REPORTS

OF

CASES DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

AT

APRIL AND NOVEMBER TERMS, 1858.

BY E. PECK,
COUNSELOR AT LAW.

VOLUME XX.

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ERRATA.

Wilson v. *Pearson*, page 87, 8th line from the bottom, read "*inoperative*," for "in operation." On the bottom of same page, read "*vests*," for "rests."

Chapman v. *McGrew*, page 102, 4th line from the bottom, read "*Selby*," for "McGrew." On page 103, 22nd line from the bottom, read "*necessary*," for "unnecessary."

Swift v. *Whitney*, page 145, 4th line from the bottom, read "*negotiated*," for "negotiable."

Warner v. *Crane*, page 151, 15th line from top, read "*against*," for "by." On same page, 31st line from the top, read "*the former*," for "either."

Bishop v. *Newton*, page 179, 3rd and 2nd line from bottom, read "*consideration*," for "condition."

Hempstead v. *Dickson*, page 195, 23rd line from top, read "*intent*," for "interest."

The City of Chicago v. *Rock Island Railroad Co.*, page 290, 19th line from the bottom, read "1851," for "1857."

McCormick v. *Tate*, page 337, bottom line, read "*by*," for "of." On page 338, between 23rd and 24th lines from the top, supply "*not*" between the words "does" and "abridge."

Dunlap v. *Daugherty*, page 400, 6th line from bottom, read "*West*," for "East."

Page 59, last paragraph of syllabus, first line, supply the word "*not*" between the words "property" and "exempt."

The opinion of Mr. Justice SCATES, in this volume, was in a case which was heard before that gentleman left the bench.

TRIBUNE PRINT,
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JUDGES OF THE SUPREME COURT.

CHIEF JUSTICE,

JOHN D. CATON.

ASSOCIATE JUSTICES,

SIDNEY BREESE.

PINKNEY H. WALKER.

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TABLE OF CASES.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

APRIL TERM, 1858, AT OTTAWA.

The Chicago, Burlington and Quincy Railroad Company, Appellant, *v.* Elias Minard *et al.*, Appellees.

APPEAL FROM LA SALLE.

The court will take notice of a summons issued by a justice of the peace, and of the indorsements thereon, if set out in a bill of exceptions; and if the judgment is for a greater amount than is claimed on the back of the summons and interest, it is erroneous and will be reversed.

This action was originally brought before a justice of the peace by the plaintiff below, to recover from defendant below, damages for the loss of a quantity of corn delivered to said defendant, to transport to Chicago. Brought by appeal into the La Salle county Circuit Court.

There was a trial by jury, and verdict for plaintiff below, assessing damages at $60. Plaintiff remitted five dollars of said verdict. Defendant below moved for a new trial, and in arrest of judgment. Motions overruled. Judgment for plaintiffs below for $55 and costs. Defendant appealed to Supreme Court.

The bill of exceptions shows the original summons from said justice, being in the words and figures following, to wit:

STATE OF ILLINOIS, } ss.
LA SALLE COUNTY. }

The People of the State of Illinois to any Constable of said County, greeting:

You are hereby commanded to summon Chicago, Burlington & Quincy Railroad Company to appear before me at my office in Whitfield, on the 18th day of April,

1857, at 1 o'clock P. M., to answer the complaint of Elias Minard and Charles E. Pooler, for a failure to pay them a certain demand not exceeding one hundred dollars, and thereof make due return as the law directs.

Given under my hand and seal this 9th day of April, A. D. 1857.

JOHN READ, [SEAL.]
Justice of the Peace.

Upon which said summons were the following indorsements:

Demand, $45; costs, $0.56; April 10th, personally served on John H. Jenkins, Agent C., B. & Q. R. R. Co.; by reading and leaving copy; service, 25; copy, 12½; mileage, ⅕, 38. James J. Millary, Const.

This cause was tried by HOLLISTER, Judge, and a jury, at November term, 1857, of the La Salle Circuit Court.

HOUGH & BASCOM, for Appellant.

GLOVER & COOK, for Appellees.

CATON, C. J. This was an appeal from the judgment of a justice of the peace, to the Circuit Court. The error here assigned is, that the judgment in the Circuit Court was for more than the amount claimed on the back of the summons. The answer made to this is, that this court cannot see what was the amount of the claim indorsed on the summons. A copy of the summons is not given as a part of the original record, but it is set out and certified to by the judge in the bill of exceptions. It is insisted by the defendants in error, that it was not such a paper as could be certified to in the bill of exceptions, it being a part of the record which should be certified to by the clerk, instead of the judge. We think the objection altogether too technical. Although it may have been a part of the record to which the clerk might certify, we think it was none the less so when set out in the bill of exceptions and certified to by the judge, a copy of which bill, containing the summons, is certified to by the clerk. We think we are judicially informed of the contents of the summons and of the amount of the claim indorsed upon it, and that the judgment of the Circuit Court was for more than the amount of such claim and interest, which was erroneous.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Henry G. W. Cronise, Appellant, *v.* John Kellogg, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

It is no defense to an action upon a bill of exchange that it was accepted for the accommodation of the drawer, of which the drawee had notice, and that time was given the drawer to make payment, by the drawee, after the maturity of the bill.

The acceptor of a bill of exchange is primarily liable to pay it, whether he has funds of the drawer in his hands or not. An accommodation acceptor is in the same position as one who accepts with funds, as to all persons who receive the bill for value.

The acceptor of a bill can never be discharged except by payment or a release, except in cases where to enforce the payment by the acceptor, would be in violation of the agreement of the parties at the time of the acceptance.

The holder of a bill of exchange is not under obligation to the acceptor to seek payment of it from any other party.

This was an action of assumpsit, brought in the La Salle County Court, at the December term, A. D. 1857, by appellee against appellant, on his acceptance of an inland bill of exchange, which purported to have been drawn at thirty days, for $500, by one Thomas M. Hobbs, in favor of appellee, and directed to and accepted by appellant.

The declaration contained a special count on the acceptance, and the common counts.

To which appellant (defendant below) pleaded,

1st. The general issue.

2nd. That appellant accepted said bill merely for the accommodation of said Hobbs, and for no other consideration whatever; that at the time of said acceptance, appellant had no effects of said Hobbs in his hands; of all which appellee had notice at the time of said acceptance, and at the time he received said bill. That afterwards, at, etc., on, etc., when said bill fell due, appellee received from said Hobbs $25, in part payment of said bill, and then and there, without the knowledge or consent of appellant, in consideration of one dollar paid by said Hobbs to appellee, extended the time of payment of said bill thirty days; by means whereof, appellant was wholly discharged from his liability as such acceptor.

Appellee demurred to said second plea; the court below sustained his demurrer.

Appellee then read in evidence the said bill and acceptance thereof; to the reading of which in evidence appellant objected, and the court below overruled his objection.

This was all the evidence in the case.

The trial was by the court; issues found for appellee, and damages assessed at $529.90. Motion for new trial overruled; appellant excepted: judgment rendered for $529.90 and costs; whereupon defendant prays an appeal.

W. H. L. Wallace, for Appellant. Cited 2 Campbell R. 185; 3 ibid. 281; 2 Stark. R. 66; 3 Eng. Com. Law R. 361, 304, 419, 518, 531; 17 ibid. 366; Story on Notes, § 190; 1 Zabriskie R. 665; 8 Pickering R. 155; 2 Denio R. 621.

C. Blanchard, for Appellee.

An acceptor of a bill of exchange is primarily liable to the holder thereof. All the other parties are only collaterally liable; and nothing but payment or release will discharge the acceptor, though it was accepted for the accommodation of the drawer, and the holder had notice that it was so accepted at the time he received the bill. *Barbary et al.* v. *Peyton*, 2 Wheat. R. 385; *Kutum* v. *Pocock*, 1 English Common Law R. (5 Taunt.) 105; *Price* v. *Edmonds*, 21 Eng. Com. Law R. 135; *Nichols* v. *Norris*, 23 ibid. 28; Harrison's Digest, vol. 1, 1312–1340; *Kerrison* v. *Cook*, 3 Campbell R. 362; Bacon's Ab., vol. 6, 811; *Whately* v. *Tucker*, 1 Campbell R. 35; *Dingwall* v. *Danster*, 1 Douglass R. 247; *Anderson* v. *Cleavland*, 13 East R. 217, 430; *Townsley* v. *Sunwall*, 2 Pet. R. 183; 3 Esp. R. 46; 1 Taunt. R. 22–24; *Anderson* v. *Anderson*, 4 Dana (Ky.) R., *Goode's* case, 352; Chitty on Bills, 310, 311, and 315, note; Story on Bills, sec. 268; 9 Sargeant and Rawle R. 229; 12 ibid. 382; 9 Pickering R. 547; 2 Blackford (Ind.) R. 137; 3 Kent's Com. 104.

Accommodation paper is now governed by the same rules as other paper. 7 Wend. R. 228, note; 3 Kent's Com. 86; 5 Taunt. R. 192; 6 Dow's Parl. Cas. 234; 9 Sargeant and Rawle R. 229; 6 Cowen R. 484; 7 How. 292.

To the acceptor the equitable doctrine respecting sureties does not apply. 4 Dana (Ky.) R. 352.

Caton, C. J. This action is against the acceptor of a bill of exchange, and the defense relied upon, is that the acceptance was for the accommodation of the drawer, which was known to the drawee at the time he took the bill, and that the drawee gave time to the drawer after maturity. The court properly decided that this constituted no defense to the action. Bills of exchange are the highest class of commercial paper known to the law, and it has ever been a cherished object of the law merchant,—which has been permitted by the courts of England to

insinuate itself into the common law, till it now forms, and has for a long time formed a part of that code,—to uphold them inviolate, as far as possible—to give them an absolute effect, according to their purport. They were invented to form a medium of exchange, and to supercede the necessity of transporting coin from one place to another, and the nearer they are brought to the absolute certainty of coin in value, the better do they perform the functions for which they were designed. While the *lex mercatoria* is deeply impregnated with the principles of equity, those principles have been chiefly marked in furtherance of these objects, and to enable the courts of law to enforce equitable rights, and upon this principle was the negotiability of bills of exchange insisted upon and finally maintained at the common law. When, however, the principles of equity have been invoked for the purpose of destroying the validity and security of bills of exchange, they have been listened to with great disfavor, and admitted as exceptional cases. The wider the door is opened to admit defenses to bills of exchange, the more is their general value impaired, and the more are commerce and exchange embarrassed. The acceptor of a bill of exchange has always been considered the party primarily liable to pay it. He expressly agrees to pay it, whether he has funds of the drawer in his hands or not, even though he expects to be in funds from the drawer. An accommodation acceptor occupies precisely the same position as one who accepts with funds, as to all persons who receive the bill for value, whether they know that it was an accommodation acceptance or not. And it is a general maxim, that an acceptor of a bill of exchange can never be discharged, except by payment or a release. The exceptions to this rule are rare, and only when to enforce the payment by the acceptor, would be in violation of the agreement of the parties at the time of the acceptance, as where a bill is accepted for the accommodation of the indorser, who, after putting it in circulation, afterwards receives it in the course of business. There, as between the original parties to the bill, it was his primary duty to pay it. And he cannot collect it of the acceptor, and should he again put it in circulation, it is probable that the acceptor would not be liable to any one who should receive it with notice. It has been often said that the acceptor of a bill of exchange incurs the same liability as the maker of a promissory note. And this is true by the English law, since the statute of Ann. But it is unnecessary now to inquire what are the rights of an accommodation maker of a promissory note. It is enough to know that the holder of a bill of exchange is under no obligation to the acceptor, to use any diligence or make any effort to collect it of any body else.

It is the contract of the acceptor, and it is his duty to pay it at maturity, without waiting for any one else to do it, and if he neglects to do this, he shall not complain that an effort was made, even though injudiciously, to collect it of one who was under a moral obligation to pay it.

The judgment below must be affirmed.

Judgment affirmed.

James A. Smith, Plaintiff in Error, *v.* William Rankin, Defendant in Error.

ERROR TO MARSHALL.

Ancient deeds will not be admitted as evidence, without proof of their execution in some way which shall be satisfactory to the court. The party producing such papers must do everything in his power to raise a presumption in favor of their genuineness.

This was an action of ejectment, brought by Rankin, in the Circuit Court of Marshall county, for the recovery of the N. E. quarter of section No. 19, in township 13 N., range No. 9 E. of 4th P. M.

Declaration, notice, bond for costs and affidavit of service, filed December 21, 1854.

At the April term of said court, 1855, defendant was ruled to plead to plaintiff's declaration, and filed plea of not guilty.

The cause was tried by jury, at the April term of said court, 1856, Hollister, Judge, presiding.

The plaintiff first offered in evidence a patent from the United States to Lemuel Tucker for said premises, which was admitted in evidence without objection.

The plaintiff next offered in evidence a deed from Lemuel Tucker to Christopher Vanzant, to wit:

This Indenture, Made this fifteenth day of January, one thousand eight hundred and nineteen, between Lemuel Tucker, of Davidson county, and State of Tennessee, of the one part, and Christopher Vanzant, of the county of Davidson, and State of Tennessee, of the other part, witnesseth, that the said Lemuel Tucker, for and in consideration of the sum of one hundred and sixty dollars 00 cents, to him in hand paid the said Christopher Vanzant, the receipt whereof is hereby acknowledged, hath given, granted, bargained, sold, aliened, conveyed and confirmed unto the said Christopher Vanzant, his heirs and assigns forever, a certain tract or parcel of land, situated, lying and being in the territory of Illinois, and distinguished in the plan of surveys made to satisfy the bounty land of soldiers in said territory, as the north-east quarter of section nineteen, of township thirteen north,

in range nine east, supposed to contain one hundred and sixty acres of land, be the same more or less, which land was patented to the said Jeremiah Tucker by the President of the United States, the 29th of November, 1817.

To have and to hold the aforesaid land, with all and singular the rights, profits, emoluments, hereditaments and appurtenances of, in and to the same belonging, or in anywise appertaining, to the only proper use and behoof, him, the said Christopher Vanzant, his heirs and assigns forever. And the Lemuel Tucker, for himself, his heirs, executors and administrators, doth covenant and agree with the said Christopher Vanzant, his heirs or assigns, that the before recited land and bargained premises he will warrant and forever defend against the right, title, interest or claim of all and every person whatsoever.

In witness whereof, the said Lemuel Tucker hath hereunto set his hand and affixed his seal the day and year above written.

Signed, sealed and delivered in the presence of } LEMUEL TUCKER. [SEAL.]

On the back of said deed appear the following indorsements, to wit:

STATE OF TENNESSEE,
Davidson County Court,
January Session, 1819.

This indenture of bargain and sale, between Lemuel Tucker, of the one part, and Christopher Vanzant, of the other part, dated the 15th day of January, 1819, for 160 acres of land in the Illinois territory, was acknowledged in open court by the said Lemuel Tucker to be his act and deed, and ordered to be so certified. The probate being of record in this court.

In testimony whereof, I, Nathan Ewing, clerk of said court, have hereunto set my hand and affixed the seal of said court, at office at Nashville, this 20th day [SEAL.] of January, in the year of our Lord 1819, and 43rd year of American Independence. NATHAN EWING.

Recorder's Office, Edwardsville, Madison co., Illinois. I, Josias Rundle, Recorder for Madison county, do certify the within deed to be duly recorded and examined in Book vol. 4, page 29, this 1 day of Jan., 1820.

JOSIAS RUNDLE.

(*Tit.*)
No. 6869.
Recorded Vol. 4, *p.* 29.
Exd. J. Rundle. 150.
Lemuel Tucker To Christopher Vansant. } *Deed.* 160 *Acres.*

To which defendant's counsel objected.

The plaintiff then read in evidence the deposition of Charles A. Rankin, for the purpose of laying a foundation for the introduction of said deed, to which defendant objected.

Deposition of *Charles A. Rankin.* I am 28 years of age; am a tailor by trade; residence, Shelbyville, Ky. I am acquainted with William Rankin, the plaintiff; he is my brother; I am also acquainted with Mr. Smith, the defendant in this suit;

have known him since the 1st of April, 1853. I do not know Henry Clapp. I do not, of my own knowledge, know of Henry Clapp ever calling on William Rankin, sen., in his lifetime. I know nothing of the land Mr. Clapp wished to purchase of my father or any one else.

I took possession of the N. E. ¼ section 19, in township 13 N., of range 9 East of the 4th principal meridian, in the spring of the year 1853. I took possession of the land in behalf of William Rankin, and there was no one in possession of the land when I took possession of it in the year above named.

I had a conversation with Mr. Smith, defendant in this suit, a few days after I took possession of the land. I left the land for a day or two, and went to the town of Henry, and when I returned I found Mr. Smith on the land; he had put up a shanty, and claimed the land. I told him that the land belonged to my father; that I could show him the title deeds. Smith said that he had bought the land of Mr. Lombard; that he (Lombard) stood between him and danger. He also stated that he had been to see Lombard, and Lombard told him that if he was dissatisfied, he would take it back. When I first took possession of the land, I had some lumber hauled to build a house. Mr. Smith took my lumber and threw it in the by-road.

I had a communication with Mr. Lombard some time after I took possession of the land. Mr. Lombard told me that he did not expect to hold the land with his deed, but he thought his tax title would hold it.

Mr. Smith, the defendant, told me that he knew of my father's claim before he bought it. Mr. Smith also told Mr. George Bonham, that he knew Rankin claimed the land before he bought it.

Plaintiff offered to read the aforesaid deed in evidence. Defendant's counsel objected. The court overruled defendant's objection, and allowed the aforesaid deed to be read in evidence.

The plaintiff offered to read in evidence a deed from Christopher Vanzant to William Rankin, to wit:

This Indenture, Made and entered into this 3rd day of October, 1825, between Christopher Vanzant and Louisa his wife, of Shelbyville, Kentucky, of the one part, and William Rankin, of the same place, of the other part, witnesseth, that the said Vanzant, for and in consideration of the sum of two hundred and ninety dollars, to him in hand paid, the receipt of which he does hereby acknowledge, hath granted, bargained and sold, and by these presents does hereby grant, bargain, sell and convey unto the said William Rankin and his heirs forever, a certain tract and parcel of land, situate, lying and being in the State of Illinois, containing one hundred and sixty acres, being the north-east quarter of section nineteen, in township thirteen north, in range nine east, in the tract appropriated by the acts of Congress for military bounties, in the territory, now State of Illinois, being the

same tract of land granted by the United States of America to Lemuel Tucker, by grant bearing date the 29th day of November, 1817, and by said Lemuel Tucker conveyed to the said Christopher Vanzant. To have and to hold the said tract of land hereinbefore described, to the said William Rankin and his heirs forever, and the said Christopher Vanzant and Louisa his wife will warrant and defend the right and title thereof against the claim of themselves and their heirs, and all and every person or persons whatsoever, claiming or to claim the same.

In testimony whereof, the said Vanzant and wife have hereunto set their hands and affixed their seals the day and year first above written.

CHRISTOPHER VANSANT. [SEAL.]

Witness: [SEAL.]

STATE OF KENTUCKY, SHELBY COUNTY, } *Sct.* I, Hector Alhinin, clerk of the county court for the county aforesaid, certify that this deed from Christopher Vanzant to William Rankin was produced to my predecessor in office (or his deputy), on the 11th day of October, 1825, and acknowledged by the said Christopher Vanzant to be his act and deed, as appears from an indorsement on said deed in these words and figures, (to wit): "1825, 60, Oct. 11th, A. by C. Vanzant."

In testimony whereof, I have hereto subscribed my name and affixed the [SEAL.] seal of said court, at Shelbyville, this 8th day of March, 1853, and in the 61st year of the Commonwealth.

HECTOR ALHININ, *Clerk Shelby County Court.*

STATE OF KENTUCKY, SHELBY COUNTY, } SCT. I, Robert Doak, Presiding judge of the Shelby County Court, certify that Hector A. Chinn, whose Jinueine signature appears to the foregoing certificuit, is now, and was at the time of signing the sam, clerk of the County Court, duly elected, commishion and qualified, and due credit should be given to all of his official acts. Given under my hand this 31st day of March, 1853. ROBERT DOAK, *P. J. S. C. C.*

On the back of which are the following indorsements:

Christopher Vanzant
To
William Rankin. } *Deed.*
160 *a. Illinois.*
1825, *C. O. Oct.* 11*th.*
A. by Vanzant.
Vanzant & Wife
To
Will Rankin.
1825, *C. O. Oct.* 11*th.*
A. by Vanzant.

Filed for record March 21st, at 7 o'clock A. M., A. D. 1853, and recorded in book M, page 450. G. L. FORT,
Recorder of Marshall Co.

To which defendant's counsel objected, which objection was overruled by the court, on the ground that said deed was thirty

years old, and, therefore, proved itself. To which ruling defendant then and there excepted. Said deed was read to the jury.

The plaintiff then offered to read in evidence a quit-claim deed for said premises, from William Rankin, Sen., to William Rankin, Jr., to which defendant objected. The objection was overruled, and the deed read in evidence to the jury.

The plaintiff then called *Samuel Flemming*, who testified that the deed of Lemuel Tucker to Christopher Vansant, with the other papers in said suit, were handed to him by plaintiff.

First. Said deed, prior to the date of the deed from William Rankin, Sen., to William Rankin, Jr., to wit, August 15, 1853. Did not know whether he took said deeds from plaintiff since the commencement of suit, but thinks he did. The plaintiff claimed title through said deed. Knows Charles Rankin; first saw him in the summer of 1853. Don't know as any one introduced him; thinks he introduced himself. He was in Lacon. Thinks he remained in Lacon a month or two, during which time he worked for J. D. Coullett, as a journeyman tailor.

The land in question is about eight miles from Lacon. Said Charles Rankin told him he had been out and taken possession of the land, and to look at it, and said he had hauled on a load of lumber, for the purpose of putting up a house. Thinks he went there before he came to see us.

That he did not learn from him that he did more than to haul lumber upon said land to build a house—the quantity not stated; that Rankin did not live on said land, but that it was vacant and unoccupied at the time, and was natural prairie. Does not know what became of said Charles A. Rankin. He said he was agent for Mr. Rankin, the plaintiff in this suit.

Verdict for plaintiff.

Defendant moved the court for a new trial, because improper evidence had been permitted to go to the jury; that the verdict was against the law and evidence; that the instructions given by the court at the request of the plaintiff are not the law, and that the instructions asked by the defendant, and refused by the court, ought to have been given as the law governing the case.

The court overruled the motion for new trial, and rendered judgment in favor of the plaintiff.

Hazard & Purple, for Plaintiff in Error.

W. Lander, for Defendant in Error.

Caton, C. J. The only questions in this case are as to admissibility of the two deeds, which were admitted as ancient deeds,

without proof of their execution in any way. One of these deeds bears date in 1819, and there is a certificate upon it, purporting to show that it was acknowledged in open court in Tennessee, in the same year of its date; and from a certificate of the recorder of Madison county, where the lands were situated, it appears that it was recorded in the recorder's office in that county, in the year 1820. There is no pretense that the certificate of acknowledgment was sufficient under our law.

The other deed, which was admitted in evidence without proof of its execution, bears date in 1825; has no subscribing witness, has no certificate of acknowledgment, and was never recorded till 1853, and purports to have been executed in Kentucky. To this deed is attached the following certificate:

STATE OF KENTUCKY, } SCT.
SHELBY COUNTY. } I, Hector Alhinin, clerk of the County Court for the county aforesaid, certify that this deed, from Christopher Vanzant to William Rankin, was produced to my predecessor in office (or his deputy) on the 11th day of October, 1825, and acknowledged by the said Christopher Vanzant to be his act and deed, as appears from an indorsement on said deed, in these words and figures (to wit): "1825, 60, Oct. 11th, A. by C. Vanzant.

In testimony whereof, I have hereto subscribed my name and [SEAL.] affixed the seal of said court at Shelbyville, this 8th day of March, 1853, and in the 61st year of the Commonwealth.

HECTOR ALHININ, *Clk Shelby County Court.*

All we know of the custody of either of these deeds is from the testimony of Flemming, who testifies that they were produced to him in 1853, by the plaintiff, who now claims under them; and all there is of any proof of possession of the premises under the deeds is, that Charles A. Rankin, claiming to act as the agent of the grantee in the second deed, in 1853, hauled some timber on to the land, which was then vacant prairie, for the purpose of building a house thereon, and that the defendant, a few days thereafter, threw the lumber off the land into a by-way, and took possession of the premises himself, by erecting a house thereon. This presents all there is in this record, as laying the foundation for the introduction of these deeds.

Deeds over thirty years old, are called ancient deeds, and may be read in evidence without proof of the hand-writing of the grantor or subscribing witness, where there is one. But in order to allow this, certain corroborating circumstances must be shown. Formerly, possession under the deed during the thirty years was an indispensable circumstance to raise the presumption of its genuineness, but lately, many courts have either limited the time of possession to a shorter period, or dispensed with it altogether, while others have strictly adhered to the original rule. Indorsements or memoranda, upon the deed or ancient

paper, have been considered as circumstances indicating that they are genuine, where such indorsements or memoranda are of such a character as to show to a cautious and discriminating mind, that they would not be there, had the paper been a forgery. When the present state of the authorities on this subject is considered, it is difficult to lay down a general rule for the admission of ancient deeds, which shall properly protect the rights of those claiming under them, and at the same time guard others against forgeries. To say that the bare production of a deed by the party claiming under it, bearing date more than thirty years ago, is sufficient to raise a presumption of genuineness, and to admit it in evidence, would be opening a door to frauds which would unsettle all land titles at once. It is as easy to date a deed 1815 as 1850, and it is as easy to forge a fraudulent memorandum upon a deed, as it is to forge the deed itself. There was, at least, some degree of safety, in the rule which required a long continued possession under the deed for that could not be got up secretly, and on the spur of the moment, as a forgery may. Great weight, formerly, with much propriety, was attached to the appearance of the document, denoting its real antiquity, but that has ceased to be entitled to any considerable consideration, for it is well known that modern chemistry will, in a single day, produce a paper, having every appearance, both in texture and writing, of the greatest antiquity. When we remember that skill in forgery has kept pace with the rapid advance in the arts and sciences, which is peculiar to our own times, and that the integrity of mankind is not a whit improved with the improvement of the age, we are solemnly admonished, that increased vigilance is necessary to protect the public against the designs of those who are capable of committing crimes. In certain portions of our State the facility now offered by our recording laws, for the perpetration of frauds and forgeries is such, that it has been said that no man feels secure that his estate may not be taken from him at any moment, and it is only necessary that we should open this new door to such practices, to totally destroy all sense of security in land titles. Let this court once proclaim, that a deed of ancient appearance and ancient date, with plausible memoranda upon it, may be read in evidence, without other proof of its genuineness, and there will shortly be such a resurrection of old parchment, as was never before heard of. The facility for proving forged deeds genuine, would be only equalled by the difficulty of proving their falsity. If the party claiming under the ancient deed, produces it, it is said to come from the proper custody, and hence, we shall presume it genuine. And suppose it a forgery, who else should produce it, but the forger who is

to be benefited by it? Indeed, if a forged deed, we should expect to find it nowhere but in the hands of the forger, or else there might be some means of accounting for or detecting it. If the party is bound to show, by legitimate and competent proof, that the paper has been actually in existence the thirty years, there may be some security in the fact, that the paper has not been got up for the immediate occasion, and if the memoranda upon it are required to be proved by legitimate evidence to be genuine, then we shall know that the whole, at least, is not a forgery, and if a long continued possession, under the deed, or at least, consistent with it, is proved, that may afford some evidence at least, that those interested in the subject matter of the conveyance, knew of its existence, and believed it to be genuine. Here there is nothing of the sort. There is nothing shown to the court which might not have been produced the day before it was shown to Mr. Flemming, while the papers themselves show, that if genuine, evidence of a very satisfactory character might have been produced of the genuineness of the indorsements upon them, and of the actual antiquity of the deeds. Let us consider for a moment the indorsements upon the first deed. They are as follows:

STATE OF TENNESSEE,
Davidson County Court,
January Session, 1819.

This indenture of bargain and sale, between Lemuel Tucker of the one part and Christopher Vanzant of the other part, dated the 15th day of January, 1819, for 160 acres of land in the Illinois territory, was acknowledged in open court by the said Lemuel Tucker to be his act and deed, and ordered to be so certified. The probate being of record in this court.

In testimony whereof, I, Nathan Ewing, clerk of said court, have hereunto set my hand and affixed the seal of said court at office
[SEAL.] at Nashville, this 20th day of January, in the year of our Lord 1819, and 43rd year of American Independence.

NATHAN EWING.

Recorder's office, Edwardsville, Madison Co., Illinois. I, Josias Rundle, Recorder for Madison county, do certify the within deed to be duly recorded and examined in Book vol. 4, page 29, this 1 day of Jan., 1820.

JOSIAS RUNDLE.

(*Tit.*)
No. 6869.
Recorded Vol. 4, *p.* 29.
Exd. J. Rundle. 150.

Lemuel Tucker
To } *Deed.* 160 *Acres.*
Christopher Vansant.

Now this first certificate, if genuine, shows that the probate of the deed is of record in the Davidson County Court, in Ten-

nessee, and if there be any such record there, it was the easiest thing imaginable to show it, and if shown, it would have afforded a strong presumption that the deed produced was the one referred to in the record. But more satisfactory still might have been the records of Madison county. If the certificate of Rundle is genuine, that this same deed was spread upon the records of that county, and although not authorized by law to be recorded, if an exact copy of this deed be actually there found, in a place in the record book corresponding to the date of the certificate, it would show very satisfactorily that there was an original paper in existence at that time, corresponding to the one produced, and which might reasonably be inferred to be the same. It is no answer to say that these things were proved by the certificates themselves, the first of which is attested by the seal of the court. If the certificate of the clerk, attested by the seal of the court, purported to give an examplified copy of a record of that court, there would be force in the suggestion. It purports to give the substance of what took place in the court, and that there is a record in the court, but what that record is, it does not profess to give. That certificate and seal is not in conformity to the law of Congress so as to make it evidence, and if it is not such evidence, it proves nothing. And the same may be said of the certificate of the recorder of Madison. He had no legal authority for recording the document, and hence the record was void. It was not a record, and hence he could by his certificate make no competent evidence in relation to it. He might as well have recorded an ancient ballad and certified that fact, and thereby proved the existence of the old song at that time. It must be remembered that official certificates are only evidence by force of positive law, and that except where they are by law declared to be evidence, they are not proof of what they certify to. Still it was not beyond the reach of the party to prove there are such records, or entries purporting to be such records, in the old record books; and as they would have afforded evidence tending to prove the fact that the deed produced was actually in existence in 1819 and 1820, it was the duty of the party to produce it. Surely, when the party is asking the court to dispense with a general rule of law, and to presume so much in his favor as to admit his deed on trust, or on mere suspicion, he ought to do everything which it is in his power to do, to satisfy the court that the deed is genuine. It may be supposed that this rule, that the party shall produce the best evidence of which the nature of the case is susceptible, is not applicable when ancient deeds are offered, because although it may be shown that the subscribing witness is still living, he need not be produced to prove the deed; but we apprehend that such indulgence

would not be granted, were it shown that the party producing the deed knew the witness was living, and had it in his power to produce him. So absurd a proposition as that, is not and cannot be the law, unless made so by the legislature, and if any courts have ever so held, they have misinterpreted the common law. If there ever was a case where the party should exhaust every effort to satisfy the court that the presumption which he asks the court to draw in his favor, that his deed is genuine, is consistent with the very fact, it is a case of this sort, where at least we can never feel satisfied that we are not lending our aid to fraud and forgery.

The second deed admitted has much less the indicia of genuineness than the first, but we deem it unnecessary to enter into a minute discussion of it. Without saying at this time when we will or will not admit papers as ancient deeds without proof of their execution, it is sufficient to say that we are very clear that these deeds were improperly admitted. We choose to proceed cautiously before attempting to lay down any general rule which shall govern all cases of the sort. Indeed, it may be almost impossible to lay down such a general rule with safety, but we may safely say that in all cases the party shall do everything in his power to raise the presumption of genuineness. To do less than this, it would be better to repudiate the rule altogether; but this we are not at liberty to do, for it certainly is a part of the common law; but we are satisfied that security to property requires that it should not be loosely extended.

