.

11. Pleadings in the Supreme, as in other courts, should be properly entitled in the cause. *Napper* v. *Short*, 119.

12. A variance between a writ and declaration can only be taken advantage of by plea in abatement; and after an award upon a reference by the court such a plea is unavailing. *Thorpe* v. *Starr*, 199.

13. In an action in *tort*, founded on a breach of duty, seeking the recovery of damages and not a specific thing, the non-joinder of any of the owners can only be taken advantage of by plea in abatement. If such plea is not interposed, the plaintiffs recover proportionately to their interests or damages, and the other joint owners may afterward sue and recover their proportion of the whole damages. *Johnson* v. *Richardson*, 302.

14. A plea which avers that a bill of exchange was drawn to a bank in Illinois, made payable in New York, with express reference to the laws of New York, but bearing twelve per cent. interest, besides the price of exchange between the two places, and was therefore void by the statutes of New York setting them out, is not an immaterial plea, as such a plea, if true, presents a good defence to a suit on the bill. *McAllister* v. *Smith*, 321.

15. An affidavit to a plea, in which the party states that he has a defence to the merits of the action, omitting the word "good," is sufficient, under the act regulating the practice in the Circuit and Common Pleas Courts of Cook county, and perjury may be assigned upon it, if the plea were wholly frivolous. *McDonald* v. *Olwell*, 375.

16. The said act of 12th February, 1853, was clearly within the constitutional power of the Legislature to enact. *Ib.* 375.

17. A plaintiff cannot crave oyer of a judgment pleaded. He admits the recovery by his demurrer to the plea; the plea should be traversed. *Hanna* v. *Yocum*, 387.

18. Profert can only be made of contracts, &c., in the power of a party to produce; not of records. *Ib.* 387.

19. Under the general issue, it is not competent to show a total or partial failure of consideration of a promissory note. *Rose* v. *Mortimer*, 475.

20. A substantial statement of an award in a declaration in assumpsit, showing the obligation to pay money, is sufficient. *Haywood* v. *Harmon*, 477.

21. All reasonable intendments will be indulged in support of an award, where no fraud, corruption or unfairness is shown. *Ib.* 477.

22. A judgment of another State will be conclusive in this, if it appear that the court of such State had properly acquired jurisdiction of the person and the subject matter. *Smith* v. *Smith*, 482.

23. A want of jurisdiction in the court need not be pleaded, where the fact affirmatively appears on the record produced. *Smith* v. *Smith*, 482.
24. Where a foreign judgment was rendered against two, one of whom was not served with process and suit is brought against the party served, as upon a joint judgment, he may show the variance upon a proper plea, and so exclude the record when offered as proof. *Ib.* 482.
25. A variance between the writ and the declaration must be taken advantage of by plea in abatement. *Carpenter* v. *Hoyt*, 529.
26 It is not requisite, in an action upon a judgment of a sister State, to aver that the court which pronounced the judgment had general jurisdiction or special jurisdiction of the subject matter, or of the person, if the action is upon a judgment of a court of general jurisdiction. *Roe* v. *Hulbert*, 578.
27. It is the duty of this court to take the same notice, that the Supreme Court of another State had jurisdiction of the subject matter and of the regularity of its proceedings, that it would take of a domestic judgment. *Ib.* 572.
28. Trespass *vi et armis*, is not the proper form of action for injuries, resulting from the negligence of the servants of a corporation; trespass on the case is the proper action, of which a justice of the peace has not jurisdiction. *Illinois Central R. R. Co.* v. *Reedy*, 580.

POSTHUMOUS CHILD.

See HEIRS.

POWER. POWER OF ATTORNEY.

.1 The appointment of one party to act for another, where it is coupled with an interest is irrevocable. The interest, coupled with the power, must be in the thing itself, upon which the power is to operate, or the power must be created upon a valuable consideration. *Bonney* v. *Smith*, 531.
2. Where the person empowered to act for another has only an interest arising out of its execution, as in the proceeds as for compensation, the power is revocable. But if the power is expressed to be irrevocable, and the attorney has an interest in its execution, it will remain irrevocable. *Ib.* 531.

PRACTICE.

1. Upon an application to amend the record of judgment, by making a new party. such party, when brought into court, should be ruled to plead, before he is adjudged. Nor should the judgment be entered *nunc pro tunc*, so to give it any retro-active effect. *Loomis* v. *Francis*, 206.
2. An action of forcible entry and detainer cannot be maintained against two or more, who hold in severalty. *Reynolds* v. *Thomas*, 207.
3. Courts of law will not take cognizance of separate causes of action against different parties in the same suit. *Ib.* 207.
4. Where a case is brought from the Circuit to the Supreme Court, and remanded, the defendant in the Circuit Court is presumed to know that the case is returned and docketed without notice of the fact. *Murray* v. *Whitaker*, 230.
5. Either party may procure the record from the Supreme Court, and have the case placed on the docket of the Circuit Court for further proceedings; and the opposite party will after that be governed by the action of the Circuit Court. *Ib.* 230.
6. While it might be a better practice for the Circuit Court to cause notice of the filing of the record in such cases to be given, yet it is not in the power of the Supreme Court to make a rule in that regard. *Ib.* 230.
7. Taking an appeal, executing a bond, &c., are in the nature of process to remove a case from an inferior to a superior court; and if these should be irregular, and objection is not made in the first instance after appearance, the irregularity is waived. *Mitchell* v. *Jacobs*, 235.
8. An appearance in a case. except to object to the process of service, is a waiver of all irregularity in them. *Ib.* 235.