The judgment must be reversed and the cause remanded.

Judgment reversed.

The Illinois Central Railroad Company, Appellant, *v.* Basil W. Alexander *et al.*, Appellees.

APPEAL FROM JO DAVIESS.

A Railroad Company may assume the double character of carriers and warehousemen, and that their duty as carriers is ended when they have placed goods entrusted to them in a safe depot of their own, or in any other safe warehouse.

Such companies have a right to charge a reasonable compensation for warehouse services; and are to be considered and treated like other warehousemen. And may retain goods in possession until reasonable warehouse charges thereon shall have been paid.

This was an action of trover brought by appellees againt the appellant for eight hundred and twenty-one sacks of salt. Declaration in the usual form in trover.

1st Plea, General issue.

2nd Plea, That defendant was a common carrier and warehouseman, and as such received the salt in question, and at the time when, etc., a large sum was due to the Railroad Company for transportation, and also a sum as warehouse charges, which sum the plaintiffs refused to pay, and defendant kept possession of the salt until the charges should be paid.

3rd Plea, That defendant had a lien upon the salt in question, as warehouseman, for storage, at the time when, etc.

General replication, denying that any sum was due either for freight or storage, and issues thereon.

On the trial, *George W. Campbell*, a witness for the plaintiffs, testified: That the salt in question was the property of the plaintiffs; that he was the consignee of said salt; that there were 1,000 sacks of it in all, 179 of which were received in good order in December last; the balance, 821 sacks, came to Galena at various times between January 1st and March 1st, 1857, on defendant's railroad; the sacks were frozen together, and were broken in getting them out of the cars; witness refused to receive these 821 sacks as in good order; defendant's depot in Galena was divided across the centre by a rope; the defendant occupied the east half, and the witness and H. F. McClaskey the west half; witness proposed to put the salt on his side of the depot, not as a delivery, but subject to the order of defendant's agent, but said agent objected; witness claimed damages on the salt, and offered to refer that question to referees, on condition that the damages caused by the delay in the transportation of the salt should not be included in the reference; defendant's agent, Petrie, would not agree to it.

About 13th March, 1857, everything relating to damage to sacks of salt was, by agreement, referred to referees, who made the following award: "Galena, March 13th, 1857. We, the undersigned, being called upon by the freight agent of the Illinois Central Railroad Company, and George W. Campbell, to assess the damages on 821 sacks of salt, now lying in the freight depot, consigned to George W. Campbell, Galena, by Alexander & Lansing, of St. Louis, have examined the same, and assessed the damage at fifteen cents per sack, which does not include the damage by delay." This was on Friday or Saturday, witness thinks Saturday; the damages, fifteen cents per sack, were deducted from the freight, and the witness paid the balance of the freight on the salt; on Monday witness sent to remove the salt, and afterwards went over himself; Petrie presented bill of 20 cents per sack for storage of the salt, and 2½ per cent. commissions for advances made by defendant; 175 of the sacks were on witness' side of the depot; Petrie said he would not deliver

the salt until the bill was paid; witness refused to pay it; the 175 sacks of salt were then removed from witness' side of the depot to defendant's side, without the consent of witness; this was within a few days after the reference, don't remember the exact time.

Plaintiff's counsel then asked the witness this question: "What was the value of the salt at the time you went over?" which was objected to by defendant. Objection overruled, and exception taken.

Witness said salt was selling at $2.50 to $2.75 per sack; I demanded the salt that had been consigned to me by Alexander & Lansing; I was a forwarding and commission merchant; salt was consigned to me for sale on their account; the prices for storage of a lot of salt of that kind at that time was ten cents per sack, for all the time that that salt was in store; the salt came at different times; the reference was on the 13th of March; some of the salt had been in store three months, some not one month; the salt has ever since remained in possession of the defendant; witness has never attempted to get it since; witness saw the salt before the commencement of this suit, and a considerable time after damages were assessed; that it was very much damaged; sacks were torn and badly damaged.

Defendant's counsel objected to any evidence as to the condition of the salt, after the assessment of damages, on the ground that the damages had been paid. Objection overruled, and exception taken.

Witness further testified that Petrie subsequently offered to give him the salt free of charges, but he refused to receive it.

On his cross-examination the witness testified that the depot was divided by a rope running across it, and by no other division. When witness went over for the salt, he told Petrie he was surprised at the amount of the bill which he, Petrie, presented; Petrie told him he could not have the salt until it was paid. Salt ran down in price during the summer; it was worth $2 per sack at the middle of March.

Charles E. Duer was then called by plaintiffs, and testified as follows: I was in the employ of George W. Campbell on the 13th day of March, 1857, and had been for two or three years before; I know the salt in controversy; after the damages were assessed, I went and paid the freight to the defendants, less the damages as assessed; defendant's agent receipted the bills for freight, witness receipted for the salt; 175 to 200 sacks of salt were then on Campbell's side of the depot; balance were on defendant's side; Campbell had told Petrie that they might put the whole of the salt on his side of the depot until the damages were settled; witness notified Petrie not to remove the salt

from Campbell's side of the depot; that he considered the whole of the salt received, although a portion of it was on defendant's side of depot; Petrie said that we should not remove it until the bill of storage was paid; sometime after, Petrie notified us that he was willing we should remove the salt, free of charge; this was several weeks after the damages were assessed; the salt was then in a much worse condition than it was when the damages were assessed; it had thawed out.

Defendant's counsel objected to all testimony as to the condition of the salt after the damage had been assessed. Objection overruled, and exception taken.

Witness then testified that defendant wasted a good deal of salt in moving it, putting it down a slide into the lower story of the depot; how much was wasted he could not tell. On his cross-examination witness said Mr. Campbell said, when he told Petrie to put salt on his side of the depot, that he would not consider it received until the damages were assessed.

John Louvain called by plaintiffs and testified as follows: Am a forwarding and commission merchant in Galena; know the warehouse of defendant; saw the salt in dispute when it arrived; saw it about 13th of March, piled up in the depot; have seen it since; the only damage that could happen to the salt while in the depot was in putting it down the slide into the lower story; it was thrown down the slide without care, and roughly handled; some of the salt was wasted in this way; can't say how much.

Geo. W. Campbell was then recalled by plaintiffs. Plaintiffs' counsel asked him: "Did you act under the instructions of the plaintiffs in relation to this salt, as their agent?" Defendant objected to this question as improper, because witness should state what he did in the matter. Objection overruled, and exception taken. Witness answered that he acted in the capacity of agent for the plaintiffs and corresponded with them in relation to the matter, and that the salt was consigned to him as a commission merchant originally.

J. M. Ryan was called by defendant. His testimony tended to show that the salt was worth $2 per sack, in Galena, on the 13th of March.

Henry Petrie, whose deposition was read by defendant, testified as follows: I was station agent for defendant from 22nd of November, 1856, to 10th of August, 1857; was engaged in warehouse business for several years before that time; the salt in question was received in defendant's warehouse in the months of January and February last, to the best of my recollection, and remained there when I left; I should think the storage was worth ten cents per hundred for the first month; after that I

should charge according to the warehouse room and locality; the freight on the salt was paid by Mr. Campbell, the consignee; 15 cents per sack was deducted from the transportation for damage done to the sacks; the salt was frozen very hard, and crowbars had to be used to get them out of the cars; I made a warehouse charge on that salt and presented it to the consignee; it was not paid; don't remember what reason was assigned for not paying it; nothing was ever settled in regard to the salt and freight; I presented the bill for warehouse charges the next day after the freight was settled; the warehouse charges were not paid, and for that reason I retained the salt; afterwards I was instructed by the general freight agent to deliver the salt free from warehouse charge, and I offered to do so to Mr. Campbell before the commencement of this suit, or before the service of process on me; the offer was made before the 23rd day of July last, I think; Campbell did not receive the salt; he objected, I think, not on account of the amount of the charges, but objected to paying warehouse charges at all; when the salt was received I had no special instructions in relation to the warehouse charge on the salt; I charged it because I thought it was right; Mr. Campbell and myself disagreed about it; I asked time to refer it to the general freight office, to which he consented; they instructed me to collect the charge, of which I informed him; afterwards I was instructed to deliver the salt to him free of charge, and offered to do so as before stated; neither plaintiffs nor their agent ever asked for said salt after said offer, to my knowledge; if they had, they would have got it.

Cross-examined. The freight and damages were settled about the 13th of March, 1857; it was not our practice to present freight bills, but the practice was to give the parties notice that the goods were there and the amount of charges at the time of the receipt of the goods. I think Mr. Campbell had such notice; at any rate he knew that the salt was there. It was our practice when we gave such notice, to include all charges upon the goods up to the time the notice was given; this was the only warehouse charge I ever attempted to collect for the railroad company, at the time I was agent for it; it was not customary to make warehouse charges on goods received at the Galena office. Mr. Campbell did not, during the winter or spring, offer to receive the salt and pay the charges on it, if the defendant would settle the damages to the sacks; at first he refused to receive the salt on account of delay in transportation; afterwards abondoned that claim, and set up a claim for damages to sacks, at fifty cents per sack. I offered to refer it at the time; he refused at first, but afterwards agreed to it, as before stated.

Geo. L. Evret, called by defendant, testified as follows: Have been in the employ of defendant as clerk in the freight house at Galena, since a year ago last August. There are printed rules on the freight bills; the printed freight bills and the rules thereon are the same as have always been used by defendant since witness has been in the service.

The printed freight bill shown to the witness is itself attached to the record, and was read in evidence, together with the rules thereon, some of which rules are as follows:

All the articles of freight arriving at their place of destination, consigned to residents, and they notified of, within business hours, must be taken away the same day; and if consigned to non-residents, must be taken away within twenty-three hours after being unloaded from the cars, the company reserving the right of charging for storage on the same, if they see fit, after those stated periods.

The company will be responsible only as warehousemen for property in their warehouse.

Geo. W. Campbell, called by defendant, and testified as follows: That he had receipts of defendant for freight paid on the 179 sacks of salt, received in December, which receipts he produced, and they were read in evidence with the printed rules on the back of them. Witness testified that he had received perhaps a thousand of these receipts. Witness then produced the receipts for the 831 sacks of salt in controversy, which were read to the jury.

Said witness, *Campbell*, on cross-examination, testified: That he had never read the matter on the back of these receipts; that he had done business with defendant ever since he came to Galena, and never paid storage before; that this was the only charge for storage made him; that it was very common to leave goods in the depot longer than the time named in the printed rules; never knew a storage bill made by defendant before; witness and defendant were never particular about the line dividing their respective parts of the depot; company frequently had goods on his side of the line, and he on their side; I think there was no uniform custom of the defendant to charge storage at Galena.

The jury found a verdict for the plaintiffs for $1,876.03. The defendant moved the court for a new trial, which motion was overruled, and the defendants excepted.

J. M. Douglass, Glover & Cook, and G. Campbell, for Appellant.

Leland & Leland, for Appellees.

CATON, C. J. The law is now too well settled to bear discussion, that a railroad company may assume the double character of carriers and warehousemen. That their duty as carriers is ended when they have placed the goods in a safe depot of their own or any other safe warehouse. That their depot is their warehouse, and that for warehouse services they have a right to charge a reasonable compensation, the same as other warehousemen. The railroad company in this case, after their relation to the goods as common carriers had ceased, is then to be considered and treated the same as other warehousemen would be considered and treated in case the goods had been placed in another warehouse. The agent of the plaintiffs below had abundant notice that the company claimed the right to charge for storage after the goods had remained in the depot one day, and by suffering the goods to remain in the warehouse for any length of time, when by such rule they would be subject to charge, he impliedly agreed for his principal to pay reasonable charges for the storage, and until these charges were paid, the company were not bound to let the goods go. While a lien for these charges existed, which the agent of the plaintiffs neglected or refused to pay, the company was not guilty of a conversion, by retaining the goods for such non-payment. If the charges claimed for the storage were unreasonable, Campbell should have tendered a reasonable amount for the charges, and then if the company had refused to receive it and deliver the goods, it would have been guilty of a conversion. There is so much evidence tending to show that the company had a fair and legitimate claim on these goods for storage, which would justify their retention, that we are of opinion that the case should be submitted to another jury. A new trial is therefore ordered.

The judgment is reversed and the cause remanded.

Judgment reversed.

THOMAS W. BAIRD *et al.*, Appellants, *v.* WILLIAM EVANS *et al.*, Appellees.

APPEAL FROM LA SALLE COUNTY COURT.

In an action upon an agreement, by which it was stipulated that plaintiffs should dig a stock well, break the prairie that was unbroken, build a stable, crib and bin room, and have the farm fenced with a lawful fence, and which conditions it was alleged were all performed, it was held that from the nature of the contract, that the foregoing were conditions precedent to be performed, and proof of performance of which was necessary before the rent, $400, should be required to be paid.

Baird et al. *v.* Evans et al.

Before a party can recover on a contract, he must have performed his part of it, or have been ready and willing to do so, unless prevented or excused from so doing.

THE first count of this declaration was upon an agreement in writing, made between the appellants of the first part, and the appellees of the second part, by which the appellees leased to the appellants their farm, (describing it,) from the 1st of March, 1855, to the 1st of March, 1856, for the sum of $400, to be paid on the 1st day of October, 1855. By said agreement said Evans and Evans contracted to put suitable and sufficient stable room for three span of horses on said farm; also to furnish sufficient crib and bin room for the grain raised upon said farm, and to break the prairie sod remaining then unbroken on said farm, in season to be planted in corn, provided the prairie was in suitable condition; also, to dig a stock well, and to have said farm fenced with a lawful fence.

The plaintiffs aver that they did put on the stables, cribs and bins, and *did* break the prairie sod that remained unbroken on said farm, in season to be planted in corn, and had said farm fenced with a lawful fence, and that Baird and Graham occupied the premises during the term, and refused to pay the rent.

The second count was a common count for use and occupation.

Plea, the general issue. An agreement was made by the parties, and entered of record, that all evidence might be given under the general issue, that could be given under any well drawn special pleas.

The jury found a verdict for the plaintiffs below, for $330. A motion for a new trial was overruled.

On the trial, the plaintiffs read in evidence the agreement set out in the first count of declaration, which is as follows:

"*Eden, La Salle County, Ill.*

"Article of agreement, made and entered into between William and Jas. F. Evans of the first part, and Thomas W. Baird and Benjamin M. Graham of the second part, this the 28th November, 1854. The said Wm. and J. F. Evans, parties of the first part, agree to lease to the said Thomas W. Baird and Benjamin M. Graham, parties of the second part, their farm, described as being the north-west quarter of section ten, town. 32, range one east of the third principal meridian, from the first of March, 1855, to the first of March, 1856, in and for the consideration of the sum of four hundred ($400) dollars, to be paid on the first of October, 1855. The said parties of the first part do further agree to put suitable and sufficient stable room for three span of horses; also to furnish sufficient crib and bin room for the grain raised upon the said farm, and

to break the prairie sod that remains unbroken on the said farm, in season to be planted in corn, provided the prairie is in suitable condition; also, to dig a stock well, and to have the said farm fenced with a lawful fence. The said Thomas W. Baird and Benjamin M. Graham, parties of the second part, do agree to pay to Wm. and J. F. Evans, parties of the first part, the four hundred ($400) dollars on the first of October, 1855, for the consideration before mentioned. The said parties agree that either of the parties shall be entitled to the pasture of the stalks, when the ground is in a suitable condition."

GLOVER & COOK, for Appellants.

LELAND & LELAND, for Appellees.

WALKER, J. This was an action of assumpsit, brought in the La Salle County Court, by William and James F. Evans against Thomas W. Baird and Benjamin M. Graham. The declaration contained a special count, upon an agreement in writing made between the parties plaintiff, of the one part, and defendants, of the other part, by which the plaintiffs leased their farm to defendants, from the 1st of March, 1855, to the 1st of March, 1856. The plaintiffs contracted to put suitable stable room for three span of horses on the farm; to furnish crib and bin room for the grain raised on the farm; to break the prairie sod which was unbroken on the farm, in season to be planted in corn, provided the prairie was in suitable condition; also, to dig a stock well, and to have the farm fenced with a lawful fence. For the rent of which the defendants were to pay $400, on the 1st day of October, 1855. The plaintiffs aver that they had fully complied with their part of the agreement, and defendants had not paid the rent.

The second count was for use and occupation, in the usual form.

The defendants pleaded the general issue, and it was agreed that any evidence might be given under it which would be admissible under well drawn pleas. A trial was had before the court and a jury, and verdict for plaintiffs for $330. Defendants entered a motion for a new trial, which was overruled, and judgment rendered on the verdict.

The evidence shows, without any conflict, that plaintiffs did not dig the stock well, and did not break all of the sod prairie, as averred in the declaration, and as they were bound by their contract read in evidence on the trial.

On the trial, the defendant Baird asked, and the court refused to give, the following instruction to the jury:

"The conditions in the agreement by which the plaintiffs were to dig the stock well, break the prairie that was unbroken upon the premises, to build the stable, crib and bin room, and to have the farm fenced with a lawful fence, are conditions precedent, to be performed within a reasonable time, taking into consideration the nature of the contract, and before the time of payment of the $400 mentioned in the agreement could be demanded; and the plaintiffs having alleged, in their count in the declaration upon the agreement, a full performance of the conditions therein contained, to be performed on the part of the plaintiffs, they must prove such performance of the conditions of the agreement in order to recover upon the agreement."

The law is well settled, that before a party can recover on a contract, he must have performed his part of the contract, or have been ready and willing to perform, or have been prevented or excused from its performance by the other party. 1 Chit. Pl. 351; *Taylor* v. *Beck*, 13 Ill. R. 387. The plaintiffs, in their first count, had averred a full performance, and the evidence showed a failure to perform their part of the contract. The averment was material, and to entitle them to recover on the special count, they were bound to prove the performance as averred. The instruction only related to the right to recover on the agreement declared on in the special count, and did not question their right to recover on the count for use and occupation; and it should have been given. Had it been to the whole right of action under both counts, it would have been different. No error is perceived in the admission or rejection of evidence, or the giving or refusing the various other instructions in the case. For the refusal to give the defendant Baird's first instruction, the judgment of the court below should be reversed and cause remanded.

Judgment reversed.

Isaac Korsoski *et al.*, Appellants, *v.* Nathan H. Foster, Appellee.

APPEAL FROM McHENRY.

A, being the holder of a note against B, to a larger amount than what A, owes B, A, may give credit for the amount due to B, so as thereby to reduce the demand of A, against B, to a sum within the jurisdiction of a justice of the peace, although the money was not then demandable by B, from A.

This was an action of assumpsit commenced before a justice of the peace in and for the county of McHenry, by summons to

"Isaac Korsoski & Co." to answer the complaint of Nathan H. Foster, etc.

Judgment rendered in favor of the plaintiff for $99.60, and costs of suit, defendant insisting that the justice had no jurisdiction in the case.

Appeal taken by the defendants to the Circuit Court of McHenry county.

The plaintiff below, to maintain the issues on his part, read in evidence a note, of which the following is a copy:

$100. *Marengo, June 1st,* 1856.

Nine months after date we promise to pay to the order of Christian Miller one hundred dollars, at his house in Marengo, with use, value received.

Signed, J. KORSOSKI & CO.

Upon which note was and is the following assignment and indorsement, to wit:

Pay the within to N. H. Foster. CH. MILLER.

Received on the within, $5.13. March 9, 1857.

The defendant below then called as a witness, *Frederick Otto*, who testified as follows:

Defendants were clothing dealers; that plaintiff came into the store a few days before the commencement of the suit before the justice, and selected an india rubber coat, price between $5 and $6, and taking out the note given in evidence, proposed to indorse the price of the coat upon it. Defendant objected, and said that plaintiff might either pay cash for the coat, or he (defendant) would give him a credit of three or six months, as he did others. Plaintiff went out a few minutes and came back and said he would take the coat upon six months' credit, to which defendant assented, and plaintiff took the coat. I was a witness before the justice; the defendant there objected to the indorsement on the note, and insisted that the justice had no jurisdiction, the note and interest being over one hundred dollars.

The plaintiff then called *S. R. Paynter*, who testified as follows:

Isaac Korsoski, one of the defendants, called at his office and said that Foster the plaintiff had called at his store and got a coat, and wanted to credit the price on the note; that he, Isaac, objected to it being so indorsed, but would let him (Foster) have the coat on a credit of six months. Foster then took the coat. Defendant then asked me if Foster could credit the price of the coat on the note. I told him that he could if that was all the deal they had. Witness said he made the indorsement on the note by the direction of the plaintiff, whose attorney he was; the indorsement was the price of the coat spoken of.

It was contended before the justice that the credit was not a fair one, and that the justice had no jurisdiction in the case.

The defendants, by their counsel, moved to dismiss the suit for want of jurisdiction in the justice of the peace, which motion was overruled by the court, and defendants excepted.

The court then gave final judgment in favor of the plaintiff for one hundred and three dollars and thirty-three cents, to which defendants then and there excepted.

Defendants then entered a motion for a new trial, which motion was overruled by the court, and defendants appealed, etc.

GLOVER & COOK, for Appellants.

S. CHURCH, for Appellee.

CATON, C. J. The only question in this case is, whether the indorsement on the note, which reduced the amount due upon it to a sum within the jurisdiction of a justice of the peace, was a fictitious credit. Were it now an open question in this court, we should hesitate long before adopting the rule which has been laid down, that the holder of a note cannot release so much of it to the maker, without any consideration, as will bring it within the jurisdiction of a justice. If a creditor chooses voluntarily to release and forgive a part of the debt, which it was the duty of the debtor to pay, it seems difficult, on principle, to see why he has any cause to complain. It was his duty to pay the whole amount of the debt when it became due, and without being sued, and he who complains of having a part of it forgiven, because he may be expedited a little in the payment of the balance, should be condemned in a legal as well as in a moral point of view, for his ungracious objection. But let the past decisions stand. This case does not come within them, and we certainly feel no disposition to extend them in the least. In all the cases decided, the credits were purely fictitious, without the least excuse on the part of the creditor to remit or indorse the amount. Not so here. Foster did owe Korsoski, justly and fairly, the full amount which he indorsed on the note, but it was not yet due, or the time for which credit was given had not yet expired. Surely Korsoski ought not to complain if Foster, more prompt than he, chooses to pay his debt before it becomes due. There seems a strange kind of consistency in the conduct of one whose standard of integrity will permit him to refuse to pay his own debts, when they do fall due, and yet complains of another who pays him before his debt is due. He will come here in vain for an indorsement at the hands of this court. We are of opinion that the credit given by the indorsement on this note was fair and honest, and the judgment of the court below must be affirmed.

Judgment affirmed.

Frank Parmelee, Appellant, *v.* Kate Austin, Appellee.

APPEAL FROM COOK.

In an action to recover for lost baggage, it is no objection to the witness that some of the articles lost may have been in his trunk, or that he may have had articles of his own in the baggage lost.

Circuit Courts must be allowed the exercise of a large discretion on the subject of leading questions.

This action was brought in a justice's court, and taken, by appeal, to the Cook Circuit Court.

Austin, the plaintiff below, sued out of the clerk's office of the Circuit Court a commission to take the evidence of one Jane M. King, of the city of New York.

On the 2nd March, 1857, the said commission was returned, with the deposition of said witness, duly filed and opened.

On the said 23rd day of May, 1857, the said cause was tried before Manniere, Judge, and a jury. The plaintiff, Austin, read, in evidence, on said trial the deposition of Jane M. King, aforesaid, which is as follows:

1st. To the first interrogatory on the part of the plaintiff, she, answering, says: "My name is Mary King. My age is 28 years. My residence is New York."

2nd. To the second interrogatory, she, answering, says: "I know the plaintiff, Kate Austin; do not know the defendant."

3rd. To the third interrogatory, she, answering, says: "The plaintiff was in Chicago during the latter part of November and fore part of December last. I went there with her, and saw her while there."

4th. To the fourth interrogatory, she, answering, says: "Upon the arrival of the plaintiff at Chicago, in November last, we had between us three trunks, one belonging to plaintiff, one wholly belonging to me, and I had a hat trunk, which contained articles of clothing of both plaintiff and myself. I had the three checks for all three trunks, and I gave the checks to an agent of Parmelee's omnibus line, on the arrival of the cars at Chicago. The hat trunk was never delivered by the omnibus line to us, or either of us, nor the check for the same returned to us."

5th. To the 5th interrogatory, the witness, answering, says: "The agent did give me a memorandum of the checks when he took the same. The last I saw of it was at the trial of this case before Esq. De Wolf, in the possession of Mr. Lumbard."

6th. To the sixth interrogatory, she, answering, says: "The hat trunk, which was lost, contained these articles belonging to the plaintiff: one winter hat, which was worth eighteen dollars; one summer hat, worth twenty-five dollars; one bracelet, worth

twenty-five dollars; one pair of undersleeves, worth ten dollars; two collars, worth five dollars each; three handkerchiefs, one worth five dollars, and the others, two dollars each, and some other articles which I cannot describe."

7th. To the seventh interrogatory, she, answering, says: "We were detained in Chicago some two or three weeks, trying to have the defendant either find or pay for the baggage. The other two trunks were delivered."

There was a finding for the plaintiff below, and a judgment for ninety-seven dollars.

Scates & McAllister, for Appellant.

Farnsworth & Burgess, for Appellee.

Caton, C. J. This was an action, brought before a justice of the peace, against Parmelee, as the owner of an omnibus line in Chicago, for the loss of baggage, delivered to the agent of his line.

We cannot say the court erred in overruling the objections to the deposition of Jane M. King. In substance, the evidence contained in the deposition was pertinent to the issue, and fully sustained it on the part of the plaintiff. She had no interest in the event of this cause. The action was not brought for the loss of any article belonging to the witness. It was no objection to the witness because the lost articles may have been in her trunk, or because she may have had articles of her own in the same trunk. Some of the preliminary questions were rather leading in form, but not so much so as to subject the testimony of the witness to reasonable suspicion. The Circuit Courts must be allowed to exercise a large discretion on the subject of leading questions.

The amended record shows that the words in the answer to the sixth interrogatory were "these articles," instead of the words "three articles," as is stated in the first record. This obviates the objection taken to the sufficiency of the evidence to sustain the verdict.

The defendant's counsel asked the court to instruct the jury as follows: "That if the jury believe, from the evidence, that the plaintiff and the witness, J. M. King, were the joint owners of the hat trunk in question, and as such, made a special agreement with defendant's agent for the custody or conveyance of the same and the contents, then the law is for the defendant." Which instruction the court refused to give as asked for, but gave the same amended, as follows: "That if the jury believe, from the evidence, that the plaintiff and witness, J. M. King,

were joint owners of the hat trunk in question, *and the goods therein contained*, and as such made a special agreement with defendant's agent for the custody or conveyance of the same, and the contents, then the law is for the defendant." To the refusal to give the instruction as asked, and giving the same with the addition aforesaid, the defendant's counsel excepted.

The instruction, as asked, was not the law, and the amendment to it was strictly proper. The whole case shows that the plaintiff was claiming to recover for the loss of the goods which the trunk contained; and if she was the exclusive owner of these, she had a right to recover for them, if the case was in other respects made out. Admitting that the defendant below was a special bailee of the goods, and did not receive them as a common carrier, still he was bound to account for their loss, or answer in damages for their value. Here was no attempt to account for them.

The judgment must be affirmed.

Judgment affirmed.

Edward L. Gilson, Plaintiff in Error, *v.* William Wood, Defendant in Error.

ERROR TO LA SALLE COUNTY COURT.

Possession of personal property is evidence of ownership, and the possessor may recover in trespass against the person who takes it from him, unless such person proves the property to be his own.

Each party engaged in the commission of a joint trespass is liable for the acts of all.

In trespass, the measure of damages is what the property was worth when taken.

It is not error to allow the statements of an agent, made at the time of the sale of personal property, to be given in evidence.

This was an action of trespass to personal property, commenced in a justice's court. On the trial before the justice, a judgment was rendered against the defendant in error for costs, and an appeal was taken therefrom to the La Salle County Court. The cause came on to be tried in the County Court, at the December term thereof, A. D. 1857, before J. C. Champlin, Judge of said court, and a jury, and a verdict had for the plaintiff for $68 damages, and judgment entered thereon; which said judgment, it is claimed, is erroneous.

The plaintiff, to maintain the issue on his part, had sworn, as a witness, *Susan Davis*, who testified, that last February she was with her brother-in-law, the plaintiff, at his house; that de-

fendant came to the house and knocked at the door; that plaintiff was not at home; that Edward Gilson and Lasher took a harness out of the stable occupied by James Dixon, and a plow, and removed them with a wagon. Plaintiff claimed to own the plow, wagon and harness. The wagon was driven away by Lasher. Gilson appeared to be directing the taking away of the property.

On her cross-examination, the witness testified that Lasher occupied the premises together with one James Dixon and plaintiff. That they all lived in one house, occupying different parts of it, and used the barn and barnyard together. That for the portion of the premises, occupied by plaintiff and Dixon, they were to pay, for the use, *one-third of the crops*. That witness went to her brother-in-law's house from the 6th to the 10th of February, 1857, a few days before Gilson took away the property.

James Dixon, a witness called and sworn for the plaintiff, testified, that he was present when defendant came and took away the property, viz.: one two-horse plow, one corn plow, one shovel plow, one wagon, one double harness. That witness rented the farm with plaintiff, who is his brother-in-law, from defendant and George W. Gilson, together. Witness supposed Edward Gilson was agent for George W. Gilson; were to pay one-third of crops for use of premises, to work on shares.

Cross-examined. When we went into possession, Lasher was living on the same farm, and occupying part, and had possession thereof. When we went into possession, Lasher had the personal property in his possession, and claimed to hold the same and the premises occupied by him, under defendant. (Objected to by defendant. Objection overruled.) Lasher retained possession of the same until about a month before this suit was brought, when Ransom came upon the premises and sold the property above named to the plaintiff.

The direct examination of the witness was here resumed by the plaintiff's attorney asking the following question: did Ransom state for whom he was selling the property at the time he sold the same to plaintiff? Which question was objected to by defendant, and objection overruled by the court, and to which ruling the defendant excepted. The witness answered, that Ransom, when he went to sell the property, stated that he did so as the agent of Mrs. Gilson, who was the widow of George W. Gilson, deceased. There was, also, evidence tending to show that Lasher paid rent for the premises so occupied by him, to Mrs. Gilson, after the decease of George W. Gilson.

CHUMASERO & ELDREDGE, for Plaintiff in Error.

C. BLANCHARD, for Defendant in Error.

CATON, C. J. This was an action of trespass to personal property, which, at the time of his death, belonged to George W. Gilson, deceased, and was at that time on a farm of the deceased, occupied by the plaintiff below, as tenant. Some time after the decease of Gilson, and, say a month, before the trespass complained of was committed, one Ransom, claiming to be the agent of Mrs. Gilson, the widow, sold the property to the plaintiff below. While the property was thus situated, the defendant below, with others, took and carried away the property. The following instructions, given for the plaintiff below, were excepted to:

2. "The possession of personal property is *prima facie* evidence of ownership, and unless the defendant has proved that the goods and chattels so taken from the possession of the plaintiff and carried away by the defendant (if such were taken and carried away), was the property of the defendant, or of some person other than the plaintiff, they will find for the plaintiff."

3. "If the jury believe, from the evidence, that other parties were assisting said Gilson, the defendant, in taking and carrying away said goods and chattels (if such were taken and carried away), then the law is, that each party engaged in the commission of a joint trespass is liable for the acts of all so trespassing."

7. "If the jury find for the plaintiff, the measure of damages is, what the property is proven to have been worth at the time it was taken and carried away by the defendant."

These instructions assert the most familiar principles of law, and we do not deem it necessary to enter into any discussion to vindicate their propriety.

The defendant asked the court to instruct the jury as follows: 4th. "If the jury find that the plaintiff occupied the farm under an agreement with George W. Gilson, by which he was to receive one-third of the crops for working the farm, that constitutes the relation of master and servant between George W. Gilson and the plaintiff, and the possession of the plaintiff under such circumstances was the possession of George W. Gilson, during his lifetime; and after his death the possession of his heirs, devisees or legal representatives. And the fact of the plaintiff's being in the occupancy of the premises under such circumstances, is, of itself, no evidence of title to the personal property on the premises during such time." Which instruction the judge qualified by adding as follows: "But, on the contrary, it is no evidence that the personal property in question was not the property of the plaintiff." To this qualification the defendant excepted. We are entirely unable to see the least objection to this qualification. How the circumstances alluded to could tend to prove that the property did not, at the time of the trespass,

belong to the plaintiff, or, at least, was not in his possession, which is a sufficient ownership to maintain this action against a stranger, we are unadvised. The qualification was very proper.

The court refused this instruction asked by the defendant: "If the jury believe, from the evidence, that Ransom sold the property in dispute to plaintiff, as the agent of Mrs. Gilson, who was the widow of George W. Gilson, they must find for the defendant, unless it be shown also that the property was the property of George W. Gilson, and that she had the right to make such sale as the executrix or administratrix of George W. Gilson, or that she was the owner of the property." This decision was also excepted to. This was, certainly, properly refused. It was no matter whether the plaintiff got a good title from the agent of Mrs. Gilson or not. His possession was sufficient as against a wrong doer, as the defendant appears to have been, or at least as he might have been but for any thing in this instruction. The evidence of Dixon tends to show that the defendant had something to do with the renting of the farm to the plaintiff, in connection with, and as the agent of, George W. Gilson. But that gave him no right to interfere subsequently, and especially after the death of George W. Gilson.

There was no error in allowing Ransom's statements, that he was the agent of Mrs. Gilson, which were made at the time of the sale, and as a part of that sale itself, to be given in evidence. We find no error in this record, and the judgment must be affirmed.

Judgment affirmed.

Francis B. Cooley *et al.*, Plaintiffs in Error, *v.* John W. G. Culton, Defendant in Error.

ERROR TO MARSHALL.

Where an appeal is taken to the Circuit Court, from the discharge, by the county judge, of a person under our insolvent act, it is the duty of the insolvent to attend the Circuit Court and submit to an examination; and if he fails to attend, the cause should be continued on application of the appellant.

This was an application for discharge from custody and imprisonment under chapter 52, Revised Statutes, entitled Insolvent Debtors, made by Culton on the 6th day of September, A. D. 1855, at the August special term of the Marshall County Court.

Culton was brought before the court on a *ca. sa.* issued by B.

F. Fuller, a justice of the peace in and for said county, on a judgment rendered by said justice against said Culton, in favor of one Lewis Skinkle.

Culton scheduled his property, made the necessary oath, was examined, E. W. Hazard was appointed assignee, and the court ordered Culton to be discharged, from which judgment the plaintiffs, being judgment creditors, appealed to the Circuit Court of said county. Before the trial of this cause in the Circuit Court, the plaintiffs in error read the following affidavit:

In the matter of the application of J. W. J. Culton for a discharge from arrest,

N. H. Purple, being sworn, says that it is necessary that the applicant for a discharge, J. W. J. Culton, should be present in court to be personally examined upon the hearing of this application, and that he is not present.

Upon this affidavit, plaintiffs in error moved the court for a continuance, which motion was overruled by the court and excepted to by plaintiffs.

The cause was tried by HOLLISTER, Judge, and a jury, at October term, 1856, of the Marshall Circuit Court.

The verdict was for the defendant, Culton.

GLOVER & COOK, for Plaintiffs in Error.

E. W. HAZARD, for Defendant in Error.

WALKER, J. This was an application by Culton to the Probate Court of Marshall county, for a discharge from imprisonment, on the 6th day of September, 1855, under the provisions of the insolvent debtors' act. He had been arrested on a *ca. sa.* issued by a justice of the peace of that county on a judgment in favor of one Lewis Skinkle. On the hearing of the application before the Probate Court, he filed a schedule properly sworn to, and made the required assignment, was examined by the court, and E. W. Hazard was appointed assignee, and applicant was discharged from custody. From that judgment plaintiffs, who were creditors and claimed to be aggrieved by his discharge, appealed to the Circuit Court of Marshall county, and sued out a summons against Culton, which was duly served. At the October term, 1856, of the Circuit Court, the plaintiff filed an affidavit that it was necessary that Culton should be present on the trial to be examined, and that he was absent, and moved for a continuance for that reason. The court overruled the motion. A trial was had before the court and a jury, and the issues were found for defendant. The plaintiff entered a motion for a new

trial, which was overruled, and the defendant was discharged by order of the court. To reverse this judgment, plaintiff prosecutes this writ of error.

The only question presented by this record for our consideration is, whether the court erred in overruling the motion for a continuance on account of the absence of Culton.

The applicant for a discharge from custody under this act is entitled to it only when he complies with the statute. The seventh section provides for the examination of the applicant when the fairness of his schedule is contested; and this privilege is mutual. On such trial in the probate court, he has a right to be examined, if he desires, and the creditor contesting his right to a discharge has the same right to examine him in regard to the fairness of his proceedings. And the only question to determine is, whether, by an appeal to the Circuit Court, the rights of the parties are changed. This is a statutory proceeding, and it is regulated by the statute; and the right is given by the statute to examine the applicant; and no reason is perceived why this right should be lost to either party by appealing to the Circuit Court. This court has held that where an appeal is given and no mode of trial is prescribed in the appellate court, that the trial shall be *de novo*. *Shirtliff* v. *The People*, 2 Scam. R. 9. And no reason is perceived for adopting a different rule in this case. If, when the creditor appeals, the applicant, on the trial of the appeal, has no right to examine him, he would have no right to be examined on his own application. And such a change in the practice in the inferior and superior courts would materially affect the rights of the parties, by appealing from the decision of the Probate Court.

The applicant for a discharge when an appeal is taken, and he is served with process, should attend on the trial, to be examined, if desired, by the opposite party or himself, and unless he does so attend, he is not entitled to a discharge, unless the opposite party waives his attendance. And it is the duty of the Circuit Court to continue the cause when the applicant fails to attend, when a continuance is asked by the creditor.

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

Judgment reversed.

Richard Cody, Appellant, *v.* David L. Hough, Appellee.

APPEAL FROM LA SALLE.

Where notice is given the day previous to a trial to produce a paper which is eighty miles distant, in the control of another person, the court will not take judicial notice that the paper could not have been obtained, and so exclude secondary evidence.

Where the court which tries a case has jurisdiction of the person and the subject matter, it will be presumed that the proceedings in it were regular; and another court will not inquire into them collaterally.

This cause was tried before Hollister, Judge, and a jury, at December term, 1856, of the La Salle Circuit Court. There was a verdict for the plaintiff in the court below, and a judgment upon that verdict. The defendant below brings the cause to this court by appeal, and assigns errors.

The facts of the case are stated in the opinion of the court.

Glover & Cook, and W. H. L. Wallace, for Appellant.

Leland & Leland, for Appellee.

Walker, J. David L. Hough sued Richard Cody in an action of ejectment, in the La Salle Circuit Court, to the November term, 1856, for lot five, block one hundred and nineteen, in La Salle. Plea, general issue. A trial was had before the court and a jury. The record shows that plaintiff, on the day before the trial, gave defendant's counsel notice to produce the patent for the lot in controversy, or the plaintiff would insist upon his right to give secondary evidence of its contents; that the patent was not produced on the trial. It was conceded that the patent was in the hands of Isaac Cook, the patentee, who resided in Chicago, eighty miles from the place of trial, and that he was not present at the trial, and the cause was set for trial on the day it was tried, three days previous. The court permitted the plaintiff to read a copy of the patent from one of the books of record of La Salle county, to Isaac Cook, for the lot in controversy, to which the defendant objected, for want of sufficient notice to produce the original. The plaintiff then offered the record of a judgment of the Circuit Court of La Salle county, at the May term, 1853, which showed, that in a case of *The People* v. *Isaac Cook*, the parties entered their appearance and defendant waived service. And the court, in that case, found that an execution had issued out of that court on the 4th day of June, A. D. 1850, on a judgment obtained therein by the people of the State of Illinois against Matthias App, for

the sum of $16.26½, directed to said Cook as sheriff of the county of Cook, which was received by him on the 6th day of June, 1850; and also that another execution for $14.47½ was issued out of that court on the same day, against the same defendant, on another judgment, and directed and delivered to the said Cook as sheriff of Cook county, on the same day as the other; and that said Cook, by Miller, his deputy, on the 29th day of June, 1850, received of the defendant ten dollars on these executions, or one of them, and the further sum of ten dollars on the 19th day of August, 1850; and that said executions had been returned by the sheriff to the office of the clerk of the La Salle Circuit Court, without any indorsement thereon of the receipt of said sums of money, or either of them, or any part thereof, nor had any part thereof been paid over to the people of the State of Illinois, and that the same was retained by Cook in the hands of his deputy. And that the interest then due on these sums of money, from the time the same were collected until that date, at the rate of twenty per cent. per annum, amounted to $13.41, which, with the principal, amounted to $33.41, for which, with the costs, the court rendered judgment against Cook and in favor of the people of the State of Illinois, and awarded execution. Which record the court permitted the plaintiff to read in evidence to the jury, and to which defendant objected. The plaintiff read in evidence to the jury an execution issued on the judgment, of the date of February 27, 1854, for $33.41 damages, and $2.70 costs, with the return on said execution showing a levy of the execution on the lot in controversy, and the sale of the lot to plaintiff Hough, on the 18th day of May, 1854; to all of which the defendant below excepted. The plaintiff then read in evidence a deed for the lot from Francis Warner, as sheriff of La Salle county, to which the defendant objected. Plaintiff called a witness, who testified that since November, 1856, lots five and six, in block one hundred and nineteen, in the city of La Salle, have been inclosed in one fence; defendant's house, in which he lives, is on lot six; did not know who put up the fence around the lots; never saw defendant exercise any acts of ownership over the lots in controversy. This was the evidence in the case, and upon it the jury found a verdict for the plaintiff, and the defendant moved the court for a new trial, which was overruled, and judgment was rendered on the verdict, and to reverse which defendant Cody brings the cause to this court.

The first question presented for our consideration, is, whether the notice to produce the patent was sufficient to authorize the admission of secondary evidence of its contents. The record only shows that the patent was in Cook's possession, and that

he resided at Chicago. It nowhere appears that defendant could not have produced it, by using reasonable efforts, after the service of notice. The court cannot take judicial notice that, by the use of the means afforded for communication by telegraph and railroad, that he could not, by using slight efforts, have produced the original by the time it was required on the trial. If, in answer to a rule, it had appeared that the defendant could not control the paper, or that by reasonable efforts he could not have produced it, then the introduction of the secondary evidence would have been erroneous. But such does not appear to have been the case; and we are of the opinion that the admission of secondary evidence was proper.

It was urged that the court did not have jurisdiction to render the judgment against Cook, under which the sale was made, and from which plaintiff below claims to derive his title, for the want of a notice, that the plaintiff would apply for a rule to pay the money, and for the want of a demand on Cook for the payment of the same. The record fails to show that such notice was given or demand made, but it shows that defendant, Cook, entered his appearance in the Circuit Court and waived notice. And the Circuit Court being a court of general jurisdiction, independent of the statute, had competent authority and jurisdiction of the subject matter, and could have heard the cause and rendered the judgment, and when the defendant entered his appearance to the cause, the jurisdiction of the court was competent over both the person and subject matter. If the evidence did not show a demand of the money from Cook, as required by the statute, it was error to render the judgment which it did; but it was only an error, from which the defendant, Cook, should have appealed, or prosecuted a writ of error, and thus have corrected the error in the appellate court. Had he not entered his appearance, and thereby given the court jurisdiction of his person, no presumption could be indulged, that he waived any of the antecedent steps to authorize the judgment, but having entered his appearance, the only question before the court for determination, was whether he had received the executions, how much he had received on them, and whether he had failed to pay the same to the party entitled to the money; and if so, what amount he should be required, by the rule of the court, to pay the plaintiff. The court having jurisdiction, any mistake of the law or facts, could not defeat the jurisdiction already acquired. The court below, then, had no right in a collateral proceeding, as this was, to revise that judgment, and determine whether it was erroneous. It only had the right to see that the court rendering the judgment offered in evidence, had jurisdiction of the person and subject

matter, and if so, give it force and effect. We are, for these reasons, of the opinion that there was no error in admitting the judgment, the execution under it, and the sheriff's deed, in evidence.

In this case, there was no plea denying the possession of the defendant, and it was unnecessary for plaintiff to have introduced any evidence of that fact, it not being in controversy under the the pleadings, and it is unnecessary to determine whether the evidence established that fact or not. Upon a careful examination of the whole record in this case, we are unable to perceive any error, and the judgment of the court below should therefore be affirmed.

Judgment affirmed.

Nicholas Schoonhoven, Appellant, *v.* James B. Gott, Appellee.

APPEAL FROM KANE.

The variance in names between Schoonhoven and Schoonhover is material, and when such variance exists between the writ and declaration, the court should, on motion, dismiss; unless the proof should be, that the party was as well known by one name as the other; upon a proper state of pleading.

The entry of a motion to quash, is not such an appearance, as would amount to a waiver of a variance between the writ and declaration.

This was an action of assumpsit, commenced in the Kane County Circuit Court, at April term, 1856. On said day the appellee filed in the clerk's office of said court, a precipe, security for costs and declaration in the cause; in each of which papers the plaintiff is named, James B. Gott, and the defendant Nicholas Schoonover.

A summons was issued, and therein the parties are named James B. Gott, plaintiff, and Nicholas Schoonhoven, defendant, which was served on appellant, and filed as the writ in the cause.

At February term, 1857, the appellant filed a motion in writing, alleging that the writ was against Nicholas Schoonhoven, and the declaration against Nicholas Schoonover, and therefore there was a variance between the writ and declaration, and praying the dismissal of the suit on account thereof; motion was supported by affidavit; which motion the court overruled; to which decision of the court the appellant excepted, and the appellant appearing no further in the case, the court, J. G. Wilson, Judge, presiding, rendered judgment against him.

The appellant prayed an appeal and brings the cause here, and assigns for error the decision of the court overruling said motion and rendering judgment against appellant.

S. Wilcox, for Appellant.

J. M. Walker, for Appellee.

Walker, J. This was an action of assumpsit brought in the Kane Circuit Court. The summons was against Nicholas Schoonhoven, and the return shows service by that name. The precipe, the bond for costs and the declaration, were all entitled against Nicholas Schoonover. At the February term, 1857, the defendant entered his motion to dismiss the suit for a variance between the summons and declaration, which was overruled, and the court rendered judgment against defendant and assessed the plaintiff's damages. And to reverse that judgment, the defendant brings the case here by appeal, and assigns for error the overruling the motion to dismiss, and the rendition of the judgment by the court below.

The question presented by the record in this case for our consideration, is, whether there was a variance between the names in the summons and declaration. It is a general rule in pleading, that the declaration should pursue the writ in regard both to the Christian and surnames of the parties, and where there is such a difference as not to be the same in sound, the variance might be plead in abatement, but the misspelling is not, however, material if the two names are the same in sound. 1 Chit. Pl. 245.

In the application of this rule, it was held in the case of *The King* v. *Shakespeare*, that the names Shakepear and Shakespeare were not the same, and a plea in abatement for the variance was held good on demurrer; 10 East R. 83. In 4 Bac. Abr., letter A, title Misnomer, 752, it is said that Rudulphus and Rodalphus are not the same names, there being a material variance in the sound. It was held by the Supreme Court of Arkansas, 2 Spear 46, that Willison and Willitson are not the same. And the rule that the names must be the same in sound is recognized by all of the English and American courts. Then when we test the present case by this rule, it is obvious that the variance is clear and distinct, the only similarity being in the first syllable, the latter portion of the names being different both in the sound and in the orthography. The variance is certainly as marked as in either of the above cases.

If the proper name was used in the summons, then the plaintiff could have amended his declaration on leave of the court,

so as to obviate the variance; and if the correct name was used in the declaration, the defendant had a right to plead the variance in abatement of the writ, or move to quash, and the plaintiff could not avoid it unless by replication and proof that defendant was as well known by the one name as the other.

The mere entry of a motion to quash the writ or dismiss the suit, is not such an appearance as waives a variance between the writ and declaration, and the variance in this case was not cured by the motion of the defendant.

The court is of opinion that the variance in this case was material, and that the judgment should be reversed and the cause remanded.

Judgment reversed.

Heman Baldwin, Appellant, *v.* George O. Banks *et al.*, Appellees.

APPEAL FROM LA SALLE COUNTY COURT.

In an action upon a note, where the word "not" is omitted in the averment of non-payment, the omission will be cured by the statute of "Jeofails," and if not, the obvious sense from the context will make the declaration good.

In a plea of failure of consideration, alleging that land sold the maker of the note had on it but sixteen hundred cords of wood instead of twenty-four hundred cords, it should be shown that the deficiency in the quantity of wood was equal in value to the note sued on, or the plea will be bad.

This was an action of assumpsit, brought at the June term of the La Salle County Court, on a promissory note made by Baldwin and payable to one Henry J. Miller, and by Miller assigned to Banks and Hutchinson, plaintiffs below, before due.

The declaration had a count upon the note, and also a common count for goods sold and money paid for the use of defendant, and had the following breach:

Yet the defendant hath disregarded his last mentioned promises, and hath paid any of the said money, or any part thereof, to the damage of the plaintiffs, of five hundred dollars. Therefore, they bring this suit.

At the June term aforesaid, the defendant pleaded the general issue, and three special pleas.

By his first plea the said defendant says, that all of the said supposed sums of money, mentioned in said plaintiffs' declaration, has reference to, and is, in fact, only one supposed sum of money, and that is the same sum of money mentioned in said supposed promissory note, declared on in the first count of said plaintiffs'

declaration; and the said defendant says, that if any such promissory note, as declared on in said first count in said declaration, was executed and delivered by him as is charged against him, it was so executed and delivered to the said Henry J. Miller, for the consideration, and the sole and only consideration, that he, the said Henry J. Miller, would then and there convey, by a good and indefeasible title in fee simple, to him, the said defendant, the following described real estate—describing it, with timber and wood upon it sufficient to make twenty-four hundred cords of wood; he, the said Henry J. Miller, then and there representing to the said defendant that the timber and wood were then and there to be found on said tracts of land. And the said defendant never having been on or seen such land or wood, which fact was then and there well known to the said Henry J. Miller, and he, the said defendant, relying wholly upon the good faith of the said Henry J. Miller, and the representations made by him as aforesaid as being true, did then and there execute and deliver said note; and avers, that he gave the said note to the said Henry J. Miller, by reason of the representations aforesaid, made to him by the said Miller; and which said representations, the said defendant avers, were not true in this, that there was not then, nor has there been at any time since, timber and wood sufficient to make twenty-four hundred cords of wood; but, on the contrary, all the timber and wood on said tracts of land at that time, or at any time since, was not sufficient to make over sixteen hundred cords of wood. And the defendant says, that the representations so made to him by the said Henry J. Miller, as to the amount or quantity of timber and wood on said tract of land, were false, and fraudulently made to deceive this defendant; and that this defendant has been deceived and defrauded by them, and that there never was any consideration for the giving of said promissory note declared on, if any such note were so given.

The second special plea avers, that all of the several sums of money claimed in the plaintiffs' declaration, as being due and owing by this defendant to the plaintiffs, has reference to but one sum of money, and is the sum mentioned in the said supposed promissory note declared on in the first count of said plaintiffs' declaration, and not other and different sums. And as to the sum of money mentioned in the promissory note, defendant says, it was so executed and delivered to the said Henry J. Miller, in consideration that he, the said Henry J. Miller, would then and there convey, by good title, unto this defendant, real estate which should have timber enough thereon to make, when cut and piled up, twenty-four hundred cords of wood. And defendant says, that said Henry J. Miller did not then and

there, nor has he at any time thereafter up to the time of this suit being commenced, conveyed unto this defendant real estate which had timber enough thereon to make, when cut and piled up, twenty-four hundred cords of wood; but, on the contrary, the said defendant says, that all the timber on all the land conveyed by the said Henry J. Miller to this defendant, would not exceed, when cut and piled up, sixteen hundred cords; of all which the said plaintiffs, at the time when said supposed note was so assigned or indorsed to them, had notice.

The third plea says, that all of the several sums of money claimed in the several counts of the said plaintiffs' declaration, has reference to, and is, in fact, only one supposed indebtedness, and is the same sum of money claimed to be due as is mentioned in the supposed promissory note declared on in the first count of said plaintiffs' declaration; and as to said supposed promissory note, the said defendant says, that if any such note was so executed and delivered to the said Henry J. Miller, as is declared on in said plaintiffs' declaration, it was so executed and delivered by this defendant to the said Henry J. Miller, under the following circumstances—averring the same facts in substance.

A demurrer was filed by plaintiffs' attorney to the second, third and fourth special pleas; to which there was a joinder.

A trial was had on the demurrer filed by plaintiffs to the second, third and fourth pleas of defendant, which resulted in sustaining the said demurrer to all of said pleas, and plaintiffs had leave of the court to withdraw the common counts in their declaration; and the said defendant electing to abide by his pleas as aforesaid, the court, by consent of parties, (a jury being waived) proceeded to try the cause on the special count in the declaration and the general issue filed thereto as aforesaid. And the plaintiffs, at said trial, offered in evidence the said note declared on in their said declaration, to the introduction of which note the defendant objected. The court overruled said objection, and admitted said note to be read in evidence; and, afterwards, did find, on the issue aforesaid, in favor of the plaintiffs, in the sum of three hundred and twenty-five dollars and costs. And afterwards, the defendant entered a motion for a new trial, which motion was overruled by the court, and judgment was rendered for the said sum of three hundred and twenty-five dollars and costs.

And the said defendant prayed an appeal.

JENKINS & BLANCHARD, for Appellant.

CHAS. BLANCHARD, for Appellees.

CATON, C. J. The objection to the declaration is not well taken, even if we can carry the demurrer back over a good, issuable plea, which, it must be admitted, the general issue is. The averment of non-payment applied to the special count as well as the common counts, and left the special count good, after the common counts were dismissed. The clerical omission of the word *not* is cured by the statute of *jeofails*, and even if it were not, where the sense is so obvious from the words used, we should not hesitate to hold the declaration good.

The substance of the defense relied upon is, that the note was given in part consideration of two thousand dollars, the purchase money of various tracts of land, which the payee of the note sold to the maker, and represented that they had upon them twenty-four hundred cords of wood, whereas they had upon them but sixteen hundred cords, which the vendor well knew; and that the maker of the note purchased on the faith of those representations, supposing that there was the full twenty-four hundred cords of wood on the land, and that the plaintiffs, when they took the note, well knew all these facts, and conclude in bar of the whole action.

Now the manifest and insurmountable objection to these pleas is, that they do not show that the eight hundred cords of wood which were wanting, according to the representations, were worth the amount of the note sued on, and unless they were, they could not entirely defeat the plaintiffs' action, which each of these pleas purports to do. It is not even averred that the wood was of any value whatever, so that the pleas were insufficient to defeat any part of the cause of action, much less the whole.

The demurrer was properly sustained, and the judgment must be affirmed.

Judgment affirmed.

RICHARD PENDERGAST, Appellant, *v.* THE CITY OF PERU, Appellee.

APPEAL FROM LA SALLE.

A copy of a city ordinance, certified in conformity with the charter, is proper evidence of the existence of such ordinance, in a suit where the city is a party.

In a suit for violating a city ordinance, by selling liquor without a license, if the defendant stated that the city charged too much for license, and that he could not afford to pay the license, and pleads guilty to the charge of violating the ordinance, it will be held that the fact is established that he had not a license,

that he had sold liquor, and that his plea of guilty had reference to that offense, although the ordinance contained other provisions of prohibition and other penalties.

In a proceeding before a justice of the peace, technical accuracy in the form of the judgment, whether it be in debt or for a penalty, will not be held indispensable.

THIS was an action originally brought before the police magistrate of the city of Peru, by plaintiff below, against defendant below, to recover a debt for the violation of an ordinance of said city, and removed, on appeal, to the Circuit Court.

The cause was tried at the November term, A. D. 1857, of said La Salle County Circuit Court, M. E. HOLLISTER, Judge, presiding, both parties having waived a jury.

HOUGH & BASCOM, for Appellant.

W. H. L. WALLACE, for Appellee.

WALKER, J. The first question presented by this record for our consideration, is, whether the court erred in admitting the copy of the city by-laws. The copy was certified by the city clerk, and verified by its corporate seal, which is literally a compliance with the charter. Private laws, 1851, p. 120, sec. 44. The evidence even went further, and showed that they had been published as required by the charter. And there is not the slightest ground for this objection.

It was next urged that the evidence did not sustain the finding of the court. This we think is untenable. When the officer served defendant with process, he stated that the city charged too much for licenses, and he could not afford to pay the price. It appeared that he had sold liquor before the commencement of the suit, and on the trial before the police court, he plead guilty to the charge of violating the city ordinance, for which he was then prosecuted. This evidence, when taken together, clearly establishes the fact, that he had no license, that he had sold liquor and plead guilty to the violation of the ordinance, one of the provisions of which prohibited its sale without a license. The prohibition is contained in the second section of the city ordinances, and provides, "That it shall not be lawful for any person or persons to sell, barter or exchange, any wine, brandy, rum, gin, whisky, beer, ale, porter, or other vinous, spiritous, malt or fermented liquors, or any mixture, part of which is spirituous or fermented liquors, without being duly licensed to keep a grocery, for selling of wines, etc., and upon a violation of this section, the person or persons so offending, shall forfeit and pay for each offense a sum not less than twenty-five dollars, nor more than one hundred dollars, and

costs of suit." The ordinance, it is urged, contained other prohibitions and penalties, and that his admission of a breach might have related to those. This is not the inference from the evidence, as it showed that he had sold liquor, and there is nothing tending to show, in the slightest degree, that he had violated some other provision of the city ordinance. And his statement that the city charged too high for a license, when unexplained, was inferentially an admission that he had no license; and this rendered it unnecessary for the prosecution to prove that fact, even if such proof would have otherwise been required.

The only remaining question is, whether the court erred in its finding and rendering judgment in damages, when the proceeding was in debt, for the recovery of a penalty. There is no doubt but a finding and recovery in the latter form is more conformable to the ancient practice, but it was strictly technical, and not calculated, in the slightest degree, to promote justice. In furtherance of justice, mere technical rules should not be permitted to prevail, unless the rule is so firmly established that the courts are not at liberty to disregard them, as settled law. This court, in an action that originated before a justice of the peace, on a record for the recovery of the amount of the judgment found by the record, and in which the Circuit Court, on an appeal, rendered a judgment in damages, held that the judgment was regular. *Horton* v. *Critchfield*, 18 Ill. R. 135. That case is decisive of this question. On the whole record in this case, we are unable to perceive any error that should reverse the judgment of the court below, and the same should therefore be affirmed.

Judgment affirmed.

George Curtis, Appellant, *v.* Anson Root, Appellee.

APPEAL FROM KENDALL.

A mortgage given for the purchase money of land, executed simultaneously with the deed, takes precedence of a judgment against the mortgagor. And the principle is the same if the mortgage is to another than the vendor, who actually advances the means to pay the purchase money.

An equity of redemption in land, is a saleable interest, on execution.

This was an action of ejectment. The venue was changed from Kane to Kendall Circuit Court.

Declaration, plea and issue in usual form.

At September term, 1854, a jury was waived, and the cause was tried by the court.

Issue found for Curtis. Judgment for costs against Root.

At September term, 1855, a new trial was granted to Root, under the statute.

At April term, 1857, cause was tried by court and jury on following facts agreed, and some other evidence, to wit: agreed, in April term, 1845, that judgments were rendered in Kane Circuit Court against Ambrose, one for $833.72 and costs, in favor of Weed & Co.; one for Rossetter for $361.49; *fi. fa.* issued immediately and levied on Ambrose's store of goods at Elgin, sufficient to pay the same. Ambrose, with Root as his surety, gave delivery bond for the goods, to the sheriff. Ambrose then gave Root a chattel mortgage on the goods, to indemnify him as surety, and the goods were left with Ambrose for sale.

Ambrose and Root appealed the cases to the Supreme Court. In the meantime Ambrose, by Root's consent, sold and exchanged the goods to Morgan and Padleford, for the land in question, and a house and lot in Elgin. The deed dated 22nd July, 1845, acknowledged 28th, recorded 7th August, 1845. Ambrose gave Root a mortgage on the land and house and lot aforesaid, bearing date August 1st, 1845, recorded on 7th, as an indemnity for becoming his security as aforesaid.

The appeals were dismissed in December, 1845.

On January 21st, 1846, *fi. fa.* issued to sheriff on Weed & Co.'s judgment, returned by order of attorney.

July 14th, 1846, another *fi. fa.* issued thereon, which was levied on said lands, which were duly advertised. The land was sold on 15th August, 1846, to Harvey, for two hundred dollars; Harvey sold and assigned the certificate of purchase to Spencer, and he sold and assigned to Havens. Not being redeemed, the sheriff, on 7th February, 1850, conveyed the land to Havens, who sold and conveyed it to the appellant, and his deed was of record before this suit was brought.

On 18th February, 1847, Root filed his bill to foreclose his mortgage against Ambrose.

Decree in 1849; and the mortgage property sold to Root by the master, and deed made 15th November, 1850, which was recorded.

All judgments, decrees, sales and deeds aforesaid are in due form, and it appears that Curtis was in possession when this suit was brought.

Root then offered in evidence Morgan's and Padleford's depositions, taken on his part. Curtis objected. His objections overruled, and he excepted.

Morgan testified he conveyed the land to Ambrose in exchange for the goods; Root released goods, or indemnified him. He traded with Ambrose. Thinks Root took a mortgage from Ambrose, about that time, on the land; thinks it was one transaction; won't say for certain.

Padleford testified to same; also, that Ambrose mortgaged back to him the house and lot for a balance over the value of the goods, which is dated 22nd July, 1845, acknowledged 28th, and recorded 30th July, 1845.

Spalding testified he was sheriff, and sold the land on Weed & Co.'s execution. Before the levy he asked Root to pay the money; Root said that Ambrose had lands, and he (sheriff) must sell them to satisfy the execution, and he (Root) would bid on them; that Root was present at the sale of the land to Harvey.

Spencer testified that he attended the sale with Root, at Root's request. He subsequently bought of Harvey the sheriff's certificate of sale, at Root's request.

This was all the evidence.

At Root's request, the court told the jury, if they believe, from the evidence, that the mortgage by Ambrose to Root was given to secure the payment of the purchase money paid for the farm in question, and that the giving of the deed to Ambrose and the mortgage to Root was one transaction, then the mortgage was a lien, and had preference over the judgment against Ambrose, and the jury should find for the plaintiff, (Root,) provided the jury believe, from the testimony, that the defendant, (Curtis,) had notice of such mortgage, and the purposes for which it was given, prior to his purchase of said land.

Curtis asked the court to instruct the jury:

First. That a judgment in the Circuit Court of this State is a lien, from the last day of the term, upon all the lands and real estate of the defendant, within the county, for seven years, if execution be issued within a year on such judgment, and that such lien affects as well the lands acquired by the defendant after, as those owned by him at the time judgment was rendered.

Second. That the lien of the judgment is not defeated by an appeal to the Supreme Court, if such appeal be dismissed. The appeal may suspend, but not destroy the lien.

Third. That the judgment in favor of Weed & Co., against Ambrose, was a lien upon the land described in the declaration, the moment the title to said land was acquired by said Ambrose, and no subsequent mortgage or conveyance thereof, by Ambrose, could destroy the lien.

Fourth. If a party having claim to lands, stand by and allow the same to be sold to another without objecting, or making known his claim, he is estopped from afterwards setting up such claim against the rights of the purchaser at such sale.

The court gave the first and second instructions as asked, and gave the third by adding: "This is the law, unless the jury believe, from the evidence, that the mortgage by Ambrose to Root was given to secure the payment of the purchase money paid for the land in question, and that the giving of the deed to Ambrose, and the mortgage to Root, was one transaction, and that the defendant, Curtis, had notice of such facts prior to his purchase of said land."

The fourth he gave, with this qualification, to wit: "This is the law in relation to property, the title to which is not made a matter of record, and by the law made constructive notice of such right or title when recorded."

To the giving of these instructions, as qualified by the court, Curtis excepted.

The jury returned the following verdict: "We, the jury, find for the plaintiff, Root, and that he is possessed of the title of the land in fee simple."