9. Where counsel for defendant found a lease among the papers in the cause not marked filed, which was an important piece of evidence for plaintiff, and annexed it to a dedimus and sent it out of the State, it was held that secondary evidence of its contents should be admitted. *Mitchell* v. *Jacobs*, 235.

10. Exceptions may be taken to the decision of a Circuit Court, trying a man without the intervention of a jury, but they must be taken at the time; and then error can be assigned, not otherwise. *Parsons* v. *Evans*, 238.

11. A *scire facias*, upon recognizance, should show, by proper recitals, that the recognizance had legally become matter of record. *Shadley* v. *People*, 252.

12 Wh ere persons are regularly summons as garnishees, and make default they admit an indebtedness to the defendant equal to the amount recovered against them. *Whiteside* v. *Tunstall*, 258.

13. A default should not be taken upon publication, without a return of s um mons "not found." *Cost* v. *Rose*, 276.

14. No default should be taken against infants, in a petition for partition; a guardian *ad litem* should be appointed for them before any steps are taken, wherein they are entitled to be heard. *Ib.* 276.

15. In an action in *tort*, founded on a breach of duty, seeking the recovery of damages and not a specific thing, the non-joiner of any of the owners can only be taken advantage of by plea in abatement. If such plea is not interposed, the plaintiffs recover proportionately to their interests or damages, and the other joint owners may afterwards sue and recover their proportion of the whole damages. *Johnson* v. *Richardson*. 302.

16. The statute of 1853, regulating practice in certain courts of Cook county, does not intend to make the service of a copy of declaration and rule to plead a part of the record; these should be incorporated into a bill of exceptions if objections to them is to be taken. The absence of them from the record will not be taken as evidence that they were not served. *Iglehart* v. *Pitcher*, 307.

17. After the case has been declared closed by both parties, it is discretionary with the court, and not assignable for error, whether the case shall be again opened, and further evidence offered to the jury. *Welch* v. *People*, 339.

18. An affidavit to a plea, in which the party states that he has a defence to the merits of the action, omitting the word "good," is sufficient, under the act regulating the practice in the Circuit and Common Pleas Courts of Cook county, and perjury may be assigned upon it, if the plea were wholly frivolous. *McDonald* v. *Olwell*, 375.

19. Where a case is submitted to the court for trial, the plaintiff may take a non-suit after the court has announced its opinion, and before a note thereof is entered. *Howe* v. *Harroun*, 494.

20. A variance between the writ and declaration must be taken advantage of by plea in abatement. *Carpenter* v. *Hoyt*, 529.

21. To entitle a party to a default at a vacation term, under the practice act of 1853, for Courts in Cook county, service of the declaration and rule to plead must be made ten days before the term. *Castle* v. *Judson*, 381.

22. If a party shall plead, demur, or enter a motion in a cause, though filed after the rule to plead has expired, if not placed in default by order of the court, he will be in time; and the plea or motion will stand for answer or hearing. *Ib.* 381.

23. An affidavit of merits filed with a plea need not be in the express words used in the practice act. *Ib.* 381.

24. The four days' notice required to be given for the hearing of a motion, if the motion is not reached for hearing, will stand good for the particular matter, without a renewal of it. Pleadings will also stand for hearing from term to term in like manner. *Ib.* 381.

25. To proceed to trial on other issues, without noticing a plea of payment is error. *Sammis* v. *Clark*, 398.

26. A default cannot be taken while there is a plea or demurrer unanswered. *Ib.* 398.

27. The deposition of a witness may be read on a trial, although the witness is present. The other party may make the witness his own, and examine him if he chooses. *Frink* v. *Potter*, 406.
28. Two instruments executed as parts of the same transaction, whether at the same or a different time, will be construed together. *Stacy* v. *Randall*, 467.
29. Obligations which are exhibited as collateral evidences of indebtedness to support a bill for foreclosure, should be established by proof; they do not come within the 14th Section of the Practice Act. *Ib.* 467.
30. Exhibits and proofs in support of a decree should be preserved in the record. *Ib.* 467.
31. To avoid expense and the incumbrance of a record with proofs of matters that might be admitted, the court may compel an admission or denial of all such allegations as require proofs. *Ib.* 467.
32. Motions to set aside defaults are addressed to the sound discretion of the court, and that discretion will not be interfered with, unless it is greatly abused. *Greenleaf* v. *Roe*, 474.
33. A court may refuse the continuance of a chancery cause where it appears there is a want of diligence in the party asking the continuance. *Wiley* v. *Platter*, 538.
34. A party cannot obtain a continuance, where the original case is ripe for hearing, by filing a cross-bill, and having the same answered, without showing sufficient cause for delay. *Ib.* 538.
35. A party who has taken the deposition of a witness, has a right to read it in evidence, although the witness may be present at the trial. If the opposite party chooses, he may examine the witness. *Bradley* v. *Geiselman*, 571.
36. The clause of the second section of the Practice Act, giving jurisdiction in the county where the contract may have specifically been made payable, does not apply to contracts other than for the payment of money, to be performed in the county where the suit is brought. *Porter* v. *Bourdman*, 594.
37. A. contracts with B. for the delivery of a quantity of wheat in Cook county. A. sued B. in Cook county for a breach of the contract, and sent summons to Tazewell county, the residence of the defendant: *Held*, that the court in Cook county had not jurisdiction. *Ib.* 594.