Curtis then moved for a new trial, upon the following grounds:

First. Because the verdict is contrary to law and evidence.

Second. Because the court erred in admitting the depositions of Morgan and Padleford in evidence.

Third. Because the court erred in giving the plaintiff's instructions, and also in qualifying those asked by Curtis.

Which motion the court overruled, and Curtis excepted to that opinion of the court. Judgment on the verdict aforesaid.

Curtis assigns for error:

That the Circuit Court erred in the instructions given to the jury, and in every member, branch and part thereof.

The said court erred in overruling the motion for a new trial.

The said court erred in allowing the depositions of Morgan and Padleford to be read in evidence to the jury.

The verdict is against law and evidence.

That the judgment is erroneous in substance and form, and not warranted by the verdict, or by law.

Morris & Blackwell, for Appellants.

B. C. Cook, for Appellee.

Caton, C. J. Without examining the evidence in detail, it is sufficient to say, that we do not feel called upon to reverse

this judgment, for the reason that the jury were not warranted by the evidence to find the facts as they did by their verdict.

The principal questions arise upon the instructions. The instruction given for the plaintiff, and to which exception was taken, is this: "If the jury believe, from the evidence, that the mortgage by Ambrose to Root was given to secure the payment of the purchase money paid for the farm in question, and that the giving of the deed to Ambrose and the mortgage to Root by Ambrose was one transaction, then the mortgage was a lien, and had preference over the judgment against Ambrose, and the jury should find for the plaintiff, provided the jury believe, from the testimony, that the defendant, Curtis, had notice of such mortgage, and the purpose for which it was given prior to the time he purchased the land in question."

It is a principle of law too familiar to justify a reference to the authorities, that a mortgage given for the purchase money of land and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping at all in the purchaser, and during such instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books, why the mortgage takes precedence of the judgment rather than any supposed equity which the vendor might be supposed to have for the purchase money; though that consideration may have originated the rule at the first. Indeed, nearly all the cases to be met with, are cases where the mortgage has been given to the vendor and for the purchase money. Such was not the case before us. The facts were, that the lands were purchased with goods, which might be considered as equitably belonging to the mortgagee, and which the mortgagor sold to the vendor for the land with the consent of the mortgagee, so that in substance the transaction was the same as if the purchase money had been paid by the mortgagee, who took the mortgage to secure himself for the purchase money thus advanced, and the jury have found, and we think properly, that the execution of the deed and mortgage were simultaneous acts. This brings the case within the letter and the equity of the rule as first stated. In point of right and principle, it can make no difference whether the mortgage is given to the vendor for the purchase money, or to another who actually advances the means to pay the purchase money to the vendor. It is unnecessary now to say whether a mortgage to a third person for an independent consideration and having no connection with

the purchase of the land, but executed at the same time with the deed, would occupy the same position or not. The instruction was properly given.

The defendant asked the court to give this instruction to the jury, "That the judgment in favor of Weed & Co., against Ambrose, was a lien upon the land described in the declaration, the moment the title to said land was acquired by said Ambrose, and no subsequent mortgage or conveyance thereof, by Ambrose, could destroy the lien;" which the court gave with this qualification: "This is the law, unless the jury believe from the evidence, that the mortgage by Ambrose to Root was given to secure the payment of the purchase money paid for the land in question, and that the giving of the deed to Ambrose, and the mortgage to Root, was one transaction, and that the defendant, Curtis, had notice of such facts prior to his purchase of said land;" to which the defendant excepted. If we are right in the conclusion to which we have arrived upon the instruction given for the plaintiff, then the court was right in adding this qualification, for it asserts the same principle of law.

The fourth instruction asked by the defendant was this: "If a party having a claim to lands, stand by and allow the same to be sold to another, without objecting or making known his claim, he is estopped from afterwards setting up such claim against the rights of the purchaser at such sale;" which the court gave with this explanation: "This is the law in relation to property, the title to which is not made a matter of record, and by the law made constructive notice of such right or title when recorded;" to which the defendant excepted. This instruction might well have been refused altogether, as having no foundation in the evidence, and as being inapplicable to the case. There was no pretense of any fraudulent concealment for the purpose of inducing the purchaser at the execution sale to buy a bad title. The defendant in the execution had an equity of redemption in the land, which was a saleable interest on the execution. The mortgagee had placed his mortgage on record, which was notice to all the world of the mortgage; and neither the mortgagee, if present at the sale, nor any one else, had any right to suppose that anything but the equity of redemption was being sold, and certainly the mortgagee was not bound to go there and proclaim that nothing but the equity of redemption could be sold. We find no error in the record, and the judgment must be affirmed.

Judgment affirmed.

Porteus B. Roberts, Appellant, *v.* William H. Haskell, Appellee.

ERROR FROM PEORIA.

A third indorsee may maintain a suit against a second indorsee upon a note which has passed through his hands without his indorsement, and is subsequently assigned to him.

Where a party suing an indorsee has to show the insolvency of the maker of the note, and attempts to prove the existence of a mortgage against him, he must have made reasonable efforts to procure the original; the introduction of a copy, without showing this, is improper.

The possession of personal property is *prima facie* evidence of ownership, and his assertion that such property belongs to another will not rebut the legal presumption that it is his.

That property is incumbered, does not furnish a sufficient reason for not making a levy upon it, unless the party omitting to do so is prepared to show, in a case like this, that the claims were valid, and that a levy would have been wholly unavailing.

If the maker of a note, where one indorsee is sued by another, had property exempt from execution, at the time or soon after the note became due, sufficient to have paid it, the presumption is, that the note could have been collected of such maker.

This is an action by the appellee as indorsee, against the appellant as indorser, of a promissory note. The note and indorsement upon the same are as follows:

$200. Peoria, Ill., May 10, 1855.

One year after date, I promise to pay Isaac Underhill, or order, two hundred dollars, for value received, with interest at six per cent. per annum, payable annually from the date hereof.

M. ZANONI.

Indorsed on the back:

Pay to Porteus B. Roberts, without recourse to me.

I. UNDERHILL.

Pay to William Brady, or order.

P. B. ROBERTS.

Pay to William H. Haskell.

WILLIAM BRADY.

The declaration was filed in the County Court of Peoria county, on the 22d day of December, A. D. 1857. It is in the assumpsit, and contains three counts, as follows:

The first count is upon the note and indorsement, and avers that suit was duly instituted and prosecuted to judgment against the maker of the note; that an execution was duly issued upon said judgment, and returned unsatisfied.

No evidence was offered under this count.

The second is also upon the note and indorsement, and contains the following averments:

That Zanoni made the note, and delivered the same to Underhill, the payee.

That Underhill indorsed the same without recourse, and delivered the same to the appellant.

That the appellant indorsed and delivered the same to one William Brady.

That said Brady indorsed and delivered the same to the appellee, who was plaintiff below.

That at the time said note became due and payable, Zanoni, the maker thereof, was wholly insolvent, and that the institution and prosecution of suit against him, upon said note, would have proved wholly unavailing.

The third count contains the common count for "*money paid*," for "*money had and received*," and for money due on an "*account stated.*"

The defendant pleaded to the whole declaration the general issue, with an agreement between the parties that all matters which could be properly given in evidence under special pleas, properly pleaded, should be admissible under the plea of *non assumpsit.*

On the trial, the plaintiff below produced in evidence the note and indorsement, which was objected to by defendant below, and objection overruled.

The plaintiff below then produced eleven witnesses, each of whom testified that they had known M. Zanoni, the maker of the note, since the spring of 1856; that on the 10th day of May, 1856, and from that time to the commencement of this suit, they had deemed Zanoni insolvent and unable to pay his debts.

The plaintiff then produced in evidence the records of two of the justices of the peace of Peoria county, and read from said records the entry of eleven judgments against Zanoni, in favor of various persons, and entered during the spring, summer and fall of 1856, together with the executions issued thereon, and returns made upon the same of "no property found."

This evidence was all objected to.

The defendant below proved that during the summer of 1856, Zanoni built a house in Peoria, on lot one, block four, which house was worth $2,000.

The plaintiff below then offered in evidence a certified copy from the records of Peoria county, of a mortgage made by Zanoni to one Mary Rosa Zanoni; and for the purpose of laying the proper foundation for the admission of such copy, the plaintiff below testified as follows: "The original mortgage, of which this is a copy, is not in my possession or power to produce on this trial, and was never in my possession. I never saw it—

never inquired for it—know nothing about it; it is all Greek to me."

The defendant below then objected to the introduction of said copy in evidence, but the court overruled the objection.

The defendant below then produced *Isaac Underhill*, who testified that he was payee of the note offered in evidence; that he knew the parties to this suit. The defendant below then offered to prove, by said witness, the following facts: That witness sold the note to the plaintiff below, indorsing it in blank, and without recourse on witness; that plaintiff below sold said note to defendant below, who in turn indorsed it to Brady, and Brady afterwards, and after said note became due, sold and indorsed said note to the plaintiff below; that said last indorsement was made on the 13th day of May, 1856.

This evidence was objected to by the plaintiff below, and the objection sustained.

At the request of the plaintiff below, the court gave the following instructions to the jury, to the giving of which the defendant below objected and excepted.

"If the jury believe, from the evidence, that at the time when the note given by Zanoni to Underhill fell due, Michael Zanoni was notoriously insolvent, and has so continued up to the time of the commencement of this suit, so that the prosecution of a suit against him would have been unavailing to obtain the amount due on the note, or any part thereof, then they will find for the plaintiff."

"Although the present plaintiff might have had the note given in evidence in this suit in his possession, as assignee of Underhill, yet if he passed it, without indorsement, to the present defendant, and he indorsed it to Brady, and Brady to plaintiff, this would not prevent plaintiff from recovering in this suit."

"The possession of property by Zanoni, claiming to hold it as the property of his mother, or any other person, is not evidence of ownership in Zanoni."

"The plaintiff was not bound to levy his execution upon the property covered by liens, mortgages, or incumbrances, by which he would have to pay off liens, or incumbrances, or involve himself in the expense of a trial of the right of property, by an adverse claimant."

"The return by the constable of an execution unsatisfied, or property not found, is proper evidence to be considered by the jury that Zanoni had no personal property subject to such execution at the time of such return; and execution returned unsatisfied, or no property found, by the sheriff of the county, is proper evidence to be considered by the jury that said Zanoni had no personal or real property at the time of such return.

But the fact that suit against Zanoni would have been unavailing, may be proven by any other legal testimony as well as by the return of executions against him unsatisfied. It is only necessary for the jury to believe, from the testimony adduced before them, that such suit would have been unavailing to entitle the plaintiff to recover."

The defendant below then asked the court to give the following instructions, all of which the court refused to give, and the defendant excepted:

"Should the jury even believe, from the evidence, that at the time the note fell due, Zanoni was insolvent, still, if the jury should believe that had the plaintiff used due diligence in the collection of the note, he could have collected the same, then the jury will find for the defendant."

"If the jury believed, from the evidence, that the plaintiff purchased the note offered in evidence, after the same became due, the jury will find for the defendant."

"If the jury believe, from the evidence, that during the summer of 1856, Zanoni had personal property not exempt from execution, sufficient to have paid the debt, such state of facts raises a *prima facie* case that the note could have been collected of him."

"If the jury believe, from the evidence, that Zanoni was in the possession of, and had under his control, personal property, during the summer of 1856, such possession is presumptive evidence that Zanoni owned said property; and unless the plaintiff has proved that some one else owned the property, the presumption would be, that it really belonged to Zanoni."

"Although the jury should believe, from the evidence, that executions in other cases against Zanoni were returned 'no property found,' such returns would not, so far as this case is concerned, prove that Zanoni was at the time insolvent, or that proceeding by due diligence in this case would have been unavailing."

The jury found for the plaintiff below, and assessed his damages at $232.80.

The defendant below moved the court for a new trial, which motion was overruled.

The defendant below then moved the court in arrest of judgment, which motion was overruled.

Errors assigned are:

The court erred in admitting the note and indorsement in evidence, without proof of the execution of the same.

The court erred in admitting evidence of the reputation or reputed insolvency of Zanoni.

The court erred in admitting as evidence, the records of judgments and executions against Zanoni in other cases, and the returns of "no property found," upon such executions.

The court erred in admitting the certified copy of the mortgage from M. Zanoni to Mary Rosa Zanoni, no proper foundation having been laid for the same.

The court erred in giving the instructions asked by the plaintiff below.

The court erred in refusing the instructions asked by the defendant below.

The court erred in overruling defendant's motion for a new trial, and in arrest of judgment.

PURPLE & PRATT, for Appellant.

MANNING & MERRIMAN, for Appellee.

CATON, C. J. This was an action by a third indorsee against the second indorsee. It was offered to be proved for the defense that while the note was under the blank indorsement of the first indorser, it had passed through the hands of the plaintiff, who subsequently received it, and now holds and sues upon it as the third indorsee. This evidence we think was properly ruled out by the court. By receiving and passing the note while under a blank indorsement, and without putting his name to it, he assumed no responsibility in relation to it. The moment he parted with it he became as much a stranger to it as if he had never held it. Had the party to whom he passed it wished him to assume any responsibility in relation to it, he should have required his indorsement upon it. By taking it without such indorsement he waived any such guarantee, and agreed to take it upon the sole responsibility of the names already upon the note. After that, Haskell was as much at liberty again to receive it in the course of business as a subsequent indorsee, as if he had never held it.

But we think the court erred in admitting in evidence the copy of the mortgage from the maker of the note to Mary R. Zanoni. The plaintiff in his testimony, which was given as the foundation for offering the copy in evidence, said, "The original mortgage, of which this is a copy, is not in my possession or power to produce on this trial, and was never in my possession. I never saw it—never inquired for it—know nothing about it—it is all Greek to me." According to the decision of *Booth* v. *Cook*, decided at this term, this evidence was insufficient. It is true, that here the mortgage was presented as rebutting evidence, while there the deed was primary and a necessary link in the

plaintiff's title; still, that could not dispense with all effort to produce the original. The plaintiff must, or should have known that if the maker of the note held the property described in the mortgage, unincumbered, it would, or at least might, defeat his action, and the necessity of producing this mortgage must have been apparent to him, and he should have made reasonable efforts to procure the original. The copy of the mortgage should have been excluded.

The third and fourth instructions given for the plaintiff were as follows:

"The possession of property by Zanoni, claiming to hold it as the property of his mother, or any other person, is not evidence of ownership in Zanoni."

"The plaintiff was not bound to levy his execution upon the property covered by liens, mortgages or incumbrances, by which he would have to pay off liens, or incumbrances, or involve himself in the expense of a trial of the right of property by an adverse claimant."

Both these instructions were wrong. The possession of property by the maker of the note was *prima facie* evidence of ownership in him, and the bare assertion by him, that the property belonged to his mother, is not sufficient to rebut this presumption. Suppose Haskell had recovered a judgment, and levied upon this property, the bare declarations of Zanoni that the property belonged to his mother, would not have been sufficient to sustain her claim to it, without corroborating circumstances, nor was it sufficient in this case, to excuse Haskell from making further inquiry.

The second instruction quoted was even more objectionable than the first. If that instruction was the law, then the maker of the note might have had property enough to pay an hundred such notes, and if it were incumbered by no matter how small an amount, the holder was excused from seeking to recover satisfaction out of it. Such is not the law. He was bound to use due diligence to collect it of the maker, or else take the responsibility of showing that, by the use of due diligence, he could not have collected it. If the maker had property worth more than any incumbrance upon it, it was the duty of the indorsee to levy upon, and, at least, offer it for sale; and whenever others set up claims to property held by Zanoni, the holder of the note was bound to contest those claims with the claimant, or take the responsibility of showing that they were valid. He was not at liberty to assume that every fictitious claim was valid.

The following instruction, asked for the defendant, was refused: "If the jury believe, from the evidence, that Zanoni was in the possession of, and had under his control, personal

property during the summer of 1856, such possession is presumptive evidence that Zanoni owned said property, and unless the plaintiff has proved that some one else owned the property, the presumption would be that it really belonged to Zanoni." For the reasons already given, we are of opinion that this should have been allowed.

The defendant also asked this instruction, which was refused: "If the jury believe, from the evidence, that during the summer of 1856, Zanoni had personal property, not exempt from execution, sufficient to have paid the debt, such state of facts raises a *prima facie* case that the note could have been collected of him." We have no doubt this should have been given. If the facts were as supposed by the instruction, the presumption is, that, by the exercise of due diligence, the property might have been found and made available for the payment of the debt.

It was the right of the party to have the case submitted to the jury, under proper instructions, and because this was not done, as well as for the reason that improper evidence was admitted, the judgment must be reversed and the cause remanded.

Judgment reversed.

Stephen Merritt, Appellant, *v.* Nathan Merritt, Appellee.

APPEAL FROM LA SALLE.

The indorser of a note, without recourse to himself, is a competent witness to prove a promise of the maker of a note so as to take it out of the statute of limitations.

A, and B, being brothers, inheriting from their father, B, sold his inheritance to A. The father, by his will, declared that any indebtedness of his sons to him, should be in reduction of his bequests; the father, at his death, held a note against B, assigned to him by C, another brother. Held that B, having sold his interest in the estate to A, was bound to pay to A, the amount of the note B, had given to C, and which C, had assigned to the father.

The common law of another State may be proved by parol.

It is objectionable that instructions should be drawn at great length, and have "injected" into them an argument of the case. They should be concise, and briefly present the point of law, on which the party relies.

This was an action of debt on a promissory note, originally commenced by appellant against appellee in the Circuit Court of La Salle county, by attachment, at the November term, A. D. 1854.

The declaration contains three counts. The first count sets out that heretofore, to wit, on the 11th day of October, 1841, at, etc., by his certain promissory note of that date, the defendant

then and there, for value received, promised the plaintiff to pay him on the 3rd day of November, 1842, nine hundred dollars; yet, though often requested, etc.

The second count varies from the first only in stating the consideration for said note to be the plaintiff's quit-claim deed to his father's estate.

The third count sets out a copy of the note sued on in *hæc verba:*

$900.

For value received I promise to pay Stephen Merritt, on the third day of November, one thousand eight hundred and forty-two, nine hundred dollars, without defalcation, being in consideration of Stephen Merritt's quit-claim to his father's estate. NATHAN MERRITT.

Peru, October 11*th,* 1841.

To which defendant pleads,

1st. Payment.

2nd. Statute of limitations (five years).

3rd. Defendant offered a set-off, a note under the hand and seal of the plaintiff, dated August 1st, 1836, payable to Daniel Merritt or bearer, for $967, with interest at seven per centum per annum, which note defendant avers, was then and there indorsed by said Daniel Merritt to him. He therefore offers to set-off so much of said note as will satisfy plaintiff's claim, and claims judgment for the balance.

4th. The defendant's fourth plea is like his third, with the additional averment of a promise by the plaintiff to said Daniel to pay said note within sixteen years next before the commencement of this suit; and that said note was indorsed as aforesaid after said subsequent promise.

5th. The general issue.

Plaintiff, for replication, traverses defendant's first plea, joins issue on his fifth plea, and demurs to his second, third and fourth, which demurrer was sustained.

Defendant then took leave to amend his third plea, and abides by the demurrer as to the other pleas. The third plea, as amended, is set out above.

By leave of the court, plaintiff filed several replications to defendant's third plea, in substance as follows:

1st. That said note claimed as a set-off is barred by the statute of limitations.

2nd. That said note, while owned by said Daniel, and before it was assigned, was, among other matters of difference and indebtedness between the plaintiff and said Daniel, submitted by two mutual bonds of arbitration, under the hands and seals respectively of the said Daniel and the plaintiff, dated April

16th, 1844, to the arbitration of Dixwell Lathrop, Burton Ayres and Henry Headley. That in accordance with the terms of said submission, said arbitrators did, on the 17th day of April, 1844, make an award between the said parties, by which said note, as well as all other matters of obligation between said parties, was canceled. And further, that said note was not indorsed until long after it fell due.

3rd. Payment of said note to Daniel Merritt, July 1st, 1839, and that it was not assigned until after it fell due.

4th. That said Daniel transferred said note, after it fell due, to one Elisha Merritt, to whom the plaintiff fully paid said note while he, said Elisha, was the owner thereof.

5th. That after said note fell due, said Daniel transferred said note to Elisha Merritt, father of plaintiff and defendant; that said Elisha died possessed of said note, in August, 1841; that in September, 1841, defendant was duly appointed and qualified as executor of the estate of said Elisha; that in October, 1841, an account was had and stated between the plaintiff, in his individual capacity, as also as said executor; that at that accounting there was found to be due from the defendant to the plaintiff, over and above the note here pleaded as a set-off, the sum of $900, for which balance the defendant then and there executed and delivered to the plaintiff the note on which this suit is brought.

6th. Payment of said note claimed as set-off by plaintiff to defendant, October 11th, 1841.

To the plaintiff's first replication, defendant rejoins: That the plaintiff agreed with said Daniel to pay said note within sixteen years before the commencement of this suit.

Defendant traverses plaintiff's second, third, fourth, fifth and sixth several replications, and plaintiff joins issue thereon.

Plaintiff traverses, by his surrejoinder, the defendant's rejoinder to the plaintiff's first replication to the defendant's third plea, and the defendant joins issue thereon.

On the above issues this cause was tried at the May term of said court, 1856, and a verdict rendered in favor of the defendant of $179.49. Plaintiff moved for a new trial, which motion was overruled by the court, and judgment entered for the above amount and costs.

An appeal was granted to the Supreme Court, on the filing of a sufficient bond, which was done, and approved by the court.

The bill of exceptions shows that plaintiff read in evidence the note, a copy of which is set out in his declaration, and there rested his case.

Defendant then read in evidence a note signed and sealed by the plaintiff, dated August 1st, 1836, payable on its face to

Daniel Merritt or bearer, for $967, with interest at seven per cent. per annum, on the back of which there was a credit of $233.83, dated September 1st, 1837, and also an assignment in these words: "Pay Nathan Merritt or order, without recourse. Daniel Merritt." The reading of said note was objected to by the plaintiff; objection overruled, and plaintiff excepted.

Defendant then called *Daniel Merritt*, who, on a preliminary examination, swore he was the payee mentioned in said note pleaded as set-off; that the written assignment thereon was made by him in October, 1853.

Defendant then offered to prove by said witness, a promise by the plaintiff to pay said note, which would take it out of the statute of limitations. Plaintiff objected that the interest of said witness disqualified him for that purpose; which objection the court overruled, and plaintiff excepted to the ruling.

Said witness was then permitted to testify that in May, 1841, being the holder of said note, and wishing to liquidate an indebtedness to his father, Elisha Merritt, he applied to the plaintiff to know when he could pay said note; that plaintiff then requested witness to get their father to accept said note as part payment of witness' indebtedness to the father; and that plaintiff then said that he would pay said note whenever his father should demand. To the admission of all of which testimony the plaintiff objected; the court overruled the objection, and the plaintiff excepted.

On cross-examination said witness testified that in July, 1841, he sold and delivered said note to Elisha Merritt, his father, who then lived in Putnam county, New York; that said Elisha died in said county, in August, 1841; that the credit was made and indorsed on said note before the delivery to his father; that witness next saw said note in the fall of 1841, in the hands of defendant, then an executor of his father's estate; that plaintiff, witness and defendant are sons of said Elisha Merritt, deceased.

On re-examination by defendant, said witness stated that, at the time of the arbitration between himself and the plaintiff, in 1844, he was not the holder of, had no interest in, nor had since had any interest in, said note. To the admission of which testimony, plaintiff then and there objected. The court overruled his objection, and plaintiff then and there excepted to said ruling.

Said witness further testified that Nathan Merritt was, in 1841, a man of wealth and property, and abundantly able to pay the amount of plaintiff's note, and, though he lived in New York, he had been in this State some three or four times since

1841. Could not say that Stephen Merritt knew of Nathan's being in this State, but that he was in the same neighborhood.

Defendant then called *Miles Kendall*, an attorney at law, who was permitted by the court to testify that, in 1853 or 1854, at the instance of Nathan Merritt, he commenced a suit in the Circuit Court of Marshall county, Illinois, on the note here pleaded as a set-off; that Mr. Cook was also employed in the case; that he drew the declaration, and wrote to Mr. Cook to attend the case.

The plaintiff objected to this testimony. The court overruled the objection, and the plaintiff excepted.

Defendant then called *Henry G. Cotton*, who testified that he had been a practicing lawyer in the State of New York, and was skilled and learned in the laws of that State in 1841; that, at that time, in that State, a note payable to bearer, or to payee or bearer, was transferrable by sale and delivery, without an assignment in writing, and that such transferree had a right to sue upon such note in his own name.

To all of which testimony plaintiff objected at the time it was offered. The court overruled his objection, and plaintiff excepted to the ruling.

Defendant then read, in evidence, a certified copy of the last will and testament of Elisha Merritt, deceased, in which said testator, after making several special bequests, provides that the residue of his estate shall be equally divided between his seven sons—Hackeliah, Elijah, Nehemiah, Daniel, Joseph, John and Stephen; that if, at the time of his death, he should hold obligations against any of said seven sons which would amount to his dowry, he directs that his executors *shall not collect such obligations*, but shall give them up and take such son's receipt for his dowry; that if such obligation or obligations should exceed the amount of such son's dowry, then he directs that his executors shall only collect *so much of such excess as may be necessary to pay the legatees.*

He then appoints Nathan Merritt and Ashael Cole executors of said will.

Attached to said copy of the will of Elisha Merritt was a certificate, under the seal of the Surrogate Court of Putnam county, New York, and signed Ambrose Ryder, Surrogate, stating that the above was a true copy of said will, as it appeared of record in his office.

Attached to said will were letters testamentary, officially declaring, under the seal of said surrogate, that the will had been duly proved and approved, and that the administration of said estate was granted to said Nathan Merritt and Ashael Cole.

Defendant then read, in evidence, a deed from plaintiff to

himself, dated October 11th, 1841, by which said plaintiff released and quit-claimed to defendant all his interest and claim, of every kind or nature, present or prospective, in the estate of his father, Elisha Merritt, deceased, and by which deed he appointed the defendant attorney in fact, to do all things which might be necessary to the full enjoyment of such interest.

Defendant also read, in evidence, similar deeds to himself from each of the other residuary legatees, dated about the same time as the one from the plaintiff. To the reading of each of said deeds the plaintiff, at the time, objected as incompetent and irrelevant. The court overruled the objections, and the plaintiff excepted.

Defendant then offered to read, in evidence, a certified copy of proceedings had before the surrogate of Putnam county, New York, to the reading of which the plaintiff objected, insisting that the same were not properly authenticated, and that the substance of the same was incompetent and irrelevant, which objection was overruled by the court, and the plaintiff then and there excepted to the ruling. Said transcript was then read.

Daniel Merritt testified that he sold his share in his father's estate to Nathan Merritt for less than $1,000.

Here defendant rested his case.

Plaintiff then proved that, in the fall of 1855, the widow of Elisha Merritt was still alive, and was 85 years of age.

Plaintiff then read, in evidence, the deposition of *Joseph Merritt*, in which he testified that he was 52 years of age; a farmer of Bureau county, Illinois; a brother of the parties to this suit; that his father's estate consisted chiefly of notes, bonds, and some money; that, on the evening before the settlement with the executors, he was at Nathan's house, and saw the interest computed on the notes and obligations, and the whole amount added up, amounting to a little over $11,000; that Nathan offered witness $200 not to appear against him before the surrogate.

Plaintiff then offered to read, in evidence, from said deposition testimony tending to impeach the memory and reliability of defendant's witness, Daniel Merritt, which the court would not permit, and plaintiff excepted.

Plaintiff proved that Nathan Merritt did act as executor of his father's estate.

Joseph Merritt, as a witness, testified that the plaintiff had lived in Illinois since 1836; that he had always been a man of such property that $1,000 could have been collected of him by execution; that witness sold Nathan his interest in the estate for $850; that he never could find out the value of said estate; that he never did believe that the $11,000, or thereabouts,

spoken of in his deposition, was really the whole of said estate; that Nathan never did nor would make an inventory.

Defendant then called *Daniel Merritt*, who testified that, at the arbitration between himself and the plaintiff, in 1844, plaintiff admitted that he had turned the note here pleaded as a set-off in the settlement of his father's estate, and that he was still liable on it for about $150; that his father told him, in July, 1841, that he thought the amount which would be coming to each of the boys to be about $900. To all of which testimony the plaintiff objected at the time it was offered. The court overruled the objection, and plaintiff excepted.

Defendant then called *Burton C. Cook*, who testified that he was employed by Nathan Merritt in the suit spoken of by Mr. Kendall; that he had seen the note offered in evidence by the defendant in this case in the hands of Nathan Merritt, before the assignment now upon it was written; that he did not attend the Marshall Court at that term on account of sickness. To so much of Cook's testimony as related to the suit in Marshall county, and his not attending said court, the plaintiff objected. The court overruled the objection, and plaintiff excepted.

The plaintiff asked the court, among other things, to instruct the jury as follows:

"10. If the jury believe, from the evidence, that the plaintiff and defendant, and the witness, Daniel Merritt, are brothers of each other, and were sons of Elisha Merritt, now deceased, and that, in 1836, Stephen Merritt, the plaintiff, gave to Daniel Merritt, the witness, the note or bond produced on this trial by the defendant, Nathan; and that afterwards, and in the lifetime of said Elisha Merritt, the father, said Daniel Merritt, to whom said note is payable on its face, sold and transferred said note or bond to said Elisha Merritt, so that he (said Elisha) became the legal holder and owner thereof; and that afterwards, in the summer of 1841, the said Elisha Merritt (still being the owner and holder of said note) died, leaving, as his last will and testament, the *will* read in evidence in this case; then, in such case, by operation of law and the will aforesaid, the share of Stephen Merritt in his father's estate consisted in the excess (if any) of the one-seventh of the residuary part of said estate, including the note offered by defendant, over all obligations and claims which Elisha Merritt, at his death, held against said Stephen.

"And if afterwards, on or about the 11th day of October, 1841, said Nathan Merritt, being then executor of said will, and, as such, holding said note, bought of said Stephen Merritt his said share in his father's estate, and took from him the quit-claim thereof read in evidence by the defendant, and gave him

therefor the promissory note sued on in this suit by the plaintiff; and if there is no proof of any other terms or conditions of said sale than those that appear on the face of those two papers; in such case such purchase was in law a settlement of said note so held by said executor, and in such case is not a proper matter of set-off in favor of defendant in this case."

The court, at the request of defendant, gave the following qualifications to the foregoing tenth instruction:

"If, however, the terms and conditions of said sale and the other proof in the case show that at the time of the giving of the note sued on, it was the understanding of the parties that the note read in evidence by defendant was a subsisting claim, and that both notes were to be in force to be set off, one against the other, or otherwise paid; in such case the note offered by defendant is a proper set-off, if plaintiff has agreed to pay it within sixteen years, and if it has not been paid or discharged.

"If Elisha Merritt died the legal holder or owner of the note which defendant has offered in evidence, that note, with the other portions of his estate not bequeathed to others, passed by the will, to the seven sons named in the will. Stephen's interest was one-seventh part of this note, and one-seventh of the other portions of the estate not bequeathed to others; and if he transferred all his interest in said estate while this note was unpaid and belonged to said estate, (and said estate had not been divided,) it carried as well his interest in this note as in the other portions of the estate."

To the giving of which qualifications to said instruction plaintiff objected, and excepted to the decision of the court in giving the same, when it was done.

Plaintiff asked the court to instruct the jury as follows:

"11th. If Elisha Merritt was the owner and holder of the note offered by defendant, and held the same, as such owner, at the time of his death, then upon his death the legal title and right to sue became vested in his executors as such; and the same could only be sued on in the name of the executors of Elisha Merritt, or in the name of some one to whom said executors transferred the same; and in that state of case it could not be set up as a defense to a suit brought against one of the executors in his individual capacity.

"12th. The defendant in this case having set up a title by indorsement to the note pleaded as a set-off in this suit, cannot sustain that plea by proving title by sale and delivery under the laws of the State of New York.

"13th. If the jury believe, from the evidence, that the note mentioned in defendant's third plea as signed by Stephen Merritt, was not assigned and indorsed by Daniel Merritt, the payee

therein named, until 1853, and that the note was made in 1836, then, in law Daniel Merritt held the legal title to said note at the time of the arbitration mentioned in the pleadings, and if so, Daniel Merritt was, in contemplation of law, the owner and holder of said note at the time of said submission and award, and said note was satisfied by said award."