PRECIPE.

1. The attorney should state in his precipe for a writ of error, the name in full of all the parties to the controversy, and their position in the record. *Napper* v. *Short*, 119.

PRE-EMPTION.

1. Under the act of 1852, in relation to the swamp lands, the right of a preempter is restricted to the several legal subdivisions of forty acres each, portions of which are covered by his improvements, not exceeding a quarter section. *Songer* v. *Gallatin County*, 53.

PRIORITY OF LIEN.

1. Where two parties have acquired title to land, one under proceedings for a mechanic's lien, the other under proceedings to foreclose a mortgage, if the mortgagee or others interested were not made party to the suit enforcing the lien, and were ignorant of it, title to the land derived through the mortgage will be superior. *Williams* v. *Chapman*, 423.

PROCESS.

1. A delay, occasioned by a change of jurisdiction from one tribunal to another, does not impair the obligations of contracts. One remedy may be abol- theris substituted, so that a party may obtain the same substan tial aid or relief. *Newkirk* v. *Chapron*, 344.

2. It is not necessary that there should be, at all times, a person having power to issue or execute judicial process. *Newkirk* v. *Chapron*, 344.
3. A party having the custody of records does not, from that fact, become authorized to issue process. *Ib.* 344.

PROFERT.

1. Profert can only be made of contracts, &c., in the power of a party to produce ; not of records. *Hanna* v. *Yocum*, 387.

PROMISSORY NOTES.

1. The law of the place where a promissory note is made, and of that where it is indorsed, will govern the contract and fix the liability of the several parties. *Bond* v. *Bragg*, 69.
2. The laws of the forum must govern the pleadings and evidence. *Ib.* 69.
3. To fix the liability of an indorser, it was necessary to demand payment and give notice of its refusal. *Ib.* 69.
4. A protest is not required on inland bills and promissory notes, unless by local law or usage ; and such protest is not, of itself, evidence of demand of payment, non-payment, and notice. *Ib.* 69.
5. The assignment of an interest in a patent, granted for an ornamental de sign for an "horological cradle," is a sufficient consideration to enable a party to recover on promissory notes given therefor, although the invention may be practically of but little value. *Myers* v. *Turner*, 179.
6. When a note is made payable in a particular locality, it will be presumed that the parties intended to adopt the laws of that locality in reference to the rate of interest. *McAllister* v. *Smith*, 321.
7. A note made payable to A. B. or bearer, cannot be transferred by mere delivery, so as to vest the legal title in the bearer. *Roosa* v. *Crist*, 450.
8. The same rule will hold, although the note may have been transferred by delivery in a State where such transfer would carry the legal right with it. *Ib.* 450.
9. The holder of a negotiable note, indorsed in blank, may fill up the blank with such undertaking as is consistent with the nature of the instrument and the intention of the parties. *Webster* v. *Cobb*, 459.
10. The signature of a third person in blank, on the back of a note in the hands of the payee, is presumptive evidence that it was placed there as a gauranty, at the time of the execution of the note. *Ib.* 459.
11. A guaranty may be written over such a signature, at the trial of a suit upon it. *Ib.* 459.
12. Upon an action upon such a guaranty, the party may show, after proving payment to the payee, that it was assigned under such circumstances as make it colorable, and defeat a recovery. *Ib.* 459.
13. Under the general issue, it is not competent to show a total or partial failure of consideration of a promissory note. *Rose* v. *Mortimer*, 475.
14. A quit-claim deed is a sufficient consideration for a promissory note. *Bonney* v. *Smith*, 531.
15. In a proceeding against the representatives of a decedent, the holder of a note, an indorsement upon it, written with a pencil, indicating a payment, raises a strong presumption of its truth, which the holder should explain away if it is to be avoided. *Greenough* v. *Taylor*, 602.

PROTEST.

1. A protest is not required on inland bills and promissory notes, unless by local law or usage ; and such protest is not, of itself, evidence of demand of payment, non-payment, and notice. *Bond* v. *Bragg*, 69.

PUBLIC ACTS AND RECORDS.