Each of which instructions the court refused to give to the jury, and plaintiff excepted.

The court, at the request of defendant, gave the following instructions to the jury, viz.:

"2nd. If, before the arbitration between Stephen Merritt and Daniel Merritt, the note offered in evidence by defendant had been sold and delivered by Daniel Merritt to his father, for a valuable consideration, and with the knowledge of Stephen, and the father held the note at the time of the arbitration, then Stephen's liability to pay said note was not affected by said arbitration, even though Daniel's name had not been placed on the back of said note at the time of arbitration.

"4th. That by the pleadings in this cause the execution of the note mentioned in defendant's third plea is admitted, and also the assignment of it by Daniel Merritt to the defendant is admitted, and that the note was given for a valid consideration is admitted.

"5th. That if Daniel Merritt, before the arbitration, sold and delivered the note in defendant's third plea mentioned to Elisha Merritt, and if Elisha Merritt died the owner of said note, and if Nathan Merritt, being one of the executors of the estate of Elisha Merritt, paid up all the debts due by the deceased, and bought out all the interests of the widow and all the heirs of the said Elisha Merritt, *he* thereby became the owner of said note; and being so the owner, if Daniel Merritt, *not* being the owner and holder at the time of the arbitration; and if Stephen Merritt, within the last sixteen years, agreed to pay the note; and if it has not been paid or otherwise satisfied; the jury should, after deducting the amount of the note in the declaration mentioned, and such payments as have been made on the note in defendant's third plea mentioned, find a verdict for the defendant for the balance. Interest should be computed on the note in the third plea mentioned at the rate of seven per cent., and on the note in the declaration mentioned, at the rate of six per cent. per annum.

"6th. That if the jury believe, from the evidence, that the note given by Stephen Merritt to Daniel Merritt was sold and delivered by Daniel to his father before the arbitration between Daniel and Stephen; and if Daniel was not the owner and holder of the note at the time of the arbitration; and if they

further believe, from the evidence, that while Daniel owned the note, and within sixteen years last past, the said Stephen agreed to pay it, and desired Daniel to turn it out to their father to pay a debt which Daniel owed to his father, and that he would pay it to the father, and the note has not been paid or satisfied in any way, the jury should allow the amount of the note and interest, or such amount as may be due after deducting payments, if any; and after deducting payments, if any, and the amount of the note from Nathan to Stephen, they should find a verdict for the defendant for the balance due, if any. Interest should be computed on the note given by Stephen to Daniel at the rate of seven per cent. per annum, and on the note given by Nathan to Stephen at the rate of six per cent. per annum; provided, that the jury believe that at the commencement of this suit defendant was the owner of said note.

"7th. If, at the time of the arbitration between Stephen and Daniel, the note from Stephen to Daniel had been sold and delivered by Daniel to his father, and Daniel was not then the holder, the note was not affected by the arbitration; and if Stephen has, within sixteen years last past, agreed with Daniel to pay it, and it has not been paid or satisfied in any way, then Nathan should be allowed the amount of the note in this suit, although Daniel may not have put his name on the back of the note until after the arbitration; provided the jury believe, from the evidence, that Nathan was, at the commencement of this suit, the owner thereof.

"8th. The assignment *prima facie* vests the title of the note in Nathan Merritt, and unless it is proved that the note was not the property of Nathan, he is to be considered the owner of it.

"9th. If, at the time Daniel Merritt put his name on the back of the note, Nathan Merritt had bought out all the persons to whom Elisha Merritt had willed his property, and the estate had been settled; and if the note in the third plea mentioned belonged to Elisha when he died; then Nathan was the owner of the note when this suit was brought, unless it had been paid to Daniel or Elisha, or paid or canceled in a settlement between Nathan and Stephen.

"10th. The jury, in determining whether the note on which this suit is brought is a valid and subsisting debt, should take into consideration the length of time which it has run, and the circumstances of the parties, and their usual mode of doing business. The payment or settlement of that note may be inferred from circumstances coupled with the lapse of time since the note was given, if the circumstances proven, coupled with such lapse of time, lead the minds of the jury to the conclusion that said note has been paid or settled, either by the under-

standing of the parties, being set off against the note held by defendant, or in any other way.

"11th. The question whether, at the time the note was given by Nathan to Stephen on which this suit is brought, the note which had been given by Stephen to Daniel, was settled, is a question of fact for the jury to determine; and in determining that question, the jury will consider all the circumstances connected with the transaction which are proved; all that the evidence shows in relation to the course of dealing between the parties; the amount of the interest which Stephen had in the estate of his father, and the statements which Stephen has made concerning the transaction; and the burden of proof to show that the note offered in evidence by defendant has been settled, is upon the plaintiff, and the jury ought not to presume that said note has been settled, unless it has been proven.

"12th. The only questions which the jury are to determine in relation to the note offered in evidence by the defendant, are,

"1st. Has the plaintiff promised to pay said note within sixteen years?

"2nd. Has the note ever been paid?

"3rd. Was Daniel the holder and owner of that note at the time of the arbitration between him and Stephen?

"4th. Was that note ever settled between Nathan and Stephen Merritt? or was there ever a settlement or accounting between them, in which Nathan was found to be indebted to Stephen over and above the amount of this note?

"And if the jury believe that it is proved that Stephen has promised to pay the note within sixteen years; and if it is not proved in this cause that Daniel was the holder and owner of this note at the time of the arbitration between him and Stephen; and if it is not proven that said note has not been paid; and if it is not proven that there has been a settlement or accounting between Nathan and Stephen, in which that note was settled, or in which it was proved that Nathan was indebted to Stephen over and above the amount of this note; and if it is proved that the defendant was the owner of this note at the time of the commencement of this suit; *then* the jury should allow to the defendant the amount unpaid upon said note, and interest at the rate of seven per cent. per annum.

"14th. The plaintiff is not permitted to deny, on this trial, that the note offered in evidence by the defendant, has been duly assigned to him, so as to vest the absolute property of the note in him."

To the giving of each of said instructions, so asked by the defendant and given by the court, the plaintiff objected when the

same were offered, and excepted to the decisions of the court in giving each of them respectively.

After verdict, defendant moved the court for a new trial, which motion the court overruled, and plaintiff excepted to the said decision of the court in overruling his motion for a new trial. And thereupon plaintiff prayed that his bill of exceptions should be then and there signed, sealed, and made a part of the record, which is done.

Cyrus Dickey, and Dickey & Wallace, for Appellant.

Glover & Cook, and Leland & Leland, for Appellee.

Breese, J. The only real questions in this case, are, was the note produced by defendant by way of set-off due and payable to him, and was there sufficient legal evidence to prove it.

Much pleading was had, and many instructions were asked on both sides, which we do not consider necessary to examine specially. It is only necessary to present the two points in controversy, and determine from them where the justice of the case is, and where the real merits lie.

The defendant, Nathan Merritt, it appears, is the brother of the plaintiff, and having purchased in October, 1841, from him his interest in his father's, Elisha Merritt's, estate, gave this note therefor.

Previous thereto, in 1836, the plaintiff had executed his note to another brother, Daniel Merritt, for nine hundred and sixty seven dollars, at seven per cent. per annum, which, as the proof shows, had come into the possession of Elisha Merritt, and which was the note sought to be set off.

The bar of the statute of limitations was attempted to be interposed to this note, and also payment to Daniel Merritt, and payment to Elisha Merritt, while it was in his hands.

The defendant, in his plea setting up this note, also averred a promise by the plaintiff, to pay it to Daniel within sixteen years next before the commencement of this suit.

The note appears to have come into the possession of the defendant, originally, as executor of his father, Elisha Merritt, who died in Putnam county, New York, in August, 1841, leaving a will with this clause in it, after devising his property to his seven sons, of whom the plaintiff was one, "that if, at the time of his death, he should hold obligations against any of said seven sons which would amount to his 'dowry,' his executors shall not collect such obligations, but shall give them up and take such son's receipt for his 'dowry;' that if such obligation or obligations should exceed the amount of such son's

dowry, then his executors shall only collect so much of such excess as may be necessary to pay the legatees."

The defendant purchased out the interest of all the sons in this estate for about nine hundred dollars a share, for one of which the plaintiff's note sued on was given, and in 1853, Daniel assigned the note in due form to defendant, without recourse.

This note of plaintiff's was passed by Daniel to their father, Elisha Merritt, to pay a debt due from Daniel to his father, at the request of the plaintiff, he promising to pay it whenever his father should demand it. This conversation was in May, 1841. The delivery of the note to the father was in July, 1841. The credit indorsed on it of $233.83 was before the delivery to the father.

There was an arbitration of matters of difference between the plaintiff and Daniel Merritt, in 1844, at which time Daniel did not hold the note, nor had he any interest in it, but which plaintiff insists in his second replication to defendant's third plea, was canceled by the award made April 17, 1844.

This is a very concise statement of the leading facts, proved by Daniel Merritt, the payee of the note; he was the only or principal witness, and if he was improperly admitted to testify, the judgment must be reversed; otherwise, affirmed.

Was Daniel Merritt a competent witness?

A witness may be competent for one purpose, while he would not be for all purposes. An indorser is not excluded merely because his name is on the paper, but because, being there, he is responsible over, and has therefore an interest, unless protected by the indorsement. Here the witness indorsed without recourse.

In *Bradley* v. *Morris*, 3 Scam. R. 182, this court say, "an indorser of a negotiable instrument is invariably allowed to testify against the recovery of the holder, by proving that it has been discharged by payment or otherwise. In this case, however, there was no objection to the testimony of Warren, the indorser, even if it had gone to the foundation of the note, because he had indorsed the note without recourse. His testimony, therefore, could not be objected to upon the ground of policy, because his indorsement gave no additional currency or security to the note, nor was it (he) liable to objection upon the score of interest. His indorsement being without recourse, he could neither gain nor lose by the event of the suit, nor indeed incur any liability in any event."

On the authority of this case, and perceiving no possible objection on the ground of policy, we think Daniel Merritt was a competent witness to prove the subsequent promise by Stephen,

to take the note out of the operation of the statute of limitations. He does not avoid any legal liability imposed on him by so testifying, as to enable the defendant to recover the note of the plaintiff, for if he assigned to defendant a note on the plaintiff which had been paid, and the defendant should recover it of the plaintiff, the witness would be answerable in an action by the plaintiff, Stephen, against him, for the consequences. The liability of Daniel would be shifted merely, and therefore, as a witness, he was indifferent.

He was also competent to prove that he had parted with the note before the arbitration, the time when and how, and for what purpose, his special indorsement protecting him from all liability over, except such as may be traceable to his own fraud.

The facts then appear to have been as stated, and the position of the parties in the fall of 1841, after the death of Elisha Merritt, was this: The note pleaded as a set-off, was then the property of Elisha Merritt's estate, having been paid over and delivered to him, in his lifetime, at the request of the maker, in July, 1841. The defendant is executor of Elisha, and as such, obtains the note. He purchases out the interests of all the owners of it—the devisees of Elisha Merritt—the plaintiff included, settles up the estate and pays all the debts and claims, and insists he has become entitled to the whole of this note in his own right, and by the assignment by Daniel Merritt, in 1853, has the legal title and can set it off.

The plaintiff resists this, and replies that the note was left by his father; that by his will the executor was enjoined from collecting it, or so much of it as may be equal to his interest in his father's estate, and therefore he is not bound to pay.

The rejoinder by defendant is conclusive. You sold your interest in the estate for the very note you are now suing upon. I own that interest, or its representative, the note you gave to Daniel, and he delivered it to the testator. If I have to pay the note to you, you must pay your note to me, or the difference between them.

Possessing himself, as the defendant did, of this note honestly, and becoming its sole owner by his purchase of all the devisees, he was, in equity at least, the true owner, and being so, it was right and proper that Daniel should convey to him the legal title by his writing of indorsement in 1853. Really the assignment was not in issue, there being no denial of the fact, verified by affidavit.

The plaintiff, as is very manifest, attempts to get double the advantage from his father's estate that the other devisees derived from it. First, by claiming his note under the will, then by compelling the defendant to pay his note which was given for

his interest under the will, thus making his share of the estate about seventeen hundred dollars, against about $875 received by the other devisees, as averaged.

It was properly left to the jury to say, from the facts, if this could be so.

There is no pretense that the note was ever paid to Daniel, or to his father—it would have been taken up had it been paid.

The case abundantly shows that the two notes were left unadjusted by the brothers, as valid, mutual claims. By the will the plaintiff might have taken the note on his share of the estate, before he sold to the defendant, but he did not do so, and the jury was perfectly right in refusing to give him, not only the full value of his interest in the estate, which was represented by the note *he* sued on, but absolve him also from paying his note, which was a part of the estate which he had sold, and which the defendant honestly purchased and owned. One was properly set off against the other; indeed, the plaintiff admitted at the arbitration in Peru, in 1844, that there was about one hundred and fifty dollars due on this note, and for that only, with the accrued interest, was the judgment rendered for the defendant.

We see no error in the court refusing to go into the inquiry in regard to the difficulties between Daniel, the witness, and the plaintiff, growing out of law suits. It was too remote, and would open a field of collateral matter too wide for any purpose of real justice.

The direct question as to the state of feeling of the witness, friendly or hostile, is the only proper one. How that might be caused, is wholly unimportant, and would lead to distressing lengths.

The objection, that one of the witnesses was allowed to testify that he commenced a suit on the note set off, in 1853, has no force in it. The fact of the commencement of a suit is like any other independent fact, and can be proved by parol—not the mode and manner, but the naked fact. It was collateral only, and needed no record or files of court to prove it. It had nothing special to do with the case, further than this, that commencing a suit on the note afforded ground for the inference that the defendant claimed the note at that time as one which the plaintiff ought to pay.

It was also objected, that Mr. Cotton could not prove by parol what the law of New York was in regard to the delivery of a promissory note.

This very remotely affected the question at bar, as the defendant claimed the note under a written assignment from the payee, which was not denied by plea verified by affidavit.

The rule may be, that the written or statute law of a State cannot be proved by parol, but the common law, for the most part made up of customs, may be proved by parol. It will be observed, Mr. Cotton did not say the law in New York, as he stated it, was the statute law. As it is so unimportant in this case, we will intend he spoke only of the common law there, or custom which existed among that community in respect to such paper.

The objection that plaintiff was not permitted to prove the mental infirmity of Daniel—impaired memory by sickness—has nothing in it.

The witness asked on this point was not shown to be capable of speaking to it, so that the jury could fully understand it. What was the character of his disease, and how necessarily did it affect his memory, and by what standard is the mental or bodily vigor of any man to be tested. Not by the opinions of those as imbecile, may be, as he. His own manner of testifying is the best test of mental power, and is never overlooked or disregarded by a jury. To go into these collateral inquiries would prolong a trial so unreasonably, that unless a very powerful reason exists for it, they should not be encouraged or indulged.

We do not deem it at all necessary to examine minutely the several instructions. The record does not show all that were given for plaintiff, so that we cannot know what bearing they may have had on the case, or the necessity for the instructions which were refused. Their substance and point may have been fully contained in those not now on the record. The tenth was properly modified by the court, and as modified, presents a proper view of the case. The eleventh, twelfth and thirteenth were properly refused.

As to the instructions on behalf of defendant, we may here, with great propriety, take occasion to remark, that a practice seems to be growing up to draw out instructions to a very great length, and injecting into them an argument of the case. This is a bad practice, and should not be encouraged by the courts. Instructions should be concise, and briefly present the point of law alone on which the party relies. These instructions of defendant are liable to this objection, but they present the law of the case fairly and fully, and from the evidence and the law, the jury was bound to find as they did. They could not believe it just, that one who had sold an estate should have the money for it and the estate besides.

The judgment is affirmed.

Judgment affirmed.

JOHN L. WILSON, Plaintiff in Error, *v.* ALBERT G. PEARSON, Assignee of J. Grant Osbourne, Defendant in Error.

ERROR TO COOK.

A debtor in failing circumstances may make an assignment for the benefit of his creditors, and if fairly done, it passes the title to his property to his assignee. The question of fairness of the transaction, is one of fact, for the finding of the jury, and the finding of the jury, when the question is properly submitted, will not be disturbed.

Where an assignment by such a creditor covers only personal property, it need not be recorded, if possession accompanies the assignment.

Whether certain facts would have the legal effect of an abandonment of an asignment, may or may not be conclusive; they should be accompanied with an intention to abandon, and that intention should be left to the jury for decision.

THIS was an action of replevin, brought by Pearson, the defendant in error, in the Circuit Court of Cook county, to recover possession of a stock of boots and shoes, valued at $1,400.

The writ was sued out on the 10th January, A. D. 1857, and executed by the coroner of said county on the 12th, by taking the goods from the possession of Wilson, the plaintiff in error, who, as sheriff of said county, held the goods, and had advertised them for sale, by virtue of two writs of execution, issued against the property of J. Grant Osbourne.

The defendant, Wilson, pleaded: 1. The general issue. 2. Property in Osbourne. 3. Property in defendant. 4. That he took the said goods by virtue of a writ of execution in favor of Whipple, Alley & Billings against said Osbourne. 5. That he took the said goods by virtue of a writ of execution in favor of Pearson & Dana, against said Osbourne.

Issue was joined thereon, and the cause tried by a jury at the November term of said court, A. D. 1857, before MANNIERE, Judge.

J. Grant Osbourne, on the part of the plaintiff, testified: That the paper purporting to be an assignment from witness to Albert G. Pearson, for the benefit of his creditors, dated January 5, 1857, was signed by him and Pearson; I was unable at that date, January 5, 1857, to pay my debts; the 5th was on Monday; the assignment was made on Monday, was signed and sealed that forenoon. After it was made, Pearson came over to the store, went into back room, and said to Nixon, my foreman, "I am boss here now, and will see you paid." Pearson's clerk came in the afternoon; the store that night was locked up by Nixon, by direction of Pearson, and opened next morning. I did not exercise any act of ownership that day; after Pearson's clerk came in that afternoon, he got a book to enter sales

in, and put up a sign on the wall near the door, and a large placard in front window, "This stock and lease for sale, apply to A. G. Pearson, assignee." It was pretty large, and continued there. In the rear of the store a placard was put up at the desk, so that it could be seen distinctly. They were all of the same tenor, and were put up on the day of the assignment.

I was in the store on Tuesday morning, and then absented myself. Pearson's clerk was there, also Nixon and the workmen, and continued to work as before. The signs were there; that afternoon (Tuesday) I found the store had been closed by the sheriff; was not there when the sheriff came; went to see Pearson, and asked him the meaning of it; and he said he should replevy the goods. The inventory in the assignment contains a true statement of all the stock then on hand, of all my property, and all debts. It was made on the third of January and executed on the fifth.

The plaintiff also offered in evidence a paper purporting to be an assignment of property of J. Grant Osbourne to Albert G. Pearson, for the benefit of his creditors, not recorded, dated January 5, 1857; to the introduction of which said paper in evidence, the said defendant objected. Objection overruled, and exception taken.

The defendant introduced in evidence a writ of execution and fee bill issued out of the Cook County Court of Common Pleas, tested January 2, 1857, in favor of Whipple, Alley & Billings, and against the property of J. Grant Osbourne, which, with the return of the sheriff of Cook county, were admitted in evidence without exception. The return indorsed thereon is—

By virtue of the within writ, I did levy on a general stock of boots and shoes, the property of the within named defendant, on the 6th of January, 1857, and on the 12th day of January, 1857, they were replevied by the coroner of Cook county; therefore I return this writ no part satisfied, this 2nd day of April, 1857.

JOHN L. WILSON, *Sheriff*,
By GEORGE ANDERSON, *Deputy*.

The defendant also introduced in evidence a writ of execution and fee bill issued out of the Circuit Court of Cook county, on judgment confessed, in favor of Albert G. Pearson and William V. Dana, and against the property of J. Grant Osbourne, tested January 7, 1857, which, with return of sheriff indorsed thereon, was also admitted in evidence without exception. The sheriff's return indorsed thereon is—

By virtue of the within execution, I did, on the 7th day of January, 1857, levy on a general stock of boots and shoes, the property of the within named defendant,

J. G. Osbourne, and on the 12th day of January, 1857, were replevied from me by the coroner of Cook county; therefore I return this execution no part satisfied, this 7th day of April, 1857.

JOHN L. WILSON, *Sheriff*,
By GEORGE ANDERSON, *Deputy*.

George Anderson, testified for defendant as follows: I am deputy sheriff of John L. Wilson, the sheriff of Cook county, and was on January last. This execution of Whipple, Alley & Billings, and against J. Grant Osbourne, for the sum of $682.89, and costs, was put into my hands, and levied by me upon a stock of boots and shoes in a store on the west side, occupied by J. Grant Osbourne, as shown by return. I don't recollect from whom I received this execution in favor of Pearson & Dana, and against Osbourne. I received it from some person with instructions to levy it immediately, and I levied upon the goods before it was taken into the sheriff's office. I levied it on the 7th of January last, upon the same stock of boots and shoes I levied the first (Whipple's) execution on. I had the stock in my possession when I received the Pearson & Dana writ. My impression is, that Pearson, or Stevens, his attorney, gave me the writ. I advertised the goods for sale under both executions, and notice of sale was posted up when the goods were replevied out of my hands. I think it was Pearson who directed me to make the levy.

I received the Whipple execution at 4 o'clock, January 6, 1857; that evening I made the levy on the stock. A young man there told me there was an assignment to some shoe store down on Lake street; he did not know the name. After I returned, I learned that Pearson & Dana were the assignees. I then made a levy, and put a man in possession. I levied the first time I went there.

It is admitted that Albert G. Pearson, the plaintiff in this suit, is the same person who is one of the plaintiffs in the Pearson & Dana execution, and that J. Grant Osbourne confessed a judgment on which said Pearson & Dana's execution issued January 7th, 1857, for $635, and costs.

The defendant also called *H. B. Stevens*, who, being sworn, testified as follows:

I presume the note of Osbourne to Pearson & Dana was executed on the 5th or 6th of January, 1857, and was ante-dated to January 1st. I think it was after the assignment was executed. The note was executed at Pearson's store, and judgment afterwards entered up. The consideration of the note was $500 due Pearson & Dana, and $100 due to Ward, and $25 for my fees. I had judgment entered, and left the execution with the sheriff, with orders not to levy until he heard from me.

I was attorney for Pearson and Osbourne in drawing the assignment. It was executed January 5, 1858. After Anderson levied on the goods, it became important to ascertain when the Whipple execution came into the hands of the sheriff. I went to the sheriff's office, and did not find it noticed on the sheriff's books. I found judgment entered up in favor of Whipple and others, against Osbourne, January 2, 1857, on confession, and execution noted on the docket. On the morning of the 7th, not being able to find out about the Whipple execution, I went to Rich's office, Whipple's attorney, and he gave me to understand that the Whipple execution was in the hands of the sheriff before the assignment was made. I then advised Osbourne to confess judgment in favor of Pearson & Dana, in order to procure a levy and come in second best.

The court gave the following instructions to the jury, on the part of the plaintiffs, viz.:

A debtor in failing circumstances may assign his property for the benefit of creditors, either with or without preferences. An assignment, when made in good faith, and accompanied and followed by possession of the property assigned, is warranted by law. Therefore, if the jury believe, from the evidence, that the assignment in question was made in good faith, and that the plaintiff took open and actual possession of the property assigned, previous to the time when the execution in favor of Whipple, Alley & Billings was received by the defendant, or by his deputy sheriff, George Anderson, then the law is for the plaintiff, and he is entitled to a verdict in his favor for a return of the property mentioned in the narr.

Actual fraud is not to be presumed, but should be proven by the party alleging it. The law presumes good faith controls business transactions; therefore, if the jury believe, from all the circumstances in evidence, that the nature and design of the assignment in question were *bona fide*, to secure and pay, first, an indebtedness due to Pearson & Dana, and S. A. Ward (after paying the just and reasonable expenses attending the executing the trust); and second, to use and apply the rest and residue of the net proceeds of the property assigned in and toward the payment of the other debts of Osbourne, and that said assignment was not contrived, as a fraud on the part of Osbourne and the plaintiff, to cheat or hinder the creditors of Osbourne, the law is for the plaintiff; if the jury shall also find that the assignee took possession of the property, and that such possession was continued to and at the time of the levy.

If the jury shall find, from the evidence, that the assignment in question was in fact made by Osbourne to Pearson, and that Pearson entered into and took open, actual and exclusive pos-

session of the goods assigned, then the subsequent declarations and actions of Pearson, introduced in evidence in this suit, and the subsequent declarations and actions of Osbourne, can only be taken into consideration by the jury, for the purpose of determining the intent at the time of the inception of the assignment, viz., whether such assignment was made with intent to hinder or delay creditors of Osbourne, and enable him, under cover thereof, to carry on business.

If an assignment is *bona fide*, and not shown to be fraudulent as to creditors, then neither mismanagement nor fraudulent disposition of property under an assignment, by an assignee, can affect the instrument, or his title under it; they may be grounds for a removal by a court of equity, but cannot be inquired into in an action at common law, brought to try his title to the property assigned.

The law does not require an assignment of personal property for the benefit of creditors to be recorded; the same not being recorded is no evidence of fraud.

In all cases of alleged fraudulent sales of personal property, a knowledge of, or participation in, the fraud, must be shown on the part of the buyer as well as the seller, in order to defeat the recovery of the plaintiff.

Exception taken to plaintiff's instructions.

The court also gave the jury the following instructions, on behalf of the defendant, viz.:

If the jury shall believe, from the evidence, that the assignment by Osbourne was made to Pearson with the intent to hinder and delay any of his other creditors, in the collection of their debts, to enable Osbourne, under the color thereof, to continue his business, and in possession of his property for his own benefit, then such assignment is fraudulent and void as to his creditors, and the jury should find a verdict for the defendant.

If the jury shall find, from the evidence, that the assignment in question was *bona fide*, then, unless it is also shown by the evidence that the assignee, Pearson, did take actual and exclusive possession of the goods before the levy under the Whipple execution, the verdict should be for the defendant. [Given by the court on its own motion.]

If the jury believe, from the evidence, that the assignment from Osbourne to Pearson was made with intent to hinder, delay or defraud the creditors of Osbourne, then the verdict should be for the defendant; and in deciding upon the intent, the jury may take into consideration subsequent as well as prior circumstances, and the transactions of the parties, to explain such intent.

If the jury believe, from the evidence, that at or about the time of the assignment from Osbourne to Pearson, there was an

understanding or stipulation between them, though not expressed in the assignment itself, to allow Osbourne a specified sum for his services in the management of the property assigned, and that Osbourne should retain possession of the same, for his own benefit, as agent for Pearson, or otherwise, to enable him to control his business to the hindrance of his creditors, such stipulation or understanding is evidence of fraud, and the defendant is entitled to a verdict.

The defendant also requested the court to give the following instruction to the jury, viz.:

V. "If the jury believe, from the evidence, that after the alleged assignment from Osbourne to Pearson was executed, and before the same was recorded, and before the other creditors of said Osbourne had in any way assented thereto, Osbourne confessed a judgment in favor of Pearson & Dana, for the amount, or more than their claim, as set forth in the schedule attached to said assignment, and that execution was thereupon issued on such judgment, and levied on the property alleged to have been assigned, then the verdict should be for the defendant, such alleged assignment being thereby virtually abandoned, annulled and released by the parties thereto, the only parties on whom it had any binding force."

The court refused the instruction as asked for, but gave another in lieu thereof, as follows, viz.:

V. "If the jury find, from the evidence, that after the alleged assignment to Pearson, and after the levy of the Whipple execution by deputy sheriff Anderson, and possession taken by him, the debtor, Osbourne, confessed a judgment in favor of Pearson & Dana, for the amount of their claim, including also the claim of Ward, the other preferred creditor, and that Pearson thereupon caused execution to be issued, and directed a levy upon the assigned property to be made by Anderson, and that the said judgment was so confessed, and execution was so levied with the intent to abandon said assignment, then the levy under the Whipple execution acquired a priority of lien over the goods in question, and the jury should find for the defendant."

To the refusal of the court to give said 5th instruction as asked, and to the giving of the one in lieu thereof, the defendant excepted.

The jury returned a verdict for the plaintiff.

Defendant then moved the court for a new trial on the following grounds:

The verdict of the jury is against the law.

The verdict is against the evidence.

Because the court gave the instructions submitted by plaintiff's counsel, said instructions tending to mislead the jury.

Because the counsel for plaintiff contended before the jury, and the court so instructed the jury, that unless they found actual fraud, both in the plaintiff and Osbourne, in the inception of the assignment, and before the levy of the Whipple execution, the verdict must be for the plaintiff.

Because the court gave a new instruction for defendant in lieu of one (the 5th) submitted by defendant's counsel, relative to the Pearson & Dana judgment and execution.

Because the court modified other instructions submitted by defendant's counsel.

Motion overruled, and defendant excepted, and tendered his bill of exceptions.

Errors assigned: 1st. The Circuit Court erred in admitting improper evidence.

2d. The Circuit Court erred in giving the 1st, 2d, 3d, 4th, 5th and 6th instructions on behalf of the plaintiff.

3d. The Circuit Court erred in refusing to give the 5th instruction on behalf of defendant, as drawn and submitted by defendant's counsel.

4th. The Circuit Court erred in refusing to grant a new trial.

Rich & Steele, for Plaintiff in Error.

H. B. Stevens, for Defendant in Error.

Walker, J. The plaintiff in error questions the decision of the Circuit Court in overruling his motion for a new trial, because, it is alleged, that the verdict was not warranted by the evidence in the case. There can be no question but the law does permit a debtor in failing circumstances to make an assignment of his property for the benefit of his creditors; and if fairly and *bona fide* made, it passes the title in such property to his assignee, for their benefit. The question of fairness and *bona fides* of the transaction is a question of fact for the finding of the jury. The plaintiff's instructions which were given, properly left that question to the jury for their determination from all the circumstances in evidence. They have found that it was fair, and we have no disposition to disturb their finding. It was urged that the deed of assignment was in operation as against the creditors, because it was not recorded before the levy was made. This deed only purported to transfer personal property, and we have not been referred to, nor are we aware of any decision which requires it, where the possession accompanies the deed of assignment.

On a sale of chattels, whether by bill of sale, by mortgage, by deed of trust, or on a verbal sale, the title rests and becomes

complete against creditors and subsequent purchasers, by a delivery to the purchaser, mortgagee or trustee. Possession of chattels is notice and evidence of ownership.

The 20th chap. R. S., section 1, p. 91, provides that: "No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded as hereinafter directed." This provision clearly makes the delivery of possession as effectual as the acknowledgment and record of the mortgage. And the last section of the chapter extends its provisions to bills of sale, deeds of trust, and conveyances of chattels. There is no force in this objection.

It was insisted that the court below erred in refusing to give the defendant's fifth instruction. That instruction, as asked, was: "If the jury believe, from the evidence, that, after the alleged assignment from Osbourne to Pearson was executed, and before the same was recorded, and before the other creditors of said Osbourne had in any way assented thereto, Osbourne confessed a judgment, in favor of Pearson & Dana, for the amount, or more than their claim, as set forth in the schedule attached to said assignment, and that execution was thereupon issued upon such judgment, and levied on the property alleged to have been assigned, then the verdict should be for defendant; such alleged assignment being thereby virtually abandoned, annulled and released by the parties thereto, the only parties on whom it had any binding force."

The court gave as a modification of the foregoing, the following instruction: "If the jury shall find, from the evidence, that after the alleged assignment to Pearson, and after the levy of the Whipple execution by deputy sheriff Anderson, and possession taken by him, the debtor, Osbourne, confessed a judgment in favor of Pearson & Dana for the amount of their claim, including also the claim of Ward, the other preferred creditor, and that Pearson thereupon caused execution to be issued, and directed a levy upon the assigned property to be made by Anderson, and that the said judgment was so confessed, and execution was so levied, with the intent to abandon said assignment, then the levy under the Whipple execution acquired a priority of lien over the goods in question, and the jury should find for the defendant." This instruction was based on the evidence, and the question presented is, whether the facts supposed by the instruction, if they were found to exist by the jury, would have the legal effect of an abandonment of the assignment by the parties; or whether the acts done, to have such effect, should

have been accompanied with the intention to abandon. In all transactions which are tainted with fraud, the intention of the parties is a material ingredient. The intention is manifested by their acts, to some of which the law attaches the effect of conclusions, which cannot be explained or rebutted, while others may. But in this case the question was whether the parties had abandoned the assignment, and had virtually canceled the deed. No reason is perceived why the acts of these parties should be held conclusive of such intent. They acted as men usually do under such circumstances. Osbourne had preferred Pearson and Ward, two of his creditors, by the assignment, and when the property was levied on under an execution in favor of a creditor who had not been preferred, and taken out of the possession of the assignee, it was natural for Pearson and Ward to desire to retain the preference which the assignment had given them, and it was consistent with the debtor's previous acts to assist them in retaining such preference. The mode suggested to attain that end, in the event that the contest then commenced over the assignment should result in its invalidity, was to procure a judgment and levy. They, it seems, were advised by their attorney to this course, and it was proper to leave it to the jury, under all the circumstances, to determine what their intention was. They have found the fact that it was not to abandon, and we think the evidence justified the finding. Upon the whole record no error is discovered for which the judgment of the Circuit Court should be reversed.

Judgment affirmed.

James Orendorff *et al.*, Plaintiffs in Error, *v.* William Stanberry *et al.*, Defendants in Error.

ERROR TO TAZEWELL.

Where a sheriff returns that he did, on the 8th day of September, 1857, serve a summons on A. B., who attempted to avoid service by concealing himself, and running from him, etc., it will be held a good service. Where the date is written at the bottom of the indorsement of service, and above the name of the officer, it is sufficient to fix the date of service.

Where there are several defendants living in different counties, the writs sent to the several counties for service may contain the names of all the defendants.

Where the venue of a writ is, "State of Illinois, Tazewell County," and the writ is directed to "The Sheriff of Logan County," commanding him to summon the defendants "to appear before the Circuit Court of said county," the uncertainty as to which of the counties the defendants are to appear in, renders the summons void.

THERE was judgment in this case by default against all the defendants, at the October term, 1857, of the Tazewell Circuit Court, HERRIOTT, Judge, presiding.

The case will be found stated fully in the opinion of the court.

JAMES ROBERTS, for Plaintiffs in Error.

A. L. DAVISON, for Defendants in Error.

WALKER, J. This was an action of assumpsit, commenced in the Tazewell Circuit Court, by William Stanberry and John W. Casey, against James Orendorff, Colvey Morris, John L. Orendorff, Quintus Orendorff and Daniel Crabb. The declaration contained special counts on two promissory notes, and the usual common counts. On the 7th day of August, 1857, writs were issued to the sheriff of Tazewell and Logan counties, against all of the defendants, returnable on the second Monday of October, 1857. The sheriff of Tazewell returned the writ directed to him, with the following indorsement:

Served on John L. Orendorff and Quintus Orendorff, by reading the within writ to them, August 27th, 1857.

C. WILLIAMSON, S. T. C.

James Orendorff and Colvey Morris not found in my county. October 2, 1857.

Served on Daniel Crabb on the 8th day of September, 1857, who attempted to avoid service by concealing himself, and running from me at the time I read this process to him at the place I last saw him.

C. WILLIAMSON, S. T. C.,
N. H. MCKEANE, *Deputy.*

The summons issued to the sheriff of Logan county, with the return thereon, is as follows:

TATE OF ILLINOIS, }
TAZEWELL COUNTY. }

The People of the State of Illinois to the Sheriff of Logan county, GREETING:

We command you to summon James Orendorff, Colvey Morris, John L. Orendorff, Quintus Orendorff and Daniel Crabb, if found in your county, personally to appear before the Circuit Court of said county on the first day of the next term thereof, to be holden at the Court House, in the city of Pekin, on the second Monday of the month of October next, to answer unto William Stanberry and John W. Casey, in a plea of assumpsit, to the damage of the said plaintiffs, as they say, in the sum of six thousand dollars; and have you then and there this writ, and make return thereon in what manner you execute the same.

Witness, M. C. Young, clerk of the said Circuit Court, and the [SEAL.] seal thereof, hereto affixed at Pekin, this 7th day of August, A. D. 1857.

M. C. YOUNG, *Clerk,*
By DON W. MAUS, *D. C.*

Upon which writ the sheriff made the following return, which is in the words and figures as follows, to wit:

Executed this writ August 20th, 1857, by reading to the within named James Orendorff and Colvey Morris, the within named John L. Orendorff, Quintus Orendorff and Daniel Crabb, not found in the county.

G. MUSICK, *Sheriff Logan County.*

At the October term, 1857, of the Tazewell Circuit Court, judgment by default was entered against the defendants for the sum of $4,560.18, and the costs of the suit, and to reverse which they prosecute this writ of error.

It is insisted that the sheriff's return of service on Crabb is uncertain as to the time, manner and place of service. The officer expressly states in his return that he served the process by reading it to Crabb on the 8th day of September, 1857. This is the language in terms, if what is said about the attempt to evade service is rejected, and his having used that language does not change the statement as to when he served it, or that it was served by reading to defendant. It is a legal presumption that the officer acted in obedience to the command of the writ. It required him to summon the defendants, if found in Tazewell county, to appear at the next term of the Circuit Court of that county. We are not authorized to intend that he violated the command of the writ, and went beyond his territorial jurisdiction to obtain service. The return is in conformity with the requirements of the practice act, and is legally sufficient.

It was further urged that the return of service as to John L. Orendorff and Quintus Orendorff, is not sufficient to sustain the judgment, because the officer does not state in his return on what day he served the process. There is written at the bottom of this indorsement, "August 27th, 1857," and below it the officer's name. Immediately following this indorsement, is the return that he is unable to find James Orendorff and Colvey Morris, which is dated on the 2nd day of October, 1857, and then follows the return that the same writ was served on Crabb on the 8th of September, 1857, which clearly shows that the writ was not returned until after the date of this indorsement of service on John L. Orendorff and Quintus Orendorff, and until as late as the 2nd of October. This, then, clearly distinguishes this case from the case of *Ogle* v. *Coffey*, 1 Scam. R. 239. The return in that case was, "executed Oct. 18th, 1832, as commanded within." The court there say, "Whether the date specified is intended for the date of the day of service, or is the day on which the summons is returned, is wholly uncertain." In this case, however, the date cannot be the date of the return, because

the subsequent indorsement shows that the writ was still in his hands more than a month afterwards. This makes it clear that the day named was the day of its service on them.

It was also insisted that the writ to Logan should have been against the defendants alone in that county, and that as it was against them all, it is illegal and void. The second section of the practice act provides, that where there is more than one defendant, the plaintiff, commencing his action where either of them resides, may have a writ or writs issued to any county or counties where the other defendants, or either of them, may be found. This language is general, and does not limit such writs to the defendant or defendants residing in the county to which the writ may be sent. It may be more conformable to ancient usage, and we doubt not is the better practice. But under our statute we are not prepared to hold that a writ against all of the defendants, sent to a different county from that in which suit may be commenced, is void. If such writs were to result in a second service on the defendants, or either of them, the costs would be unnecessarily made, and the plaintiff would be liable for their payment.

It is again objected that the writ directed to Logan county requires the sheriff to summons defendants to appear at the next term of the Logan Circuit Court. The venue of that writ is, "State of Illinois, Tazewell county," and the writ is directed to the sheriff of Logan county, and commands him to summons the defendants to appear before the Circuit Court of said county on the first day of the next term thereof. The words, "said county," necessarily refer to one of the counties before named. Tazewell and Logan counties had both been named in a former part of the writ, and Logan having been last named, is probably the one that a literal construction would point out as referred to. But at least, it is left in doubt, from the language, which county is intended. A defendant has a right to certainly know when and where he is required to appear when summoned. This summons fails to give him that notice in regard to the court. The writ was, for that reason, void, and the court did not legally have the defendants found in Logan county, in court, when the judgment was rendered, and it was, therefore, erroneous. The judgment of the court below is reversed, and the cause remanded for further proceedings.

Judgment reversed.

William R. Bush, Appellant, *v.* Napoleon B. Kindred, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

Where there is evidence to support a verdict, this court will not be inclined to disturb it; unless it is manifestly against its weight.

A party, when sued before a justice of the peace, is not bound to set off unliquidated damages. Such a practice would invest justices of the peace with a jurisdiction beyond the statutory limits.

This cause was tried in the County Court of Peoria county. The case will be found fully stated in the opinion of the court.

H. Grove, for Appellant.

Manning & Merriman, for Appellee.

Walker, J. This was an action of assumpsit, brought by Kindred against Bush, in the Peoria County Court, to the February term, 1858. The declaration contained special counts for damages claimed as growing out of a breach of contract, and the common counts in the usual form. The defendant filed five pleas. First, the general issue. Second, payment. Third, that the plaintiff was indebted to defendant in the sum of $95.05, on a judgment before a justice of the peace. Fourth, set-off; and fifth, that defendant, before this suit was instituted, had sued plaintiff before a justice of the peace and recovered a judgment against the plaintiff, and that the cause of action in this case then existed, and could have been set off in that trial, and failing to do so, that judgment was a bar to this action. On these pleas there were issues. A trial was had before the court and a jury, and a verdict for plaintiff for thirty dollars damages. Defendant entered a motion for a new trial, which was overruled by the court, and a judgment rendered for plaintiff on the verdict. And defendant brings the case to this court by appeal.

It was urged that the verdict is against the weight of evidence, and should, for that reason, have been set aside. The evidence was conflicting and contradictory, and it was the province of the jury, in the light of all the surrounding circumstances, to weigh it and give it the credit to which it was entitled. This they have done, and we do not feel called upon to disturb their finding. There was evidence to support the verdict, and we would not be justified in disturbing it, unless the finding was manifestly against its weight. *Allen* v. *Smith et al.*, 3 Scam. R. 97.

It was urged that this cause of action was barred by the plaintiff's having failed to set off the damages claimed in the suit between the same parties before the justice of the peace. The claim is for unliquidated damages growing out of a breach of contract between the parties; that suit was, upon claims, apparently totally disconnected with this contract, and if the damages claimed in this action were proper as a set-off before the justice, there can be no case in which unliquidated damages, growing out of a breach of covenant, contract, or tort, could not be set off. If such damages might be so set off, it would be to invest justices of the peace with jurisdiction over questions involving title to real estate, and compel parties to litigate all their rights, of every nature and kind, in one action, which would result in great injustice and endless confusion. *Hawks* v. *Sands*, 3 Gil. R. 232. It is manifest that the legislature never intended to confer such jurisdiction upon justices of the peace, and thereby produce such results.

The defendant asked the court to instruct the jury, that "if they believed, from the evidence, that the parties had settled their whole matters at Pontiac, and that afterwards Bush paid money or gave checks that were paid to Kindred, the jury should find a verdict in favor of defendant, for the amount of such payments, and also the amount of the judgment rendered by Bailey."

The court refused to give this instruction, and gave, in the place thereof, the following: "If the jury believe, from the evidence, that the parties settled their whole matters at Pontiac, under and according to the contract between the parties, and that afterwards Bush paid money or gave checks which were paid to Kindred, the jury should find a verdict for the defendant, for the amount of such payment, and also the amount of the judgment rendered by Bailey, unless, from the evidence, it appears the same was to be applied on the contract."

It was in evidence that a settlement of some kind was made between the parties, before the expiration of the time for the performance of the contract. In the absence of proof to the contrary, the presumption would be, that the unperformed portion of the contract was not embraced in the settlement. It was, therefore, proper for the court to qualify the instruction so as to apply the settlement to the contract and all matters under it; and as, on that settlement, there may have been a balance due to plaintiff, it was proper to again modify it by adding the concluding clause. If defendant was indebted to plaintiff on that settlement, and made payments on it, in money or by checks, it would be clearly erroneous to instruct the jury that defendant would have a right to a verdict for such payments. And that was what the instruction, as asked, told the jury. This modified instruction was properly given. And we are unable to discover

any error in the giving of plaintiff's instructions; nor has any been discovered on the whole record of the case; and, therefore, the judgment of the court below should be affirmed.

Judgment affirmed.

James May, Paintiff in Error, *v.* Robert Symms *et al.*, Defendants in Error.

ERROR TO ROCK ISLAND.

Where it appears that in June, 1835, A, and B, had improvements upon public land which entitled them to a preëmption, which they sold and conveyed to C, selling all the right they then had or might acquire, they binding themselves to pay the government the price of the land; that in 1842, D, a brother of A, and B, obtained a certificate by preëmption in his own name, but represented to C, that he, D, had been put to trouble and expense to procure his title, whereupon C, paid to D, the full amount of such trouble and expense and took a receipt therefor, and A, B, and D, occupied the land as tenants of C, and that D, conveyed a part of said land to A: *Held*, that an injunction would lie, to prevent further sales of the land, and that the prayer of the bill, asking a conveyance to C, and for general relief, should not be dismissed upon demurrer, and that the sale and subsequent ratification of it were not in violation of any law at the time they were made.

This cause was commenced in the Rock Island Circuit Court, on the chancery side thereof, by the plaintiff in error, against the defendants in error. The bill was filed on the 11th of August, 1851. The defendants appeared and demurred to the bill, and the court sustained the demurrer. The complainant elected to abide by his bill, when the court, Wilkinson, Judge, dismissed it, and rendered a decree for costs against him, at May term, 1854.

The plaintiff in error brings the cause to this court, and assigns for error that the Circuit Court erred in sustaining the demurrer and dismissing the bill.

The bill alleges that on the 24th day of June, 1835, the complainant purchased of Robert Symms and Thomas Symms, two of the defendants, two tracts of land, one being a fractional piece, with improvements, situate and lying at and near the head of Rock Island rapids, and the other lying back of and adjoining said fraction, for three hundred dollars, and on the same day took a deed of conveyance from them, duly acknowledged, which was recorded on the 29th June, 1835, and wherein the fractional piece was described as above stated, and conveys "in fee simple, all their right, title, interest, claim and improvements that they now have or hereafter may have."

The bill then avers that by the deed it was the intention to convey as the "fractional piece," the south-west fractional quarter of section twenty-five, in township nineteen north, of range one east of the 4th principal meridian, to which the description in the deed applied, but was not described by the numbers because they were unknown to the parties at the time of the execution.

The bill then avers that at the time of the sale and conveyance, the tract of land was Government land, on which the said defendants had made a settlement and improvements, whereby they were entitled to a right of pre-emption and preference as purchasers, and that the said defendants agreed to obtain the legal title free of expense to complainant.

It is further stated that the defendant, Thomas Symms, in pursuance of the agreement to obtain the title, proved his pre-emption claim, and on the 28th day of June, 1842, or soon after, paid the entrance money and obtained title in his own name.

The bill avers payment in full of $300; and *after the entry* by Thomas Symms, on the 12th Sept., 1842, in addition to the $300 already paid, at the request of the defendant, Thomas Symms, the complainant, agreed to and did pay him the further sum of $29.37, for which a written receipt was given, which is set out *hæc verba*, wherein it is said to be "in *full* for the *entrance money*" for the fractional piece of land, describing it by its numbers. The sum thus paid was exactly the amount of the entrance money, and fifty cents for the fee of the land officers in taking proof. The tract contained twenty-three forty-nine one hundredths acres.

The complainant avers that the defendants, Thomas and Robert Symms, from the time of the purchase occupied the land as tenants under him; and after the procurement of title by Thomas, he held it in trust for him, and that the same enured to his use and benefit by virtue of the deed to the complainant. It is charged that the improvements made before the sale to the complainant were permanent and substantial, and also, that all persons had notice of their claim and right to the land by virtue of the pre-emption laws, and that the complainant's right to the land was acknowledged by the defendants and the whole community, being in accordance with the custom of the country.

The bill then charges that the defendant, Thomas Symms, without any consideration, fraudulently conveyed to the other defendant, James Symms, all the tract, except one acre, on the 2nd Sept., 1843, and that James had actual notice of the complainant's rights. It is then stated that James Symms made a power of attorney to Robert Symms, authorizing him to convey

the land, and a part thereof had been deeded by him, the avails of which had been appropriated by Robert to his own use.

The prayer of the bill is for a writ of injunction to restrain a further conveyance of the property under the power of attorney or by the parties, for a conveyance of all right and claim of the defendants in the premises to the complainant, and for general relief.

The only question is as to the sufficiency of the bill upon general demurrer.

GOUDY & JUDD, for Plaintiff in Error.

MANNING & MERRIMAN, for Defendants in error.

WALKER, J. May filed his bill in this case, against Robert Symms, James Symms and Thomas Symms, in the Rock Island Circuit Court, and in it alleges, that on the 24th day of June, 1835, he purchased of James and Robert Symms two tracts of land, one of them, which was a fractional piece, with improvements, near the Rock Island rapids, and the other lying back of and adjoining the fractional piece, for which he paid and was to pay the sum of three hundred dollars, and that he, on the same day, took from them a deed of conveyance duly acknowledged, and which was recorded on the 29th day of the same month. By the deed they "conveyed and sold in fee simple to May, all their right, title, interest and improvement, that they now have or hereafter may have in and to two pieces of land," which were described as above, and it recites that $150 of the purchase money was paid in hand, fifty dollars to be paid in one year, and the remaining one hundred dollars when the patent was delivered, which the Symms' were to procure, and were to pay for the fractional quarter free of expense to complainant. The bill alleges that it was the intention to convey the fractional piece by this deed, that its description is the S. W. fractional quarter of Section 25, 19 N. 1 E. of the 4th meridian, to which the description in the deed was intended to apply, but the numbers were not known to the parties at the time. That it was government land upon which the Symms had an improvement, which entitled them to a pre-emption at the time of the sale. That prior to the 28th day of June, 1842, Thomas Symms proved his pre-emption to the fractional quarter, in the land office in which it was subject to entry, and on the last named date, paid for it and became the purchaser in his own name. That Thomas Symms represented to complainant that he had been put to trouble and expense to procure the title, and

that complainant should pay to him the price which he had paid to procure the title; and that he, complainant, paid to said Thomas Symms $29.37, the full amount of the price which he had paid to Government as the entrance money, and took from him the following receipt:

Received of James May, by the hands of Nathaniel Belcher, twenty-nine dollars 37-100, being in full for the entrance money, for the south-west fractional quarter of Section (25) twenty-five, in township No. (19) nineteen, north of the base line of Range No. 1 east of the fourth principal meridian. Sept. 12th, 1842.

Witness: R. F. BARRETT. THOMAS his ⋈ mark. SYMMS.

The bill also alleges the full payment of the balance of the purchase money, and that after the purchase, the Symms occupied the premises as complainant's tenants, and held under him; and after Thomas entered it, he held it in trust for complainant. That Thomas Symms fraudulently, without consideration, conveyed to James Symms all of the tract except one acre, on the 2nd day of September, 1843, who had actual notice. That James made a power of attorney to Robert Symms, authorizing him to sell the same, a part of which he had sold. The bill prays an injunction to restrain further sales, and for a conveyance of all the right of defendants to complainant, and for general relief. To this bill defendants filed a demurrer, which was sustained by the court and the bill was dismissed, and complainant decreed to pay the costs. And to reverse the decree of the court he prosecutes this writ of error.

The act of Congress, of the 29th May, 1830, provides that every settler and occupant of public lands prior to its passage, who was then in possession, and had cultivated any part thereof in the year 1829, "shall be and is hereby authorized to enter, with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres not more than one hundred and sixty, or a quarter section, to include his improvements, upon paying to the United States the minimum price of said land." The 3rd section required proof of settlement and improvement to be made to the satisfaction of the register and receiver of the land district in which the lands were situated, prior to the entry; and that all assignments and transfers of the right of pre-emption given by the act, prior to the issuance of patents, should be null and void. A supplemental act of the 23rd day of January, 1832, authorized the assignment and transfer of such certificates of purchase and final receipts, and that patents should issue in the name of the assignee, anything in the act of the 29th of May, 1830, to the contrary notwithstanding.

An act adopted the 19th of June, 1834, revived the act of May 29th, 1830, and continued it in force for two years from its passage. By the construction given to this act of 1834, by the department, it revived the act of Jan. 1832, and the department and its officers acted upon that construction; 2 Land Laws, 196. An act of July 14, 1832, had also extended the time for making proof and payment under the act of May, 1830, until one year after the plats of the surveyed lands were filed in the proper office. On the 5th of April, 1832, an act was passed, providing that "actual settlers, being housekeepers, upon the public lands, shall have the right of pre-emption to enter within six months after the passage of this act, not exceeding one-half quarter section, under the provisions thereof, to include his or their improvements," etc. To this act a supplemental act was passed on the 2nd of March, 1833, extending the time of making the proof and payment of the same until one year after the plats of the surveyed lands were returned and filed in the proper office. These were the only acts in force on the subject at the time of May's purchase, and there is no allegation in the bill from which it appears under which act the pre-emption was claimed, and whether it was under the act of May, 1830, or under the act of April, 1832, and the several amendatory acts. The sale, when made, violated none of their provisions. The act of April, 1832, contained no provision which prohibited such an assignment. The act of January, 1832, had repealed the prohibitory clause of the act of May, 1830. By an act of our legislature, approved Feb. 15, 1831, Sess. L. p. 82, such contracts were declared to be valid in law or equity. This act was in force at the time this contract was entered into by the parties, and its provisions have been repeatedly recognized and enforced in numerous decisions by this court. *Turner* v. *Sanders*, 4 Scam. R. 527; *French* v. *Carr*, 2 Gil. R. 664; *Delaney* v. *Burnett*, 4 Gil. R. 492; *Phelps* v. *Smith*, 15 Ill. R. 572. It seems to be clear that no law, either of the State or General Government, was violated by this contract when it was entered into by the parties, but it was sanctioned by the laws of both governments; and had a suit then have been instituted, this contract would have been enforced in our courts precisely as any other contract which was legal and binding.

It was, however, urged that the entry, having been made on the 28th day of June, 1842, the act of the 4th of September, 1841, must control the rights of the parties, which required persons entering by pre-emption under its provisions, to file an affidavit that they had not settled on and improved the same to sell on speculation, but in good faith to appropriate to his own exclusive use and benefit, and had not, directly or indirectly,

made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title he or she might acquire from the government of the United States, should enure, in whole or in part, to the benefit of any person except himself or herself; and if the person taking such oath should swear falsely, they were subjected to all the pains and penalties of perjury, and should forfeit the money paid for the lands, and all right and title to the same; and any grant or conveyance which he or she had made, except in the hands of *bona fide* purchasers, for a valuable consideration, should be null and void. The bill alleges, and the demurrer admits, that May paid a valuable consideration for the property. No law or moral duty was violated by the contract. He committed no fraud on any law then in force, and was most clearly a *bona fide* purchaser for a valuable consideration. And if he was such a purchaser, did not the act of 1841 protect his rights? Even if it did not, after Thomas Symms made the entry, and had the undoubted right to sell and dispose of the land, he and his brother, as the bill alleges, received the balance of the purchase money under the contract, and not only so, but at his request, and as he alleged hardship in procuring title, complainant paid to him the full amount of the entry money, for which he gave his receipt. And the bill alleges that the two Symms held the land as tenants of complainant. By these several acts the defendants most clearly ratified and confirmed the sale, and that, too, after the purchase was made from the government. This subsequent ratification was made when no law was violated; it was upon a new as well as the former consideration. They had obtained from complainant his money under a contract perfectly legal when it was entered into, received a further sum beyond the contract price, when they had the power to sell the land, and every principle of justice and equity would require the defendants to execute a contract thus entered into and thus ratified. The defendants have shown no defense by answer or plea, and upon the record, as it is now presented, the court erred in sustaining the demurrer to complainant's bill, and the decree of the court below should be reversed, and remanded with leave to answer.

Decree reversed.

Franklin B. Chapman, for the use of John Wightman, Plaintiff in Error, *v.* James A. McGrew, Defendant in Error.

ERROR TO TAZEWELL COUNTY COURT.

A parol agreement to vary a contract under seal cannot be pleaded in a court of law, to defeat a recovery on the original undertaking; and such an agreement will not discharge a security from liability.

The lessor cannot assign a lease by indorsement, so as to give the assignee such a legal interest as can be enforced in his name, although the assignee may, in that way, acquire an equitable title to the rents.

This was an action brought for rent, by Chapman, for the use of Wightman, against N. C. Selby and James A. McGrew, before a justice of the peace, where a judgment was rendered for the plaintiff, and by McGrew appealed to the County Court of Tazewell county. At the July term, 1857, said cause was submitted to the court without the intervention of a jury.

The plaintiff introduced a lease, bearing date Oct. 11th, 1856, under seal from Chapman to Selby, signed by Selby and McGrew, reciting that Chapman had leased to Selby the hotel known as the Chapman House, in the city of Pekin, for the term of one year, with the privilege of keeping it two; said Chapman to furnish the hotel with all necessary furniture, beds, bedding, cooking utensils, table ware, carpeting, and all necessary things and articles for carrying on and conducting said hotel; said furnishing to be of good and sufficient quality, to be furnished by Chapman by the first day of November, 1856, or as soon thereafter as Selby should need the articles, which were all to be kept in repair by Chapman; for which Selby was to pay Chapman $700 per year, payable monthly. That the names of the persons attached after the names of the lessor and lessee, were to be considered securities of Selby for the performance of the contract.

The defendant then proved that said lease was assigned to Wightman.

It was then admitted, on the part of the defendant, that the sum of $54.27 was still unpaid upon said lease.

The plaintiff then rested his case.

The defendant then introduced an agreement between N. C. Selby and John Wightman, assignee of Franklin B. Chapman, of a certain lease, dated Nov. 1st, 1856, in which N. C. Selby is lessee of the City Hotel, in the city of Pekin, in which it was agreed that Selby should release Wightman from furnishing any more furniture for keeping said hotel, and from keeping the same in repair, and that Wightman, during the time that Wightman

was assignee of Chapman, was to charge Selby only $500 per year, and that the deduction was specially made in consideration that Selby called on Wightman for no more furniture or repairs to the same.

To the introduction of said agreement in evidence the plaintiff objected; but the same was admitted by the court, to which the plaintiff excepted.

The defendant then proved that it would be fifty per cent. more profitable to the lessee to rent a hotel at $700 per year, and have the same furnished and kept in repair at the expense of the lessor, than to rent one at $500, and kept in repair at his (the lessee's) expense; that any change made in that respect would be a great injury to the lessee.

The foregoing was all the evidence in the cause.

The court rendered judgment for the defendant, to which the plaintiff excepted.

James Roberts, for Plaintiff in Error.

A. L. Davison, for Defendant in Error.

Walker, J. This was a suit for rent, commenced before a justice of the peace of Tazewell county, by Chapman, for the use of Wightman, against Nathaniel C. Selby and James McGrew. Service was had on McGrew, and Selby was not found; and on the trial, judgment was rendered against McGrew for $54.27, and costs of suit. The case was taken to the County Court of Tazewell county, where it was tried by the court, by consent, without the intervention of a jury, and a judgment rendered for the defendant, to reverse which, this writ of error is brought. The bill of exceptions shows that plaintiff, on the trial, introduced an agreement between Chapman, of the first part, and Selby, of the other part, dated the 1st day of November, 1856, at the beginning, and on the 11th day of October, 1856, at the conclusion, by which Chapman leased to Selby the hotel known as the Chapman House, in the city of Pekin, for one year, with the privilege of keeping it two years. Chapman bound himself to furnish the hotel with all necessary furniture, beds, bedding, cooking utensils, table ware, carpeting, and all necessary things for carrying on and conducting said hotel, the furniture to be of good and sufficient quality, and by the first day of November, 1856, or as soon thereafter as Selby might need said articles, and to keep the premises and furniture in good repair. McGrew agreed to pay Chapman, as rent, $700 a year, payable monthly. This agreement was signed and sealed by Chapman, Selby, and McGrew as security of Selby. The bill of exceptions further

states, that the agreement "was proved, by defendant, to have been duly assigned to John Wightman, for whose use this suit is brought." Defendant admitted that there was due on the lease the sum of $54, which was unpaid.

The defendant introduced in evidence an agreement between Selby and Wightman, dated January 28th, 1857, which recites that Wightman is assignee of Chapman, of a certain lease, dated November 1st, 1856, in which N. C. Selby is lessee of the City Hotel, in the city of Pekin. By it the parties agree that Selby shall release Wightman from furnishing any more furniture and fixtures for keeping said hotel, and from repairing the same, and Selby was to pay only $500 per year, monthly, as rent, from date of lease; and that the reduction of $200 a year was made in consideration that Selby was to call for no more furniture, or repairs of what was already furnished. This was objected to as evidence, by plaintiff. The bill of exceptions states, that defendant proved, by three witnesses, that it would be fifty per cent. more profitable to the lessee to rent a hotel at $700 per year, and have the same furnished and kept in repair at the expense of the lessor, than to rent one at $500, and the lessee to furnish it and keep it in repair at his (lessee's) expense, and that any change in that manner would be a great injury to the lessee. This is all the evidence that is material in the decision of this case. We deem it unnecessary to consider the question whether there was such a change of contract between Wightman and Selby as released McGrew, as security, from liability.

It is undoubtedly true, that a surety for the performance of a contract has the right to insist that it shall be strictly executed as entered into by him, and any change in its provisions which will prevent its enforcement in its original form, without his assent, will release him from its performance. But to have that effect in a court of law, the change must be such as will bind the parties holding the legal interest. Such a change made by a stranger to the contract, or by an agreement not binding, would have no such effect.

The indorsement, by the lessor, of a lease to a stranger to the contract undoubtedly passes an equitable title to the assignee, but does not pass such a legal interest as can be recognized by, and enforced in, his name, in a court of law. Such an instrument is not assignable by the common law, and has not been made so by our statute. *Buckmaster* v. *Eddy*, Breese R. 300; *Busby* v. *Jones*, 1 Scam. R. 34. Any contract entered into between Wightman and Selby, in regard to the terms of the lease, would not change its legal effect, unless it was binding upon them; and

any thing short of such a change would not discharge McGrew, as surety, from liability.

It is a principle of the common law, that a parole agreement to vary a contract under seal cannot be plead in a court of law, to defeat a recovery on the original undertaking. Chit. Contracts, 90. And it is equally well settled by the English decisions, and is supported by numerous American cases, that such a variation will not discharge the security from liability. *Ashbee* v. *Pidduck*, 1 M. & W. R. 564; *Davy* v. *Pendegrass*, 5 B. & Ald. R. 187; Addison on Contracts, 444; Chitty on Cont. 423; *Twopenny* v. *Young*, 3 B. & C. R. 210; *Bell* v. *Banks*, 3 Scott N. R. 503; *Bulteel* v. *Jerold*, 8 Price R. 467, affirmed in the House of Lords; *West* v. *Blakeway*, 2 Man. & Gran. R. 729; *Cordevant* v. *Hunt*, 8 Taunt. R. 596; *Sock* v. *The United States*, 3 Mason R. 446; *The United States* v. *Howell*, 4 Wash. C. C. R.; *Sewell* v. *Sparrow*, 16 Mass. R. 26; *Crane* v. *Newell*, 2 Pick. R. 614; *Lewis* v. *Harbin*, 5 B. Monroe R. 564; *Tate* v. *Hymont*, 7 Blackf. R. 240. It is true, that some of the courts in this country, in their anxiety to relieve against hardship in particular cases, have departed from this rule, and administered equitable relief in courts of law. We think such a practice is not warranted, and should not be adopted while the two courts exist as separate jurisdictions; and if tolerated must soon destroy all distinction between them.

The agreement for a change of the terms of this lease was not under seal, while the lease was; and therefore, this agreement did not have the effect to release defendant from his liability on the lease. And the court below, consequently, erred in rendering a judgment in his favor. The judgment of the County Court is reversed, and the cause remanded.

Judgment reversed.

Alexander Allison, Plaintiff in Error, *v.* Eldrick Smith, Defendant in Error.

ERROR TO PEORIA.

The indorser of a note, when sued, may show in defense, that if the maker had been sued in some other court of competent jurisdiction, as before a justice of the peace, instead of in the Circuit Court, that a judgment could sooner have been obtained against him and been satisfied, and thus relieve the indorser from liability.

Smith sued Allison in assumpsit. The declaration contains three counts.