1. All public acts of Congress in relation to the public lands, and the acts of such officers to whom execution of them is confided, as are required to make and keep public records in relation thereto, may be shown by the public records, or by copies duly authenticated, and these are admissible in evidence. *Lane* v. *Bommelmann*, 95.
2. If a record shows that a court had jurisdiction of the subject matter and the person, the judgment rendered by the court cannot be collaterally questioned for errors of substance or form. *Ib*. 95.
3. A certified copy of a patent for land, issued by the United States, may be offered in evidence. *Ib*. 95.
4. Records from the Circuit Courts should be legibly written and the proceedings be stated in proper consecutive order. *Napper* v. *Short*, 119.
5. The act of the general Assembly, which declares that a county seat shall be changed, unless upon a petition of a majority of the voters, is merely advisory, and does not deprive the legislature of the right so to do without petition. *Turley* v. *County of Logan*, 151.
6. That a law appears on the statute book, properly signed, is not conclusive that it was passed by a constitutional vote; this may be tested by the journals. *Ib*. 151.
7. The same legislature which passed a law, may correct its journals, at the same or a subsequent session, so as to make the truth appear; and this shows that a law received the proper vote for its passage. *Ib*. 151.

QUO WARRANTO.

1. The right of a party to exercise an office, should be determined by quo warranto. *Akin* v. *Matteson*, 167.
2. A director of the State institution for the education of the deaf and dumb, appointed by the Governor with the advice of the Senate, holds an "office of honor," within the meaning of the twenty-ninth section of the third article of the constitution which will be vacated by an acceptance of an appointment as Marshal by authority of the United States. *Dickson* v. *People*, 191.
3. A judgment of ouster upon a proceeding by quo warranto will not be reversed, because formal leave to file the information had not been first obtained, if it appears that there was an acquiescence in the proceeding. *I* . 191.
4. A director in the same institution (for the education of the deaf and dumb) has sufficient interest to entitle him to make the information in such proceeding. *Ib*. 191.

RAILROADS:

1. The grant to a railroad company, to construct a road, with such appendages as may be deemed necessary for the convenient use of the same, will authorize them to acquire land by condemnation of work-shops, &c.—these being necessary appendages. *Chicago, Burlington and Quincy R. R Co.* v. *Wilson*, 123.
2. This power is not exhausted by an apparent completion of the road, if an increase of business shall demand other appendages, or more room for tracks. *Ib*. 123.
3. On an application to a judge for the appointmen of ommissioners to condemn lands he is compelled to act, if such a cause is made as the statute directs. He is rather a ministerial than a judicial officer. *Ib*. 123.
4. Railroad companies are not liable for injuries to cattle, unless they be willfully or maliciously done; or done under circumstances exhibiting gross negligence. These companies are not bound to use the highest possible degree of care toward animals coming in the way of their trains. *Great Western R. R. Co.* v. *Thompson*, 131.

5. The case of the *Chicago and Mississippi Railroad Company* v. *Patchin*, in 16th Illinois, referred to and approved. *Great Western R. R. Co.* v. *Thompson*, 131.
6. A passenger in a railroad car need only show that he has received an injury, to make a *prima facie* case against the carrier; the carrier must rebut the presumption, in order to exonerate himself. *Galena and Chicago Union R. R. Co.* v. *Yarwood*. 509.
7. Negligence is a question of fact, which the jury should pass upon. *Ib.* 509.
8. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent careful man; the law makes allowances for them and leaves the circumstances of their conduct to the jury. *Ib.* 509.
9. The law makes a distinction in the liability of railroad carriers, between injuries to person and property transported, and injuries to persons and property coming upon a railroad track, without the intervention of the company. *Central Military Tract R. R. Co.* v. *Rockafellow*, 541.
10. Railroads are not common highways in the sense of public wagon roads. *Ib.* 541.
11. In passing public highways and streams, where others have common rights, railway companies must exercise the same care, and their liability will correspond with that of all others passing and doing business on them. *Ib.* 541.
12. In an action against a railroad company for killing an animal, it is erroneous to charge the jury, that if the animal was running at large, and went upon the road where the same was unfenced, that it was lawfully there, and if killed by any want of ordinary care and diligence, then the railroad company is liable for the destruction; or that if said animal was killed, because the engineer in charge of the train was not keeping a proper look-out in advance of the engine, without regard to his other duties, then it was such negligence as would make the company liable. *Ib.* 541.
13. A railroad company has a right to run its cars upon its track, without obstruction, and an animal has no right upon the track without consent of the company; and if suffered to stay there, it is at the risk of the owner of the animal. *Ib.* 541.
14. An allegation of negligence in the management of the train, is not supported by proof that too heavy a train was fastened to the locomotive. *Ib.* 541.
15. Trespass *vi et armis*, is not the proper form of action for injuries, resulting from the negligence of the servants of a corporation; trespass on the case, is the proper action, of which a justice of the peace has not jurisdiction. *Illinois Central R. R. Co.* v. *Reedy*, 580.
16. Animals wandering upon the track of an uninclosed railroad, are strictly trespassers, and the company is not liable for their destruction, unless its servants are guilty of willful negligence, evincing reckless misconduct. *Ib.* 580.
17. The burden of proof is on the plaintiff, to show negligence. The mere fact that an animal was killed, will not render the company liable. *Ib.* 580.
18. In order to show the manner in which railroads trains are conducted, witnesses acquainted with their management must be examined. *Ib.* 580.

See COMMON CARRIERS.

RECOGNIZANCE.

1. A *scire facias* on recognizance stands in the place of a declaration, and fills the same office. *Lawrence* v. *People*, 172.
2. It is sufficient to state a recognizance, according to its operation and legal effect; or it may be set out verbatim, and the court will decide upon its effect. *Ib.* 172.
3. The certificate of the justice, before whom a recognizance is taken, is essential, to its validity, and implies its approval by him; no form of words is necessary to this end, if the officer took and accepted the recognizance for the purposes contemplated by the law. *Ib.* 172.
4. A suit by *scire facias* on a forfeited recognizance in a criminal case is for the recovery of a debt of record, and is a distinct proceeding from the criminal matter out of which it arises. *People* v. *Phelps*, 200.

5. Where a sheriff, in a criminal proceeding, takes bail for a larger sum than is directed by the court, the recognizance is a nullity. *Waugh* v. *People*, 561.

See CRIMINAL LAW.

RECORDER'S COURT, CHICAGO.

1. The Recorder's Court of the city of Chicago is a constitutional tribunal, not repealed or affected by the Act of 27th February, 1854, providing for the better government of towns and cities. *Welch Ex parte*, 161.

REDEMPTION.

1. The right of redemption continues until barred by lapse of time, by strict foreclosure, or by judicial sale. But such right of redemption ceases after a sale under a decree to pay the debt. *Weiner* v. *Heintz*, 259.
2. A suit at law to coerce payment of a balance remaining due, after applying the proceeds of the sale, does not open the sale and entitle the mortgagor to redeem, except within the time limited by the statute. *Ib.* 259.

See MORTGAGE.

RELEASE.

1. The cashier of a bank acting in conformity with the practice and rules of the institution, may release a debt secured by mortgage in its favor. Nor need such release be under seal. *Ryan* v. *Dunlap*, 40.

REPEAL OF STATUTES.

1. The act repealing the Municipal Court of the city of Chicago was absolute and unqualified. *Newkirk* v. *Chapron*, 344.
2. Courts must look to the act repealing, rather than to the repealed act, to fix upon the powers and duties which remain in existence. *Ib.* 344.
3. A delay, occassioned by a change of jurisdiction from one tribunal to another, does not impair the obligation of contracts. One remedy may be abolished, if another is substituted, so that a party may obtain the same substantial aid or relief. *Ib.* 344.
4. It is not necessary that there should be, at all times, a person having power to issue or execute judicial process. *Ib.* 344.
5. A party having the custody of records does not, from that fact, become authorized to issue process. *Ib.* 344.

REPLEVIN.

1. Where a minor makes an exchange of a horse belonging to his father and the father apparently acquiesces in the bargain for a considerable time after it has been made, he cannot recover the horse his son has exchanged, in an action of replevin. *Hall* v. *Harper*, 82.

SCIRE FACIAS.

1. A *scire facias* on recognizance stands in the place of a declaration, and fills the same office. *Lawrence* v. *People*, 172.
2. It is sufficient to state a recognizance, according to its operation and legal effect; or it may be set out verbatim, and the court will decide upon its effect. *Ib.* 172.
3. The certificate of the justice, before whom a recognizance is taken, is essential to its validity, and implies its approval by him; no form of words is necessary to this end, if the officer took and excepted the recognizance for the purposes contemplated by the law. *Ib.* 172.
4. Must be in the name of the People. p. 252.

4. A suit by *scire facias* on a forfeited recognizance in a criminal case is for the recovery of a debt of record, and is a distinct proceeding from the criminal matter out of which it arises. *People* v. *Phelps*, 200.

5. If bail, by means of a capias on the indictment found, can produce the principal, so as to procure their own discharge from *scire facias*, by a surrender of the principal, the costs under the capias are not properly chargeable as costs under the proceeding by *scire facias*. *Ib.* 200.

6. A *scire facias*, upon recognizance, should show, by proper recitals, that the recognizance had legally become a matter of record. *Shadley* v. *People*, 252.

SERVICE OF PROCESS.

1. In serving process by copy, the return of the officer must show a strict compliance with the statute, or the court will not obtain jurisdiction of the person. *Cost* v. *Rose*, 276.

SHERIFF.

1. To disqualify a deputy sheriff from serving an execution, either he or his principal must have been plaintiff in the action, entitled to the money to be made by a sale under it, or have a direct interest in the process. *Woods* v. *Gilson*, 218.

2. There is no implication of indemnity to a sheriff for the execution of a process, put into his hands, without direction to execute it in a particular manner. *Nelson* v. *Cook*, 443.

3. If a defendant dies between the *teste* of an excution and its delivery to the sheriff, he cannot proceed to make a levy under it. *People* v. *Bradley*, 485.

4. Where a sheriff, in a criminal proceeding, takes bail in a larger sum than he is directed by the court, the recognizance is a nullity. *Waugh* v. *People*, 561.

SHERIFF'S SALE AND DEED.

1. A purchaser at a sheriff's sale, who is not a party to the proceedings, having a good deed, will not be defeated in his title by any defect or irregularity; he relies upon the judgment, levy and deed; all other questions are between the parties to the judgment and officer. *Phillips* v. *Coffee*, 154.

2. Such a purchaser has nothing to do with the return of the officer to the execution. *Ib.* 154.

3. A misrecital of the judgment in the deed will not distroy the title. *Ib.* 154.

4. A stranger to the proceedings cannot collaterally question the regularity of them. *Ib.* 154.

SLANDER.