The 1st count alleges that on the 13th March, 1855, Pinegar executed his note to Hoyt & Stephens for $200, payable at six months. That Hoyt & Stephens assigned the note to Allison, and Allison to Smith. That at the next term of the Circuit Court of Peoria county, after the note became due, Smith sued Pinegar. That suit was commenced Oct. 9, 1855, and was prosecuted with due diligence to the final judgment. That judgment was recovered November term, 1856, and execution issued upon same, Dec. 20, 1856, and same day put into hands of the sheriff, who levied same on certain lots in Frye's Addition to Peoria, as the property of Pinegar, which were sold to plaintiff in January for fifty cents. That *Pinegar had no title to the property nor interest in the same*, and that execution was returned unsatisfied for balance, and that Pinegar had no property subject to execution in said county, of which Allison had notice.

The 2nd count avers that Pinegar executed note to Hoyt & Stephens, March 13, 1855, at six months, for $200. That Hoyt & Stephens assigned to Allison, and Allison to plaintiff. That at time note fell due, and up to present time, Pinegar lived in Fulton county, and had no property subject to execution or attachment, and that a suit would have been wholly unavailing. And that at the next term of the Circuit Court, on the 9th Oct., 1855, Smith commenced suit, and that judgment was recovered against Pinegar in due course of law, Nov. term, 1856. That execution issued January 24, 1857, to sheriff of Fulton county, and returned, no property found.

3. The common counts. Goods sold and allowed. Work and labor. Money loaned. Money had and received. Money had, etc.

A jury being impanneled, Smith offered in evidence a note executed by Pinegar for $200, dated March 30, 1855, payable to Hoyt & Stephens, by them indorsed to Allison, and by Allison to plaintiff.

Plaintiff then offered summons and return in case of plaintiff against Pinegar. Summons Oct. 9, 1855, directed to and served by sheriff of Fulton county.

Smith then offered in evidence the declaration in the case of Smith against Pinegar, which was filed Oct. 9, 1855, and also the pleas filed in said cause, which were filed May 16, 1856, and an amended plea filed May 27, 1856, and replication filed at said term.

December 1, 1856, there was a judgment entered against Pinegar.

The defendant then proposed and offered to prove that at the time said note fell due, and for a year thereafter, the said Pinegar

owned a drug store in Farmington, Fulton county. That said Pinegar was in Peoria often, as frequently as once a week. That he purchased goods for his store in Peoria, and that under the act of A. D. 1855, the plaintiff might have sued Pinegar before a justice and recovered judgment and collected the amount of the note. But the court refused to permit the defendant to give in evidence the fact proposed and offered by him, and excluded the evidence from the jury.

H. Grove, for Plaintiff in Error.

E. G. Johnson and James Strain, for Defendant in Error.

Caton, C. J. This was an action against the indorser of a promissory note, and to prove due diligence to collect the note of the maker, the plaintiff proved the institution of an action against the maker at the first term of the Peoria Circuit Court after the note matured, and that such proceedings were thereupon had, that over a year thereafter he obtained a judgment against the maker, and then issued executions to the counties of Peoria and Fulton, which were returned unsatisfied. The defendant then offered to show that the maker had plenty of property when the note matured, and that if the plaintiff had commenced his action before a justice of the peace who had jurisdiction of the amount and might have acquired jurisdiction of the person of the maker by service in Peoria county, where he frequently was on business, the amount could have been collected of the maker before he became insolvent. This evidence the court ruled out, and we think improperly. We have often held that it is the duty of the holder to prosecute the maker with diligence, in order to hold the indorser responsible under our statute. If in truth the money could have been made by suing in a justice's court and he neglected to sue there, but chose to sue in the Circuit Court, where from a press of business or other cause he could not obtain a judgment for a year or more, and until the maker became insolvent, it cannot be said that he prosecuted the maker with due diligence. Through his neglect the money was not collected of the maker, and he must bear the consequences of his own laches. The defendant should have been permitted to show the jury that by prosecuting before another court of competent jurisdiction, he might have obtained an earlier judgment and secured its satisfaction. The evidence should have been admitted.

The judgment is reversed and the cause remanded.

Judgment reversed.

Isaac Cook, Appellant, *v.* Timothy J. Skelton, Appellee.

APPEAL FROM COOK.

Where a statute has empowered a court of general jurisdiction to call special terms, it will be presumed, if a record recites that the court convened in pursuance of the order of the judge heretofore made of record, that a special term was in conformity to law.

The judge of a Circuit Court has power to adjourn its sessions for such short periods as in his discretion may seem proper, and an adjournment over two days is not error.

A default admits the material allegations of a declaration, and the only question remaining for trial is the amount of damages. On this investigation the defendant has not the right to give any evidence that will defeat the action, but only such as tends to reduce the damages.

Placita of the June special term, 1857, begun and held on the 22nd day of June, 1857, "in pursuance of the order of the judge of said court, heretofore made and entered of record," but does not give the order, nor state when it was entered, nor what, if any, notices were given.

Suit commenced by summons. Skelton, plaintiff, and Cook, defendant. June 2, 1857. Returnable to the said special term.

Declaration in assumpsit.

First count states that on 5th December, 1855, James S. Speed, George Steeley and H. G. McCulloch, and H. Y. McCulloch, made their note to the order of Cook for $1,500, payable, with interest, twelve months after the date thereof. Cook indorsed the same to the plaintiff; that the note was presented for payment 8th December, 1856, and payment refused; that the first term of court in said county was the January term of Cook Common Pleas, held on first Wednesday of January, 1857; that the plaintiff commenced suit on the 18th December, 1856, on said note against the makers in said Common Pleas, and issued summons to that term, which was served on Speed and Steeley, and not served on McCulloch; that such proceedings were thereupon had that, on the 7th January, 1857, he recovered judgment in that court on said note against Speed and Steeley, impleaded with McCulloch, for $1,597.50 and costs.

That on 9th January, 1857, he issued execution on that judgment to the sheriff of Cook county, which being delivered to the sheriff on 19th January, 1857, was by him, on the 7th April, 1858, returned no property found. That at the time the note became due, and ever since, McCulloch had left the State, by reason whereof defendant was liable, and in consideration thereof promised to pay, yet had not so paid.

Second count sets forth making of note by Speed, Steeley and McCulloch, and its indorsement by Cook, as in first count; that

it had been presented and not paid; that the January term of the Cook Common Pleas was the first term of court in said county after note fell due. That at that term the plaintiff recovered judgment against Speed and Steeley, impleaded with McCulloch on said note, for $1,597.50 and costs; Speed and Steeley then being residents of said county, and on 19th December, 1856, served with process in that suit. That McCulloch, when note fell due, and ever since, was a non-resident of the State, and process could not be served on him. That said judgment was wholly due and uncollectable, whereby defendant became liable, and being liable, promised to pay said note.

Third count sets forth making note and its indorsement, as in first count, and that the commencement of a suit against the makers of the note, from the time same became due till commencement of the present suit, would have been unavailing. By means whereof plaintiff became liable, and being liable, promised to pay said note.

Common counts for money loaned, money paid, had and received, for goods sold, for labor done, and account stated.

June 24, 1857. Judgment by default; court assess damages at $1,639.39, and final judgment.

July 11, 1857. On motion of defendant, assessment of damages set aside.

July 16, 1857. Damages assessed at $1,644.20, and final judgment.

Bill of exceptions sets forth the first assessment and its vacation by the court; and then, that on Monday, the 13th July, court adjourned to Thursday the 16th July, and no court, in fact, held on Tuesday and Wednesday. That on the 16th, again come the parties. And thereupon the defendant asked leave of the court to file a plea and affidavit of merits, which was denied by the court, to which the defendant excepted.

And thereupon the defendant asked for a continuance of this cause because there had been an assessment of damages this term, which was refused by the court, and the defendant excepted, and thereupon the court, on motion of plaintiff, proceeds to assess the damages of the plaintiff, to which the defendant excepted, and the plaintiff introduced a note and its indorsement, as follows:

$1,500. *Chicago, December* 5, 1855.

Three months after date we promise to pay to the order of Isaac Cook, fifteen hundred dollars, value received, with interest from date at rate of six per cent.

JAMES S. SPEED,
GEO. STEELEY,
H. G. McCULLOCH.

Indorsed,
I. Cook.

And also introduced *F. H. Winston* as a witness, who testified: I know Speed and Steeley, the other man I know by sight; on the 5th of December, 1856, I can't tell where Steeley lived, except by hearsay. He never told me where he lived. I know where his family was then by reputation. He is a wandering man, being a surveyor; his family has always lived in Kentucky. Steeley told me he traveled round; he never told me where he resided, but has told me he thought of bringing his family up here. Have not seen Steeley here within the last eight months. I know McCulloch by sight; I don't recollect to have seen him here within a year or two. Firm of Speed, Steeley & McCulloch was dissolved over a year ago. I consider and know Speed insolvent. Steeley's condition I know by reputation. Don't know anything of McCulloch.

I got judgment against Speed, and he made an assignment in the Probate Court. I have an unsatisfied judgment against him.

The plaintiff here introduced the record of a judgment in the Common Pleas in favor of Timothy J. Skelton, against James S. Speed, George Steeley, impleaded with Hezekiah G. McCulloch, for $1,597.50 and costs.

And an execution from same court in favor of and against same parties, to the sheriff of Cook county, dated January 9, 1857; returned 7th April, 1857, no property found. Demand made of Speed; Steeley not found.

To which the defendant objected; overruled, and exception taken.

Other witnesses were called to show the insolvency of the makers of the note.

The court thereupon assessed the plaintiff's damages at $1,644.20.

The defendant moved the court to set aside the assessment of damages on account of the insufficiency of the evidence, the admission of improper evidence, and that the evidence did not warrant the assessment of damages. Which motion is denied by the court.

Errors assigned:

1st. The term of the court at and during which final judgment was rendered in said cause, does not appear by the record to have been held at the time and place, and convened in the manner, and notice thereof given as required by law.

2nd. For that before the rendition of said judgment during the said pretended special term, after the first day thereof, the court adjourned over from the 13th July to the 16th July, without any court being held on the 14th and 15th days of that month.

3rd. Because the court heard improper evidence in the assessment of damages.

4th. Because the evidence before the court was insufficient for the assessment of damages, and nothing but nominal damages should have been thereunder assessed.

5th. Judgment should have been for the defendant.

W. T. BURGESS, for Appellant.

SHUMWAY, WAITE & TOWNE, for Appellee.

WALKER, J. This was an action of assumpsit brought by Timothy J. Skelton against Isaac Cook, in the Cook Circuit Court, on the assignment of a note by Cook to Skelton. The declaration averred due diligence and a failure to collect the money of the makers. The suit was brought to the June special term, 1857; service was had, and appellant failing to plead, judgment was rendered by default against him, at that term, on the 24th day of the month, and the court assessed damages at the sum of $1,639.39, and rendered judgment against the appellant. On the 16th day of July, 1857, and during said term, the court set aside the assessment and judgment, and after hearing the evidence, the court assessed the appellee's damages at the sum of $1,644.20, and rendered judgment on the assessment against appellant. The record shows that the court adjourned on the 13th day of July, 1857, till the 16th, and no court was held on the 14th and 15th days of the month.

In this case the appellant insists that the record does not show that the court was legally and regularly organized. The record shows that the court convened on the 22nd day of June, "in pursuance of the order of the judge of said court, heretofore made and entered of record." From this order it does appear that the term had been ordered by the judge of the court, and as the statute has empowered him to call a special term of court in vacation, and it being a court of general jurisdiction, the presumption would be, from this recital, that the law had been complied with, or the judge would not have proceeded to hold the term.

It was again urged that it was irregular for the court to adjourn over two days, and that all the proceedings had after it again convened were void. The custom has always prevailed of adjourning from day to day, and for such other short periods as the convenience of the court and the dispatch of business might require, and such power, so far as we are able to find, has never been questioned. This power, of course, should be confined in its exercise, to reasonable times, but must, to a great extent, be

left to the sound discretion of the court, acting with a view to the dispatch of business and the administration of justice. The adjournment in this case was not error.

The default admitted every material allegation in the plaintiff's declaration, and left nothing but the assessment of damages open to be determined. When the court came to assess the damages, the only issue it could then try was, the amount of damages in the case, and any other issue was not before the court. The indebtedness was admitted, but the amount had to be ascertained by the inquiry. The defendant, on the execution of a writ of inquiry, has no right to give any evidence which would defeat the action, but only such as tends to reduce the damages. 1 Tidd's Prac. 523. All the evidence in this case relating to the solvency of the makers of the note, their residence, and questions as to the use of diligence, was not properly before the court below, and we of course decline its discussion here. There appears to have been no mistake in the assessment of the amount of damages in this case, and the assessment appears to be regular in other respects. Upon a careful examination of the whole record, no error is perceived, and the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

JOHN W. WAUGHOP, Appellant, *v.* WILLIAM H. CARTER *et al.*, Appellees.

APPEAL FROM COOK.

On a submission to arbitrators of all the claims of A, and B, upon C, for work, etc., done on certain buildings, for C, some of which work C, said was defectively done, it was competent for the arbitrators to admit A, and B, to prove that C, had not furnished certain materials within the time agreed upon by him, and that therefore the defect occurred.

THIS cause came into the Cook County Circuit Court at the October term, 1857, on a motion for a judgment on an award.

The agreement of submission was entered into by and between the parties on the 24th September, 1857.

The claims of said Carter & Miller, upon said Waughop, for payment of work and labor done, and materials furnished, in and about the erection and completion of three dwelling houses built in the years 1855 and '56, in the city of Chicago, and all claims of said Waughop upon said Carter & Miller, for any alleged defects in the said work upon said houses, were submit-

ted to the arbitrament and award of Cornelius Price, Levi H. Waterhouse and Edward Burling; that their award, when made, should be entered of judgment in the said Circuit Court.

The submission was drawn in such a manner as to intend, by agreement, to exclude all reference to the subject of the damage claimed by the said Carter & Miller, for an alleged delay by said Waughop to furnish the cut stone, which was to be left for future adjustment.

The arbitrators found, as their award, that the said Waughop should pay the said Carter & Miller the amount of their claims in full, to wit, $742.79, in full satisfaction for contract and extra work of houses, in full for all differences submitted.

The award was filed, together with a notice to said Waughop, October 7th, 1857. At October term, 1857, a judgment was rendered on said award, for the amount thereof, to wit, $742.79, MANNIERE, Judge, presiding.

On the 31st of October, 1857, said Waughop, by leave, in his own proper person, filed his motion to set aside the judgment, for the following reasons assigned in said motion:

1st. Because the award of the arbitrators, in this cause filed, was made on matters and things not submitted to them, but expressly excluded from their consideration, by agreement, before entering into the arbitration.

2d. Because matters and things that were excluded, by agreement, from the arbitration, were, in bad faith, afterwards presented, and urged, and actually considered by the arbitrators in making up the award upon which this judgment was rendered.

3d. Because evidence was received and considered by the arbitrators, which had been excluded from the arbitration by express agreement.

4th. Because the award is, in fact, a fraud upon the rights of the defendant.

To support his motion, said Waughop produced affidavit of two of said arbitrators, Price and Burling, which state, "That in making the award in this case, they, as arbitrators, considered that the delay in furnishing the cut stone, by said Waughop, was the real cause of the damage to the work on the buildings of the said Waughop; that testimony to that effect was given by said Carter & Miller, and objected to by said Waughop."

The affidavit of the said Waughop, in support of his motion, states, that during the treaty of agreement, it was asserted that the delay of the cut stone on the work, which was to be furnished by said Waughop, would be set up as an excuse for the imperfections in the work, and that damage would be charged for the delay, equal to damage for imperfections in the work.

Said Waughop claimed damage to more than equal a balance

due on the contract, if work had been accepted by architects. The work was not accepted, but certificate refused by architects of said Waughop.

That said Waughop objected to going into the question of the delay in the cut stone, and the submission was redrawn, for the purpose of excluding all reference to the delay occasioned by the non-delivery of the cut stone, and the damage consequent thereupon, and expressly agreed that that subject should be excluded.

That the work was proven, before the arbitrators, to have been imperfectly done, and the architects refused their certificate, which was required by the contract before payment could be demanded.

That proof was given, before the arbitrators, that the damage to one of the buildings was such as to impair its value some $300, and that they were, all three, very much alike.

That witnesses on the subject of the delay in the cut stone were introduced and sworn, and testified on the subject before the said arbitrators.

That the said Carter & Miller still have their remedy for the delay in the cut stone.

The contract for the cut stone was such that it would exclude damage for delay in case of strike, or epidemic, and said Carter & Miller were aware of the clause.

That said Waughop was not prepared with proof on the subject of the cut stone, as that subject had been excluded.

That said Waughop set up no claim for delay in the completion of the work under the contract, but for bad work.

That the defects in the work done for said Waughop were not of a kind to be produced by any delay in the cut stone.

The effect of the proof before the arbitrators was such as to make a case of damage for failure to deliver cut stone, in shape of off-set.

Affidavit of said Wm. H. Carter states, that they had claim for balance due for extra work, and for damages for a failure to deliver the cut stone used in the erection of said houses.

That said Waughop claimed damages for defective work in said houses.

That all matters in controversy, in relation to said houses, were submitted to decision of arbitrators, except the claim of said Carter & Miller, for damages for said alleged failure to deliver said cut stone.

That said Waughop claimed that said Carter & Miller had not complied with the said contract, and were not entitled to recover under it, and also claimed damages for defective work upon said buildings.

That said Carter & Miller offered evidence to show that the said Waughop's failure to deliver the cut stone as he was required by said contract to deliver the same, had prevented the said Carter & Miller from complying with the said contract, and that the said Waughop's delay in delivering said stone was the cause of all the defects complained of by said Waughop, and for which he sought to recover damage in said arbitration.

That upon the hearing, his attorney stated that said Carter & Miller did not claim to recover, in said arbitration, any damages for failure or delay of Waughop in delivering said stone; but that the evidence in relation to the delivery of said stone was offered to show that the said Waughop prevented the said Carter & Miller from complying with said contract, and that the delay of said Waughop in furnishing said stone was the cause of the defects for which said Waughop sought to recover damages.

That testimony was offered showing, or tending to show, that by his delay in furnishing said cut stone, the said Waughop prevented said Carter & Miller from complying with said contract, and made it impossible for said Carter & Miller to complete said buildings before cold weather; that it was impossible to avoid the defects complained of by said Waughop, at that time, and that but for the acts of the said Waughop, the said work would have been done and completed before cold weather, and the contract would have been kept in each and every particular.

That the amount awarded was less than the amount claimed by them for work done under said contract, and for extra work and interest, and that nothing was allowed for damages from failure of said Waughop to deliver the said cut stone.

That he is informed, and believes, that the said arbitrators considered the delay of said Waughop in furnishing said cut stone only so far as it might legally furnish an excuse to said Carter & Miller for non-compliance with the contract, and might be good defense against the claims of said Waughop for damages, by showing that the defects he complained of were the consequences of his own acts.

On a hearing, the motion was overruled, and an exception was taken, and appeal awarded.

John W. Waughop, *pro se.*

J. Howland Thompson, for Appellees.

Caton, C. J. The submission in this case is, of "all claims of the said Carter & Miller upon said Waughop, for payment, for work and labor done, and materials furnished in and about the erection and completion of three dwelling houses built in the

years 1855 and 1856, for said Waughop, and situated on Washington street, in said city of Chicago, and all claims of said Waughop upon said Carter & Miller, for any alleged defects in said work upon said houses." Under this submission, Waughop proved that certain of the stone work was defectively done, for which he claimed damages. To rebut this, the arbitrators admitted the other parties to prove that Waughop had neglected to furnish the cut stone within the time he had agreed to do so, and that by reason thereof, the work complained of could not be done till it was so late that it was injured by the frost, which was the defect complained of, and that so Waughop himself was responsible for the defect. The objection to the award is, that the arbitrators admitted evidence of the delay in furnishing the cut stone. Admitting that by the submission the arbitrators had no jurisdiction to consider the question whether Carter & Miller were entitled to damages because Waughop had not furnished the cut stone at the time agreed, it seems to us that it was clearly competent to show that the defect in the work was attributable to this neglect of Waughop. It was as competent to show that Waughop was responsible for the defective work in this way, as it would have been to show that he had ordered the work to be done in a particular mode, and then complained that it was not well done; or as to have shown that the defect was in consequence of the bad quality of the material furnished by him. For the purpose of answering the claim for damages for defective work, it was perfectly competent for the arbitrators to hear any competent proof to show that the fault complained of was justly attributable to Waughop himself. If the evidence was competent for one purpose and not for another, it was properly admitted, and the presumption is, that it was only considered for the legitimate purpose for which it was admissible. There is nothing upon the face of the award, nor is there any thing in the case, showing that the arbitrators allowed any thing for damages in consequence of the delay in delivering the cut stone.

The judgment must be affirmed.

Judgment affirmed.

George H. Hosley, Plaintiff in Error, *v.* Francis Brooks *et ux.*, Defendants in Error.

ERROR TO COOK.

In an action for slander, the pecuniary circumstances of the slanderer may be given to the jury.

Hosley *v.* Brooks et ux.

It is no mitigation of the offense to show that the person slandered was quarrelsome.

In a suit for slander, the jury may consider the pecuniary circumstances of the defendant; also that defendant obtruded himself into the house of the plaintiff and offered undue familiarities to his wife, when the offensive words were uttered, in fixing their damages, which may be by way of punishment, as well as for compensation.

It is not a defense to such an action, to show that the wife of plaintiff used the first harsh words, and that the slanderous words resulted from such previous harsh words.

The time of the speaking of the words as laid in the declaration is not material.

Instructions, unless based upon evidence, should not be given.

The law will imply malice in the uttering of slanderous words, and heat of passion does not rebut the malice thus implied.

THIS was an action on the case for slander. The declaration is in three counts.

The first count states that in a colloquium on the 17th of October, 1856, with the plaintiff, in the hearing of divers good and worthy citizens, the plaintiff falsely and maliciously spoke and published these several false, malicious, scandalous and defamatory words, of and concerning the said Eunice Brooks, that is to say, "you," meaning the said Eunice Brooks, "are a damned whore, and I," meaning the said plaintiff, "can prove it," meaning that he, the said plaintiff, could prove that she, the said Eunice, was a whore.

The second count states the words to be—"you," meaning the said Eunice Brooks, "are a God damned bitch of a whore."

The third count states the words to be—"you," meaning the said Eunice Brooks, "are a whore." Damages, $2,500.

Plea, not guilty.

A trial was had before a jury, in the Circuit Court of Cook county, at the April term, A. D. 1857, MANNIERE, Judge, presiding, and a verdict of guilty rendered, with $750 damages and costs.

At the trial the plaintiffs below produced *Frederick Guernsey*, who testified that he knew the parties. He was at defendants' house in October, when the plaintiff, Hosley, called there; Hosley knocked at the door, and Mrs. Brooks went and opened it; Hosley came in, put his arms around her neck and kissed her; she (Mrs. Brooks,) then called him a mean dirty puppy, and went into the back part of the house, which was used as a kitchen, to tell Mr. Brooks; Hosley called her all manner of names—a God damned bitch of a whore; she told him to leave the house; he replied that the house was his own, and he should not leave till he got ready; he had a right to say and do what he pleased in his own house; he kicked her, and drew his cane to strike her; Brooks stepped in between them; Hosley called her a damned rip of a whore; said he could prove it; said,

too, he would kill her; his precise words were—"You are a damned bitch of a whore, and I can prove it;" he repeated the language, or language to that effect, several times.

This testimony was corroborated by several witnesses.

W. K. McAllister and Brown & Runyon, for Plaintiff in Error.

Rich & Steele, for Defendants in Error.

Caton, C. J. This was an action on the case for slander, and the evidence not only proves the words spoken as alleged, but shows the slander to have been of a most unprovoked and malicious character, and accompanied with threats of personal violence, and even an assault, by an attempt to kick Mrs. Brooks. We are of opinion that the defendant below was dealt with most leniently by the jury. Nor do we find the least semblance of an error in the record. It is first assigned for error that the court permitted evidence to go to the jury of the pecuniary circumstances of the slanderer. It is sufficient to say that this has been repeatedly decided by this court to be proper.

The defendant below also proposed to prove that Mrs. Brooks, the person slandered, was a quarrelsome woman, for the purpose of reducing the damages. This the court properly ruled out. We are not of the opinion that if she was quarrelsome, that that affected her general character for chastity, or would excuse, or in the least palliate a groundless charge against her of incontinence, or would make such a charge any the less injurious to her.

The following instruction given for the plaintiffs below was excepted to: "If the jury believe, from the evidence, that the defendant is guilty of uttering the slanderous words charged in the declaration, they may take into consideration the pecuniary circumstances of defendant, and his position and influence in society, in estimating the amount of damages; and if they shall also find, from the evidence, that the defendant obtruded himself into plaintiff's house, and there offered undue familiarities to Eunice, his wife, at the time and on the occasion of the uttering of the words in question, these circumstances may also be taken into consideration in fixing damages, and the jury in their discretion may give damages by way of punishment to the defendant, proportioned to the circumstances in evidence, as well as for compensation."

It is sufficient to say that every member of this instruction is strictly proper.

The following instructions were asked for the defendant below and refused, and exceptions taken:

"If the jury should believe, from the evidence, that the defendant, Hosley, went to the house of the plaintiff, Brooks, for the purpose of collecting money, and a dispute arose between the parties while there, and that Eunice Brooks was the aggressor, and used the first harsh expressions, and that the words spoken by Hosley were a retort to such expressions, they will find for the defendant.

"If the jury should believe, from the evidence, that there was no malice at the time the words were spoken by the defendant, but that they were spoken in the excitement consequent from the hard words that had previously passed between them, they will find for the defendant.

"If the jury should find, from the evidence, that the words spoken by the defendant were at another and different time than those alleged in the declaration, they will find for the defendant.

"If the jury should believe, from the evidence, that there is a conspiracy between the plaintiffs in this suit, or between them and others, to extort money from the defendant, they will take that into consideration in rendering their verdict."

In this there was no error. The first quoted assumes that if Mrs. Brooks used the first harsh expressions towards Hosley, that justified him in falsely accusing her of the most degrading and revolting offense of which a female can be guilty. Such is not the law. And the second instruction quoted contains substantially the same proposition, and was refused with equal propriety. The third supposes that the time of the speaking the words laid in the declaration was material, which is not the case. The fourth was properly refused, because there was not the least particle of evidence tending to show a conspiracy between the plaintiffs or anybody else, to extort money from the defendant. As well might two payees of a promissory note be accused of a conspiracy to extort money from a maker, when they bring an action upon it to recover the amount due, as to call this a conspiracy.

To the following instructions asked by the defendant below, the words included in brackets were added and then given, and exceptions taken:

"If the jury should find, from the evidence, that the language used by the defendant, Hosley, to the plaintiff, Eunice Brooks, was spoken in jest, and not with malice, their verdict will be for the defendant, [if they also find that the language was so received and understood by the persons present at the time.]

"If the jury shall believe, from the evidence, that the words

were spoken in heat and passion, [and without malice,] then their verdict will be for the defendant, [if they also find that the words were also so understood and regarded at the time.]

"If the jury should find, from the evidence, that Eunice Brooks, one of the plaintiffs in this suit, was a quarrelsome person, [and so exhibited herself at the time,] and that the language alleged and proved to have been used by the defendant to her, was caused by a quarrel between them, they will take that fact into consideration in considering the amount of damages which the plaintiffs are entitled to recover.

"The question of the defendant's malice is a question of fact for the jury upon consideration of all the facts and conversations, and that if they believe the words spoken by the defendant to the plaintiff, Eunice Brooks, were spoken in heat and passion, [without malice,] and without intention to accuse her of the actual crime which the words import, [and that it was so understood by the parties present at the time,] they will find for the defendant."

The first should have been refused altogether, for that was a sort of jesting, which the law under no circumstances can tolerate. There was no pretense of jesting about it, at the time the words were spoken. Even if his gross familiarities with Mrs. Brooks, which she indignantly repelled, were intended by him as a jest, that jesting was entirely over before the slander was uttered. At that time he was under the influence of a more serious mood.

The second, also, should have been refused altogether. Our law implies malice from the speaking of the words, and the heat of the aggressor's passions had no tendency to rebut the malice thus implied.

The qualification to the fourth instruction was proper. No matter how quarrelsome Mrs. Brooks' general disposition might have been, unless that disposition was exhibited on that occasion, it could afford no sort of excuse for the slander. Because she may have been a virago at other times, the defendant had no right to falsely asperse her character for chastity.

What has been already said in reference to the pecuniary instructions is sufficient to show why we hold the qualification given to the last instruction proper.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

Emily Chapman, Appellant, *v.* Timothy Wright, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

In cases of forfeiture of a lease for non-payment of rent, there must be a demand at the time fixed, or the forfeiture will not accrue.
A party proceeding for a penalty must show that he is entitled to recover, by a strict compliance, on his part, with all the requirements of law.
It is error to try a cause in which a demurrer remains undisposed of.
In an action of debt the judgment should not be in damages.

This was an action of debt commenced by the appellee against the appellant.

Debt demanded, $176.30. Ad damnum, $200.

The declaration contained six counts. The first was a special count upon a lease therein named, for rent alleged to be due by defendant below to plaintiff below, and also for the double value of the premises in said lease named, from 1st day of September, A. D. 1855, to date of suit, and sets forth the execution of the lease on the 6th day of July, A. D. 1854, by the parties to this suit, whereby the plaintiff below leased to the defendant below, lot "C," in Wright's subdivision of lots five and six, in block ninety-three, School Section Addition to Chicago, the defendant agreeing to pay a yearly rent of $50, and all taxes and assessments against said premises during the existence of the lease. This count further states that the defendant below was seized and possessed of said premises until the 1st day of September, A. D. 1855, when $59 of the rent aforesaid became due and payable, and was still unpaid; that on the 1st day of September, 1855, the plaintiff below re-entered and took possession of said premises, and brought his action of unlawful detainer on the 10th day of September, 1855, against the defendant below, before J. A. Hoisington, a justice of the peace, within and for said county of Cook, and recovered judgment before said justice, Oct. 6th, 1855; that the yearly value of said premises was $75, and concluded with demanding $177.86.

The second count is for $155.34, rent on said premises from July 6th, 1854, to the termination of the lease.

The third count is for $59.44, as rent from July 6th, 1854, to August 1st, 1855.

The fourth count is a common count, as follows: "And whereas, also, the said defendant afterwards, to wit, on the first day of May, A. D. 1856, at the county aforesaid, was indebted to the said plaintiff in the sum of $200, for money then and there paid by the said plaintiff, to and for the use of the said defendant, at her request."

The fifth and sixth counts are similarly framed with the fourth count, and are for money had and received, and amount due on account stated.

The declaration concludes as follows: "Yet the defendant hath not paid the same or any part thereof, to the plaintiff's damage of $200, etc."

To the declaration was annexed a bill of particulars.

The defendant below pleaded non assumpsit, and subsequently a plea in abatement to the first, fourth, fifth and last counts of the declaration, setting forth that the action of unlawful detainer mentioned in the declaration, was still pending and undetermined, on appeal from the judgment rendered by the justice, in the Cook County Court of Common Pleas. The plaintiff below filed his replication to the plea in abatement, to the effect that said action of unlawful detainer ought not to be pending, and ought to be dismissed, because the appeal had not been entered in the Cook County Court of Common Pleas within the time required by law.

To this replication the defendant below filed a demurrer.

The cause came on for trial on the 5th day of June, A. D. 1857, and was submitted to the court without the intervention of a jury.

The plaintiff below introduced in evidence the lease referred to in his declaration, which corresponded to the allegations therein, and also offered in evidence an order of the Common Council of Chicago for the construction of certain sidewalks, and among others for a walk along the premises in question, and called H. Kreisman, who testified that he was city clerk of Chicago, and that that order was the original one on file in his office.

The proper publication of the order was admitted.

D. S. Hawley then testified, on behalf of the plaintiff, that that he was deputy street commissioner for the town of South Chicago in 1855; that the sidewalks in question were built partly by the property owners, partly by the tenants, and partly by the city; that the cost of building said sidewalks was $1 per foot, and that the other expenses made the cost $1.10 per foot.