1. An infant under ten years of age may maintain an action, by her next friend, for slanderous words charging her with theft. *Stewart* v. *Howe*, 71.

2. In an action for slander, a party may show that he offered an explanation of the offensive words, if the explanation was a part of the same conversation and before the same auditory, and in reference to the same subject. *Winchell* v. *Strong*, 597.

STATUTE OF FRAUDS.

1. The statute of frauds is the plain law of the land, and it is the duty of courts to enforce its provisions. This statute requires the promise to be in writing, and the common law makes a consideration necessary to the legal obligation of the promise. *Hite* v. *Wells*, 88.

2. Parties may make valid contracts, though not in writing, to pay the debt of, or for services rendered for, another; but the new or original contract must be declared on; and this must be founded upon a new and original consideration moving to the party making the promise, and the debt of the original debtor must not be the consideration for the promise. *Ib.* 88.

3. To take a case out of the statute of frauds, no form of language is necessary; anything from which the intention may be gathered is sufficient, whether in memoranda books, papers, or letters. *McConnel* v. *Brillhart*, 354.
4. These must contain enough on their face, or by reference, to fix the names of the parties, the interest or property to be affected, and the consideration to be given. *Ib*. 354.
5. The party to be charged, or his agent, must sign the obligation; and parol proof of agency will hold the party who acts by agent. *Ib*. 354.
6. The signing may be in the caption, in the body or at the end of an instrument. *Ib*. 354.
7. The contract must be signed with an intent to enter into it, be mutual, reciprocal, and upon good consideration. *Ib*. 354.
8. Such contracts are not subject to alteration, but mistakes in them may be corrected—or the identity of parties, or the quantity of an interest, may be sometimes established by extrinsic facts. *Ib*. 354.
9. The main inquiry, under the statute of frauds, where one person is called upon to pay the debt of another, is, whether the promise is an original and independent, or, whether it is collateral to, and dependent upon, the debt or liability of another.. *Eddy* v. *Roberts*, 505.
10. If the liability of the original debtor continues, the promise of another to pay his debt should be in writing. *Ib*. 505.
11. A consideration is necessary to support all promises, and, without it, no action can be maintained upon the promise, whether it is in writing or not. *Ib*. 505.
12. Where one enters into a simple contract with another, for the benefit of a third person, such third person may maintain an action for the breach, and such a contract is not within the statute of frauds. *Ib*. 505.

STOLEN PROPERTY.

1. Trover against a purchaser will lie for the recovery of stolen property, without a prosecution or conviction of the thief. *Newkirk* v. *Dalton*, 413.

STRICT FORECLOSURE.

1. Although equity may grant relief by a strict foreclosure, the practice should not be encouraged. *Weiner* v. *Heintz*, 259.

SUPREME COURT.

1. The Supreme Court will not reverse a judgment as being against evidence, unless the finding of the jury is clearly so. *Booth* v. *Rives*, 175.
2. The Supreme Court, except in certain specified cases, has only appellate jurisdiction. *Crull* v. *Keener*, 246.
3. The Supreme Court will not take jurisdiction of a case certified, or an agreed case, unless there has been a final judgment entered in the court below. *Ib*. 246.

See Error.

SURETY.

1. The surety in a forth-coming bond cannot plead that the property levied upon by an attachment, was not the property of the defendant, thereby to discharge himself from the obligation of the bond. *Grey* v. *McLean*, 404.
2. Where it is agreed beween A. and B. that B. shall enter into business with A., and receive a specified sum per annum as his share of the profits, upon condition that B. shall devote his whole time to the business, they are to the world copartners; and the sureties to a bond, conditioned for the faithful conduct of a servant who was employed by A. before his association with B., were held to be released as against A. and B., who continue the servant in their joint service, such servant having become delinquent while in such joint service. *Barnett* v. *Smith*, 565.

SWAMP LANDS.

1. Under the act of 1852, in relation to the swamp lands, the right of a pre-empter is restricted to the several legal subdivisions of forty acres each, portions of which are covered by his improvements, not exceeding a quarter section. *Songer* v. *Gallatin County*, 53.

TAXES.

1. It is within the constitutional power of the legislature to exempt property from taxation, or to commute the general rate for a fixed sum. *Ill. Cent. R. R. Co.* v. *County of McLean*, 291.
2. The provisions of the charter of the Illinois Central Railroad Company, exempting its property from taxation, upon the paymnnt of a certain proportion of its earnings, are constitutional. *Ib.* 291.

TITLE.

1. A party who holds land under paper title, purporting to convey the same, and pays taxes for seven successive years, will be protected. *McConnel* v. *Street*, 253.
2. That the title of a party originated in good faith, and that he holds under it, will be presumed until the contrary is shown. *Ib.* 253.
3. Good faith, (under the act of 1839, to quiet possession,) is understood to be the opposite of fraud and of bad faith; and its non-existence must be established by proof. *Ib.* 253.
4. Where, upon a proceeding by town authorities, to condemn lands for opening streets, they describe said land in all their proceedings, as being the land of A., they cannot afterward deny his right to be heard on the question of damages, upon the ground of his want of title. *Mount Sterling* v. *Givens*, 255.

TOWN ORDINANCES.

1. In an action of debt for violation of a town ordinance, against selling liquor, in order to justify a recovery, it should be shown that the liquor had been sold after the ordinance took effect. *Newlan* v. *Town of Aurora*, 379.

TRESPASS.

1. In an action of trespass for injury to personal property, it is not error to refuse to instruct the jury that if they have a reasonable doubt of the guilt of the defendant, they must find for him. Such a case depends upon the preponderance of the evidence offered and its credibility. *Wells* v. *Head*, 204.

TROVER.

1. Trover against a purchaser will lie for the recovery of stolen property, without a prosecution or conviction of the thief. *Newkirk* v. *Dalton*, 413.
2. *Markets overt*, as known to the common law, making distinctions in the sale of stolen property, are not recognized in this State. *Ib.* 413.

TRUSTS. TRTSTEES.

1. In chancery proceedings a trustee may state facts explanatory of a transaction, and interpose denials and objections, with a view to negative his own transactions as charged, and to require full proofs of complainant. *Morris* v. *Thomas*, 112.
2. Although a remedy at law may exist, yet if a complaint is one of equitable jurisdiction, chancery will sometimes take cognizance of it where its aid is more effectual. *Ib.* 112.
3. In matters of trust funds, &c., courts of law might enforce bargains, which equity would set aside, as being in violation of the trust. *Ib.* 112.

4. Equity will not enforce an agreement made by a trustee in gross violation of his trust to take land in satisfaction of a judgment. *Morris* v. *Thomas*, 112.
5. The power given the trustee, to close up the affairs of the Bank of Illinois, by making such settlements and compromises as he might deem most advantageous, is subject to the revision and control of a court of equity; which will inquire, not only into the good faith, but the propriety of his acts, revoking or confirming them at its discretion. *Ib.* 112.
6. Where a person purchases property as the agent of another, though he may have the deed of contract of sale made out in his own name, the principal, from the moment of the purchase, aquires an equitable title thereto, subject to all the incidents attaching to such an estate, and the agent holds it in trust for the principal. *Follansbe* v. *Kilbreth*, 522.
7. An equitable title derived under such circumstances may be divested out of the *cestui que trust* otherwise than by alienation, before the trust is actually performed. If the trustee has practiced any fraud toward his *cestui que trust*, the latter may, when he discovers the fraud, repudiate the acts and purchase of the trustee, and thus divest himself of his equitable title, or he may waive the fraud and claim rights as *cestui que trust*; or, before he has discovered the fraud, he may treat the purchase as his own by selling his equitable title. The *cestui que trust* may also divest himself of his equitable title by laches, fraud, or by agreement. *Ib.* 522.
8. A court of equity will not permit a *cestui que trust* to show a speculative disposition toward his trustee. If a *cestui que trust* discovers facts which would give him a right to repudiate the acts of his trustee, and has investigated them, or had a reasonable time to do so, he is bound to declare whether he will avail himself of the right or not, and cannot lie by in a position to affirm the bargain, if a profitable one, and repudiate it, if it is a losing one. *Ib.* 522.
9. Where a *cestui que trust*, having a right to repudiate a transaction, laid by for three years, and suffered his trustee to go on and make payments for the property: *Held*, he was not entitled to relief. *Ib.* 522.

USURY.

See Interest.

VENDOR AND VENDEE.

3. The admission of a person in possession, claiming property, are proper testimony as against his own title. An exception to this rule arises, under the statute, in the trial of right of property, which excludes the testimony of the defendant in execution. *Waggoner* v. *Cooley*, 239.
2. As between vendor and vendee, a fraudulent sale may be good, but void as between each of them and creditors. *Ib.* 239.
3. A debtor in failing circumstances, has not the right to transfer his assets to an agent, with power to sell, and prefer creditors. *Ib.* 239.
4. Creditors who, to secure a debt, take title by purchase, from a fraudulent vendee, with knowledge of his title, take only such title as their vendor had, and other creditors may assail the whole transaction for fraud. *Ib.* 239.

VENUE.

1. The act in relation to changes of venue, applies to parties and causes in the Lake County court. *Searls* v. *Munson*, 558.
2. An application for a continuance of a cause in that Court, should be granted, as it would be in the Circuit Court. *Ib.* 558.

WAIVER.

1. Proceeding to trial without a formal issue, is, after verdict, treated as a waiver of the plea or issue. *Armstrong* v. *Nock*, 166.

WILLS AND TESTAMENTS.

1. A husband by his last will gives to his wife all his estate, except so much of a described piece of land as it might be necessary to sell to pay all his just debts, to own as long as she should remain his widow; this will invest her with a life estate, if she continues unmarried. *Batterton* v. *Yoakum*, 288.
2. Such a will is not to be understood as creating a charge of the debts of the deceased upon the life estate. *Ib.* 288.

WITNESS.

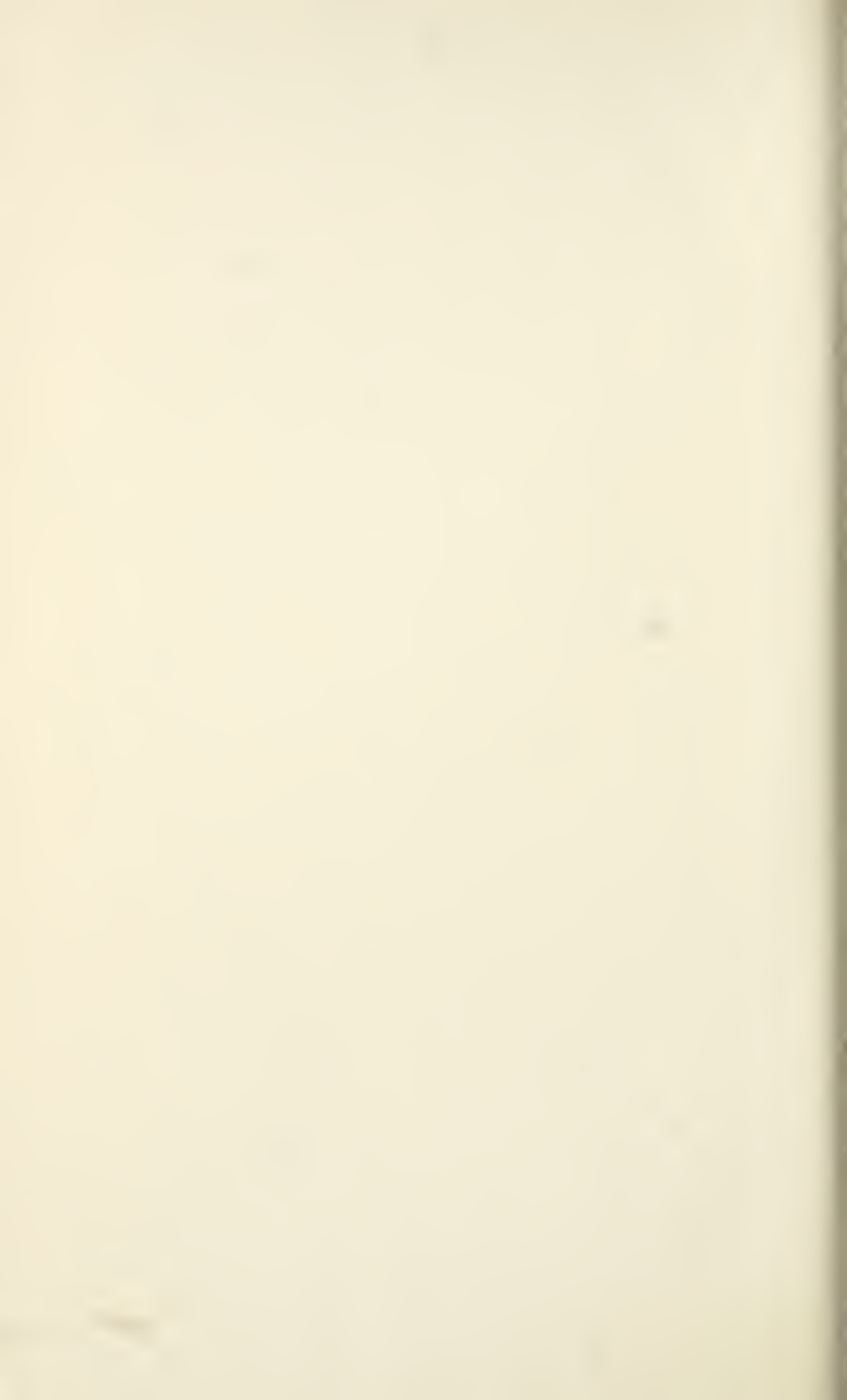
1. A party may show, where a witness resided in a particular county for several years, that his character for truth was bad; althouth the witness may have been roving for some years preceding the trial at which his character was impeached. *Holmes* v. *Stateler*, 453.
2. A person who has no religious belief, who does not acknowledge a Supreme Being, and who does not feel himself accountable to any moral punishment here or hereafter, but who acknowledges his amenability to the criminal law, if he forswears himself, cannot become a witness. *Central Military Tract R. R. Co.* v. *Rockafellow*, 541.
3. The unbelief of such a person is best established by the testimony of others; though he may be permitted to explain any change of belief, and leave the court to determine as to his competency. *Ib.* 541.
4. The attendence of a witness, upon the request of a party, is evidence of diligence on his part. *Searls* v. *Munson*, 558.
5. A party who has taken the deposition of a witness, has a right to read it in evidence, although the witness may be present at the trial. If the opposite party chooses, he may examine the witness. *Bradley* v. *Geiselman*, 571.

See EVIDENCE.

WRIT OF ERROR.

1. Heirs, who are made parties to a proceeding for the sale of the land of their ancestor, although personal service of notice of the proceeding is not required to be made upon them, may sue out a writ of error to review such proceedings; but they must sue out the writ in their own names, or by their gaurdians or next friends, if they are still minors. *Napper* v. *Short*, 119.
2. The attorney should state in his precipe for a writ of error, the names in full of all the parties to the controversy, and their position in the record. *Ib.* 119.

See SUPREME COURT.



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