L. S. Bond, a witness for plaintiff, testified that the plaintiff divided the expenses for building the sidewalk in question equally upon four lots, one of which was occupied by the defendant; that he had presented a bill, in words and figures following, to wit:

Mrs. Emily Chapman,

To Timothy Wright, Dr.

1855, May 1,	To rent on lease of lot "C," of 5 and 6, in block 99, as per account rendered.....	$121	00
	Interest.....		44
		$121	44
May 22,	By cash paid on account rendered.....	75	00
		$46	44
1855, Aug. 1,	To interest.....		51
" "	To one quarter's rent.....	12	50
" " 30,	To building sidewalk (assessment,).....	26	75

to one Atkins, who acknowledged the same to be correct; that Atkins was at that time agent of the defendant; that Atkins paid the plaintiff $75 on this bill, and that nothing had been paid on the lease introduced in evidence; that there was a former lease of the premises in question from the plaintiff to some other person than the defendant, but to whom the witness did not know, and that part of the plaintiff's claim was for rent due on that lease; that the plaintiff had told him (the witness) that he (the plaintiff) had destroyed that lease.

On cross-examination the witness testified, that he knew nothing personally of the payment of the $75, and had never had any dealings with Atkins except in relation to this matter.

The plaintiff then offered in evidence certain papers of a suit of unlawful detainer between the parties to this suit, before a justice of the peace for the county of Cook, to the introduction of which the defendant objected, but the court overruled the objection, and the defendant duly excepted.

The papers were then introduced in evidence and were a transcript of the record of the justice in said suit, and the appeal bond filed by the defendant therein, from which it appeared that judgment was rendered against the defendant by said justice, and that the defendant had appealed therefrom. It also appeared that said suit was still pending, and undetermined, in the Cook County Court of Common Pleas.

The plaintiff below here rested his case, and the defendant put in evidence a check signed by the defendant, and payable to T. Wright or bearer, for $75, and indorsed by the defendant and "Cowper & Co."

The defendant here rested her case.

The plaintiff then offered to introduce further testimony, to which the defendant objected, but the court overruled the objection, and the defendant excepted.

The plaintiff then introduced a notice from the plaintiff to the defendant, declaring the term for which the lease was granted forfeited, and demanding possession of the same, and called A. S. Seaton, who testified that he served a notice (of which the notice introduced was a copy,) upon the defendant, on the first day of September, A. D. 1855.

The defendant below, by her counsel, then moved that the testimony of the witness, Seaton, be excluded; the defendant also moved to exclude the testimony of L. S. Bond, in so far as related to the presentation of an account to Atkins; the defendant also moved to exclude all the testimony introduced on behalf of the plaintiff below, under the common counts in plaintiff's declaration, to sustain plaintiff's claim for double value; the defendant also moved to exclude all the testimony admitted on behalf of the plaintiff under the common counts of his declaration; the defendant also moved the court to give judgment for the plaintiff, if at all, only for such amount as was due according to the tenor of the lease introduced in evidence; but the court overruled the several motions of the defendant, to which several rulings of the court the defendant then and there excepted.

This was all the evidence in the case, and the court found the issue for the plaintiff below, and assessed damages at $129.25, said judgment being in part for double value of said premises, for nine months from September 1st, A. D. 1855.

The defendant below thereupon entered a motion for a new trial, which was overruled, and thereupon took an appeal.

The errors assigned and relied on by the appellant are as follows:

1st. That the court erred in giving judgment in any amount for double value.

2nd. That the court erred in admitting proof of demand and notice, and in admitting any evidence to establish the plaintiff's claim to double value under the common counts of the declaration of the plaintiff below.

3rd. That the court erred in allowing the plaintiff below to introduce evidence after he had rested his case.

4th. That the court erred in giving judgment for any rent due on a prior lease, there being evidence that there was such a lease, but such lease not having been produced, and no proof being introduced of its loss, or if so, of its contents.

5th. That the court erred in admitting the papers of the suit of unlawful detainer pending in this court on an appeal from the justice, as evidence.

6th. That the court erred in giving judgment for the plain-

tiff below, for any part of the sum claimed by him under the common counts of his declaration.

7th. That the court erred in not confining the plaintiff below to his bill of particulars, and in admitting any evidence as to indebtedness on the part of the defendant below, prior to the lease filed and declared upon in this cause by such plaintiff below, and referred to by him in his bill of particulars.

8th. That the court erred in giving judgment in any part for any indebtedness on the part of the defendant below prior to the execution of the lease on file in this cause, on the evidence that one Atkins had admitted such indebtedness to exist, there being no proof that said Atkins was the agent of said defendant below, or that such admission of Atkins was in any manner by authority of, or binding upon, said defendant below.

9th. That the court erred in giving judgment in any part for double value of said premises for nine months from the first day of September, A. D. 1855, to the first day of June, A. D. 1856 —the lease introduced in evidence by plaintiff below having expired on the first day of May, A. D. 1856, and this suit having been brought on the 21st day of May of the same year.

10th. That the court erred in giving judgment before the disposition of the demurrer filed by said defendant below to the replication of said plaintiff below to said defendant's special plea.

11th. That the court erred in giving judgment in any part for the assessment claimed by the plaintiff below to be due to him upon the premises occupied by said defendant.

12th. That the court erred in giving judgment in any part for double value, there being no proof what the value of the premises was.

13th. That the court erred in giving judgment for damages alone, the action being in debt.

14th. That the court erred in overruling the motion for a new trial.

15th. That the court erred in entering judgment for the plaintiff below.

And the appellee joins in the above errors.

Dow & Fuller, for Appellant.

Bond & Seaton, for Appellee.

Walker, J. This was an action of debt, commenced by appellee against appellant, in the Cook County Court of Common Pleas. The declaration contains six counts. The first on a lease, for rent due, and double value of the premises from the

1st day of September, 1855, to the 20th May, 1856, when suit was brought; and avers that appellee leased to appellant certain lots, for which appellant agreed to pay the yearly rent of $50, and all taxes and assessments on the same during the continuance of the lease, and contained a clause of forfeiture of the lease on non-payment on the day; that appellant occupied the premises until the 1st day of September, 1855, at which time $59 of rent was due and unpaid; that appellee on that day entered and took possession, and brought his action of unlawful detainer on the 10th day of September, before a justice of the peace, and recovered a judgment on the 6th day of October, 1855; that the yearly value is $75, and concluded with demanding $177.86. The second count was for $155.34, rent on the premises from July 6th, 1854, to the termination of the lease. The third count is for $59.44, as rent from July 6th, 1854, to August 1st, 1855. The remaining counts are the common counts for money paid, for money had and received, and for an account stated. The defendant pleaded non-assumpsit, and subsequently a plea to the 1st, 4th, 5th, and last counts, that the action of unlawful detainer was still pending and undetermined, on appeal from the judgment rendered by the justice of the peace in the Cook County Court of Common Pleas. To this plea, appellee replied that the action of unlawful detainer ought to be dismissed, because the appeal was not entered into in proper time. To this replication appellant filed a demurrer, which remains undisposed of by the court. The parties went to trial, and the cause was heard by the court without the intervention of a jury, by consent. After hearing the evidence, the court rendered a judgment in favor of the appellee, for $129.25, damages; and the cause is brought to this court by appeal.

The first count proceeds for the recovery of double the yearly value, for a holding over after the expiration of the term. The lease contains a clause "that if the said rent, or any part thereof, be not paid on the day of payment, or if default be made by said lessee in any of the conditions of said lease, that then and in that case the said lessor might, at his election, declare said term ended, and re-enter and take possession of said premises."

The doctrine seems to be well settled, that in cases of forfeiture of a lease for non-payment of the rent, there must be a demand, and generally, where a penalty as well as a re-entry is given for the non-performance of a condition, the forfeiture cannot be taken advantage of, without a demand at the time fixed. 1 Wood's Convey. 11; Sterne's Real Act. 27; Hob. 82.

This declaration fails to aver any such demand, and was, for the want of such an averment, insufficient to entitle the appellee to recover for double the yearly value.

The 2nd section of the 60th chap. R. S. 1845, giving the right to recover double the yearly value of the lands held after the expiration of the term, requires that demand shall be made and notice in writing given, for the possession by the landlord or other person entitled to the possession, before such a recovery can be had. This action is, in its nature, highly penal, and in all such cases, the party proceeding for the penalty must, by his pleadings, show that he is entitled to recover. Courts will not extend acts imposing penalties beyond the cases provided for by the legislature, and will require the party to bring himself strictly within its provisions. The statute has imposed, as a condition, that a demand must be made and written notice given for the possession before the penalty can be recovered, and the appellee has failed to show by averment that he has complied with this provision, and the first count of the declaration is, in this respect, fatally defective. And a recovery under it cannot be sustained, as there is no right of recovery of this penalty shown. And this judgment should be arrested for that cause.

It has been repeatedly held by this court, and is the settled law, that it is error to try a cause while a demurrer remains in the record undisposed of in some appropriate manner. *Moore* v. *Little*, 11 Ill. R. 549.

This court has held, uniformly, that it is error, in an original action of debt in the Circuit Court, to render judgment in damages. *Howell* v. *Barrett*, 3 Gil. R. 433; *O' Connor* v. *Mullen*, 11 Ill. R. 57. The judgment was, in that respect, erroneous.

For these various errors, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

Charles L. Armsby, Appellant, *v.* The Supervisors of Warren County, Appellees.

APPEAL FROM WARREN.

The sheriff is not compelled to keep an office open at the county seat. He is permitted to occupy a room in the court house, if he chooses to do so. He is not obliged to provide for the accommodation of the public, and the county is not liable to pay for his lights, fuel, etc.

This was an action of assumpsit, commenced by the plaintiff, to recover for wood, coal, candles, blanks and stationery, provided by the plaintiff, for the use of his office, while acting as sheriff of Warren county, from December, 1852, to December, 1854.

The declaration contains, also, an indebitatus count, for money paid, laid out and expended by the plaintiff, for the use of the defendants, in providing said articles for the use of his office, while acting as sheriff of said county as aforesaid.

The defendants pleaded the general issue, and the cause was tried by THOMPSON, Judge, and a jury, at the September term, 1857, of the Warren Circuit Court.

The plaintiff, in support of the issues on his part, proved that from December, 1852, to December, 1854, he was sheriff of Warren county, and acted as such.

That during that period, he kept an office in the court house of said county, and was also collector of said county.

That he kept the tax books in his office, and by himself, or deputy, was generally in the office.

That during the time he was sheriff and collector, he furnished fuel, candles, coal, blanks and stationery, for the use of his office.

That the room occupied by plaintiff was also occupied by James G. Madden, as a law office.

That Madden furnished one-half of the fuel, each one buying one load alternately.

That said Madden furnished his own lights.

It was also proven by the plaintiff, that at each term of the board of supervisors, the plaintiff presented his bill for services rendered, but *not* including candles, wood, coal, blanks and stationery; and at one time stated to the board in session, that other counties provided the sheriff with such articles, and he thought they ought to allow them to plaintiff; but the court was of a different opinion, and no formal bill was presented.

The plaintiff kept no account of the articles furnished, neither did Madden of the articles furnished for the office by him; and that plaintiff had no certain means of ascertaining the precise amount furnished, but proved that it would take 200 to 300 bushels of coal, at from 12½ to 16 cents per bushel, each winter; from $10 to $15 per year for lights; about $25 per year for blanks; from $3 to $4 per year for ink, paper and pens. He furnished his own lights, at a cost of $15 or $16.

This was all the evidence in the case.

The plaintiff then asked the court to instruct the jury as follows:

1. If the jury believe, from the evidence, that the plaintiff acted in the capacity of sheriff of Warren county, from December, 1852, to December, 1854, and furnished the office, during that time, with lights, fuel and stationery, and that the County Court or board of supervisors refused to pay for the same, or

refused the money so expended by the sheriff for lights, fuel and stationery for the office of sheriff, then the plaintiff is entitled to recover the amount so expended, in this suit.

2. It is the duty of the county to furnish lights and fuel for the use of the office of the sheriff of the county.

3. It is the duty of the county to furnish lights, fuel and stationery for the use of the office of the sheriff of the county.

The court refused to give said instructions, to which the plaintiff excepted.

The court then gave the following instructions, asked for by the defendant, to which the plaintiff excepted:

1. If the jury believe, from the evidence, that the plaintiff was sheriff of the county of Warren, and occupied a room in the court house during his term of office, and that the fuel and lights in the plaintiff's account were furnished by him for his own office, then they will find for the defendants.

2. If the jury believe, from the evidence, that the plaintiff, while he was sheriff, furnished himself with printed blanks for his own use as an officer, and that these are the blanks sued for, then they cannot find for the plaintiff the value of such printed blanks.

3. The county is not by law required to furnish the sheriff of the county, fuel, lights and printed blanks, for the use of himself, in any office occupied by him as an officer, but these are to be furnished by the sheriff at his own expense.

4. The jury must believe, from the evidence, that there was an express promise by the defendants to pay the plaintiff for the articles claimed by him, or that they were furnished by the plaintiff for the use of the county, under such circumstances that the law will imply a promise to pay for the same.

5. If the jury believe, from the evidence, that the fuel, lights and blanks were used by the plaintiff in his own office, as sheriff of the county; that there was no arrangement made at the time, or since, with the county, for the payment of the price thereof; that the plaintiff kept no account thereof against the county; that no claim was made for payment until long after his term of office expired, and that the plaintiff used the articles for his own convenience, and that he voluntarily, without request of the county, donated these articles for the use to which they were applied, then the law does not imply any promise to pay.

The jury found a verdict for the defendants, and plaintiff moved for a new trial,

Because the court gave improper instructions to the jury on the part of defendant, and refused proper instructions asked by the plaintiff.

Because the verdict is contrary to law and evidence.

Which motion was overruled, and the court rendered judgment against the plaintiff for costs, and plaintiff appealed, and now assigns the following errors:

The court erred in refusing to give proper instructions asked for by plaintiff.

The court erred in giving improper instructions asked for by the defendant.

It was contrary to law and evidence.

The court erred in overruling the motion for a new trial, and rendering judgment for defendant.

WEAD & WILLIAMSON, for Appellant.

GOUDY & JUDD, for Appellees.

CATON, J. The statute does not compel the sheriff to keep an office open at the county seat, as it does the clerk. It permits him to occupy a room in the court house, but leaves it optional with him whether he will do so. He is under no obligation to provide for the public accommodation, as is the clerk, and we do not find any warrant in the statute for compelling the county to pay for his lights and fuel. The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

JONATHAN BOOTH, Appellant, *v.* JOHN COOK, Appellee.

APPEAL FROM MARSHALL.

A party may not state in general terms that it is not in his power to produce a deed; but he must give such detailed circumstances, in relation to the search for it, and the probabilities of its loss, as will convince the judgment of the court of its actual loss, or of the inability of the party to produce it.

An acknowledgment of a deed, by a notary public of another State, without a seal, or certificate of his appointment, will be altogether invalid.

THIS was an action of ejectment, by the plaintiff, Booth, against the defendant, Cook, brought to recover the east half of the north-west quarter of section twenty-six, in township thirty north, range two west of the third principal meridian, in Marshall county.

For the purpose of sustaining his title, and as a necessary link in the chain, the plaintiff offered, in evidence, a certified copy of a deed from Joseph L. James and wife, John H. Haines

and wife, and Hezekiah Lyon, to Cephas Mills, dated January 3rd, 1837.

This deed was objected to, for the reason that no sufficient excuse had been shown for the non-production of the original.

The plaintiff, to obviate the objection, read the following affidavit:

"Jonathan Booth, the plaintiff above named, after being duly sworn, on oath, saith, that the original deed of conveyance, made by Joseph L. James and Amelia James, his wife, and John H. Haines and Catherine Haines, his wife, and Hezekiah Lyon, to Cephas Mills, dated on the third day of January, A. D. 1837, for the following described land, to wit: the east half of the north-west quarter of section twenty-six, in township thirty north, of range two west of the third principal meridian, in the county of Marshall and State of Illinois, is not in his power, possession or control; that he, affiant, has never, to his best knowledge or belief, seen said deed, and has never had possession thereof; and that he, affiant, has no knowledge of the whereabouts of the same."

The court overruled the objection to the deed, and admitted the same in evidence, and the defendant's counsel excepted.

The plaintiff then offered, in evidence to sustain his title, a deed from Cephas Mills and wife to Joseph P. Martin, dated March 29th, 1841, which purported to have been acknowledged before Cyrus Dana, "a notary public of Berrian county, Michigan," which was objected to, upon the ground that it did not appear to have been executed, acknowledged and certified under any official seal. The objection was overruled and the deed admitted. The defendant excepted.

The admission of these two deeds in evidence is the only error complained of in the record.

This cause was heard before Ballou, Judge, and a jury, at October term, 1857, of the Marshall Circuit Court.

N. H. Purple, for Appellant.

Wead & Richmond, for Appellee.

Caton, C. J. This was an action of ejectment, by the plaintiff, Booth, against the defendant, Cook, brought to recover the east half of the north-west quarter of section twenty-six, in township thirty north, range two west of the third principal meridian.

For the purpose of sustaining his title, and as a necessary link in the chain, the plaintiff offered, in evidence, a certified copy of a deed from Joseph L. James and wife, John H. Haines

and wife, and Hezekiah Lyon, to Cephas Mills, dated January 3rd, 1837.

This deed was objected to, for the reason that no sufficient excuse had been shown for the non-production of the original.

The plaintiff, to obviate the objection, read the following affidavit:

"Jonathan Booth, the plaintiff above named, after being duly sworn, on oath, saith, that the original deed of conveyance, made by Joseph L. James and Amelia James, his wife, and John H. Haines and Catharine Haines, his wife, and Hezekiah Lyon, to Cephas Mills, dated on the third day of January, A. D. 1837, for the following described land, to wit: the east half of the north-west quarter of section twenty-six, in township thirty north, of range two west of the third principal meridian, in the county of Marshall and State of Illinois, is not in his power, possession or control; that he, affiant, has never, to his best knowledge or belief, seen said deed, and has never had possession thereof; and that he, affiant, has no knowledge of the whereabouts of the same."

The court overruled the objection, and admitted the copy in evidence, to which an exception was taken.

We think the affidavit was insufficient, and that the objection should have been sustained. The affidavit states, in general terms, that the original deed was not in the affiant's power, possession or control, without showing that he had ever made any inquiry for it, or any effort to produce the original. It is not sufficient to state in general terms that it is not in his power to produce the deed, but he must state circumstances to the court, from which the court can itself see it is out of his power to produce the original. It is for the court, and not for the party, to draw the conclusion whether or not it is in his power to produce the deed; and it is the duty of the party to state the facts and circumstances, from which the court may be enabled to draw a correct conclusion on the subject. He must show the court that he has, in good faith, made every reasonable effort to produce the original, and he must show, in detail, what those efforts have been. If he has made diligent and faithful inquiry to find the parties in whose possession it might probably be, as the grantee, and those claiming under him, and has been unable to find them, or, if found, and he proves by them that the deed is lost, or cannot be found after diligent search, then the court may properly conclude that it is out of his power to produce the deed. The provision of the statute under which the copy was offered, is this: "And if it shall appear to the satisfaction of the court that the original deed so acknowledged or proved, and recorded, is lost, or not in the

power of the party wishing to use it, a transcript of the record thereof, certified by the recorder in whose office the same may be recorded, may be read in evidence in any court of this State without proof thereof."

These facts must appear to the satisfaction of the court. The court can only be satisfied of them by evidence sufficient to convince its judgment that the deed is lost, or the party cannot produce it. There is nothing unreasonable in requiring the party to make faithful efforts to produce the original. The security of parties against fraud and forgeries, requires that the original should be produced whenever it is practicable to do so. Copies should only be admitted from absolute necessity. So long as there are bad men in the world who are capable of committing as well perjury as forgery, it is the duty of the courts, as far as possible, to protect honest men against them; and honest men should not complain at any reasonable inconvenience to which they may be subjected, to close every possible avenue to such practices. The very rule which will subject an honest man to inconvenience to-day may be his security to-morrow. We think the affidavit altogether insufficient.

The plaintiff then offered in evidence, to sustain his title, a deed from Cephas Mills and wife to Joseph P. Martin, dated March 29th, 1841, which purported to have been acknowledged before Cyrus Dana, a "notary public of Berrian county, Michigan," which was objected to, upon the ground that it did not appear to have been executed, acknowledged and certified under any official seal. The objection was overruled and the deed admitted, and an exception taken.

There is not the least shadow of evidence that Cyrus Dana was a notary public, neither a certificate of the secretary of the State of Michigan, nor any notarial seal to verify his attestation. A notary's acts should always be attested by a notarial seal, which every notary is presumed in all countries to have. Even in this case there is no certificate of conformity. Indeed, there is nothing to show that this man Dana had any authority, either by our law or by that of Michigan, to take acknowledgments of deeds. Some objection might be taken to the substance of this acknowledgment, but it is unnecessary to consider it.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Henry M. Day, Appellant, *v.* Benjamin Hackney *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

For any misfeasance of a sheriff other than a failure to return an execution or to pay over money collected on an execution, or for any other misconduct than is mentioned in the statute, the party must resort to his action; summary proceedings against a sheriff will be limited to such derelictions as the statute provides for.

This was a summary proceeding by motion by appellees against appellant.

The bill of exceptions shows that, at the hearing of the motion, July 10, 1856, appellees read in evidence an execution, under seal of said court, dated March 14, 1855, in favor of appellees, and against Alford & Chapman, for $593.09, directed to sheriff of Kendall county, with said sheriff's return and indorsements thereon, on which was a receipt signed by J. J. Cole. The indorsements were as follows:

Rec. this writ, Mareh 15, 1855, at one P. M., from J. J. Cole, agent for plaintiff. H. M. DAY, *Sheriff of Kendall County.*

March 15th, 1855.—By virtue of the within exeeution, levied on the following real estate, (here follows description of divers tracts of land); also the following personal property, (here follows list of horses, etc.)

H. M. DAY, *Sheriff of Kendall County.*

The above real estate was by me advertised, etc., before the 25th of June, 1855, at one o'clock P. M., when the said real estate was by me sold, and the same was struck off to Jeremiah J. Cole, agent for plaintiffs, for $619.09, he, the said Cole, being the highest bidder, but *no money was paid to me,* the land being bid off as aforesaid by said Cole, and this execution is returned in this manner by his direction. HENRY M. DAY, *Sheriff Kendall County.*

Rec'd of H. M. Day, Shf. of Kendall Co the amt of debt and costs on the within Ex for Hackney Jenks & Co JEREMIAH J. COLE

Appellees then read in evidence the affidavit of Barr, of 7th July, 1856, that on 14th March, 1855, appellees recovered judgment in said Common Pleas Court against Alford & Chapman, for $593.09 and costs, that execution was issued, directed to sheriff of Kendall.

That on 15th March, 1855, execution and fee bill was *by him forwarded* to Kendall county, *to be* delivered to sheriff.

That on 16th March, 1855, Barr saw sheriff Day, who said he had received the execution and had levied on Alford's real estate.

That Barr consulted and directed in regard to same.

That on 25th June, 1855, Barr went to Oswego to attend the sale of said lands by sheriff.

That he then *learned* that said sheriff had two other executions levied upon the same property, and that if the same was sold it would be sold upon all the executions, (one of which affiant believes was in favor of Jeremiah J. Cole.)

That he *understood* that Cole, perhaps with others, was trying to buy the lands of Alford, and negotiations were pending when this affiant *had to leave*.

That Cole informed Barr, that if lands were sold upon the executions, he intended *to bid off the same* for *enough* to *cover all of said judgment*.

That with *that understanding* Barr left before the sale was made.

That said sheriff knew at that time that Barr was at Oswego *attending to the same* as attorney of the plaintiff.

That Barr afterwards *learned* that said premises were sold and bid off by said Cole, and went to Oswego to get the money thereon.

That Cole being inquired of for the sheriff, said to Barr that the sheriff was out of town, but that *he* could pay a part of the money going to the plaintiffs, and Barr received of Cole $400 to apply on the same.

That Barr *understood* "that the sheriff kept his official papers at Oswego, in the office of Cole, and that when property was bid off or redeemed by Cole, the money was not paid over at the time, but credit given on the deal between the parties, as a deposit or otherwise."

That from Barr's recollection of the *contents* of the *record* of the certificate of sale, as recorded in the recording office of Kendall county, the premises were sold upon all of said executions together, and but one certificate of sale, and that to said J. J. Cole.

That Barr afterwards *saw* said execution, with a return thereon, (which he *believes* was in handwriting of said sheriff,) in substance as follows:

"I return this execution satisfied—money paid to plaintiffs."

That this was on said execution the 13th of June, 1856, and before, but is now erased.

That the return now on the execution was *not* then on the same.

That said return does not state to whom the certificate of sale was made.

That Barr has twice made demand upon said sheriff, (H. M.

Day,) in writing, to pay over the balance due to plaintiffs upon said writs to plaintiffs, or their attorney, and also to return said writs.

That the sheriff has neglected to pay.

That the present returns on said execution have been made since such demand.

That Barr was attorney of plaintiffs.

That he believes he was the only attorney.

That on 13th of June, a written notice, attached to the affidavit, was served on Day.

The written notice referred to, notifies Day that $243.33, or thereabouts, issue to the plaintiffs, on an execution in your hands, wherein Benjamin Hackney, and Levi Jenks, and Albert Jenks, were plaintiffs, and John W. Chapman and Clark B. Alford were defendants; and also on a fee bill in the same case, which execution and fee bill issued, etc.

And demand is hereby made upon you for the money due thereon, (said fee bill and execution,) and you are notified, that unless you return said execution and fee bill, and pay over said money to said plaintiffs, or their attorney, within ten days from date hereof, that at next term of said court, etc., plaintiffs will apply to said court for a judgment against you for the amount due them, with twenty per cent. damages, according to statute.

That after the sale, Cole called on affiant and said he was to pay plaintiffs' demand.

That affiant believes he was the only one of the firm that ever had any correspondence with said Cole about said matter in any way.

This was all of plaintiffs' evidence.

Defendant then read in evidence an extract from a letter dated March 9, 1855, and written by appellees to said Cole, as follows:

"Can that demand against Alford & Chapman be collected, if sent to you?"

Also, another letter from plaintiffs to Cole, as follows:

"Can you get at that old matter of John Chapman & Alford, but due Hackney, Jenks & Co., and send it to me on receipt of this? If not, can you give us a statement of the balance due, and how we must proceed to get it?"

This was all the evidence.

The court, reciting on the record that the sheriff had returned the execution, and "it appearing from his return thereon indorsed, he sold the property of said defendant on said execution, on the 25th day of June, 1855; and that the same was struck off to Cole (who is stated in the return to have been agent of plaintiffs) for $619.09;"

And it further appearing to the court that Cole was not the agent of plaintiffs;

And that said sheriff *collected* on said execution the money due thereon, June 25, 1855;

And that plaintiffs have received thereon $400;

That the amount due thereon now from said sheriff is $219.09, besides the penalty imposed by statute;

Ordered, that Day pay over to plaintiffs the $219.09, with twenty per cent. thereon from 25th June, 1855, till paid; and further, that he pay the cost of this proceeding.

To this decision defendant excepted; then moved for new trial, which was overruled, and he excepted.

T. Lyle Dickey, for Appellant.

Grant Goodrich, for Appellees.

Caton, C. J. This was a summary proceeding by motion under the 44th section of the practice act, against the sheriff of Kendall county, for failing to pay over money by him collected on an execution. The proof and even the complaint which is the foundation of the proceeding, fails to show that any money ever actually came to the hands of the sheriff upon the execution. We think the proof satisfactorily establishes that the execution was sent to Cole by the attorney of the plaintiff, and was by Cole handed to the sheriff, who levied upon certain lands, which were bid off by Cole in his own name, and probably assigned by him for his own benefit, but that he never paid to the sheriff any money upon that bid, designing and intending to pay the money directly to the plaintiff or his attorney, and that he did actually pay to the plaintiff's attorney the greater part of the money called for by the execution. In the view we take of the statute under which this proceeding was instituted, it is unnecessary to inquire whether the sheriff supposed that Cole was the authorized agent or attorney of the plaintiff or not, or whether he was in fact such agent or attorney. Admitting that he knew otherwise and improperly gave Cole a credit upon his bid, and trusted him to pay the amount of the bid to the plaintiff in the execution, still he is not liable for such official misconduct under the statute, but a remedy must be sought upon his official bond or by an action on the case against him. This proceeding against a sheriff is only authorized for failing to return an execution, or failing to pay over money collected upon an execution, and cannot be maintained for failing to collect money upon an execution or for any other official misconduct than that mentioned in the law. The

statute is penal in its character, punishing the sheriff with a penalty of twenty per cent. upon the amount of money collected and not paid over, and must be strictly construed. We cannot extend it by construction so as to make it embrace cases not within the expressions of the enactment. As the proof fails to show that the sheriff ever did receive any money on this execution which he failed to pay over, the judgment against him must be reversed.

Judgment reversed.

J. Tilden Moulton *et ux.*, Plaintiffs in Error, *v.* Harvey B. Hurd, Defendant in Error.

ERROR TO COOK.

A court has no power to reform the deed of a married woman, for any mistake in its provisions.

This was a bill in chancery, filed by the defendant in error against the plaintiffs in error, on the 29th day of March, A. D. 1855, setting forth, that on or about the 27th day of October, A. D. 1853, Charlotte Harden Moulton, being then seized of the premises thereinafter mentioned, and her husband, J. Tilden Moulton, in order to secure to the orator the payment of $4,009.86, being for a portion of the purchase money to be paid for the premises thereinafter mentioned, at that time sold to the said Charlotte Harden Moulton, secured to be paid by four promissory notes of even date with the mortgage thereinafter mentioned, each for the sum of $852.46, and due in one, two three, and four years from the date hereof, with interest at six per cent., payable annually, which notes were signed by J. Tilden Moulton, made their mortgage, dated October 27th, 1853, to the orator, thereby conveying to him part of the S. E. quarter of section 33, in township 40 north, range 13 east, containing one hundred acres, more or less, with a proviso in said mortgage contained: "That if the said party of the first part should well and truly pay, or cause to be paid, to the orator the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the notes above mentioned, according to the true intent and meaning thereof, then and in that case, said mortgage should be null and void;" and with a further proviso therein contained, *that in case "of failure to pay" any one or more of the payments of principal and interest at the time and*

times the same were therein specified to be paid, the whole sum and interest therein mentioned should become due and payable, but averring that the words "*of failure to pay*" were inadvertently left out of the covenant and agreement above referred to, and that the orator and the defendants meant to insert said words so as to make said agreement read as above set out in substance.

And further, setting forth the acknowledgment and record of said mortgage in due form, the non-payment of the first of said notes, due October 27, 1854, and the interest on the whole sum of $4,009.86 for one year.

And praying that the defendants might answer upon oath, and be decreed to pay the whole sum of $4,009.86, with interest, and in default thereof that a sale might be made; and for general relief.

Attached to the bill of complaint is a copy of the mortgage mentioned therein, the only material part of which is the condition, and that is as follows:

"Provided always, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the above mentioned notes, according to the true intent and meaning thereof, then and in that case, these presents and everything herein expressed shall be absolutely null and void.

"It is further understood, that in case any one or more of the above payments of principal or interest, at the time or times the same are above specified to be paid, the whole sum and interest above mentioned shall become due and payable, this mortgage being given for purchase."

The defendants filed their answer on oath, setting forth that, on the 27th day of October, A. D. 1853, as guardian of William Brown, the said Harvey B. Hurd, in pursuance of an order to that effect made by the Cook County Court of Common Pleas, in and for the county of Cook and State of Illinois, exposed for sale the interest of said William Brown in said premises, and then and there sold the same to Charlotte Harden Moulton for the sum of $4,362.62, upon the following terms, to wit: one-fifth cash at the time said purchase was made, and the remainder in four equal annual installments, with six per cent. interest, to be secured upon said premises by mortgage.

That the said Charlotte Harden Moulton paid to said Hurd the sum of $942.78, and executed the mortgage and notes mentioned in said bill, with her said husband, which said mortgage

was left as an escrow until the said Hurd should deliver to said Charlotte Harden Moulton a certain deed of one David Coulson, and that although said Hurd did procure said deed, yet that he did not procure or deliver the same as aforesaid until the 30th day of October, 1854, some time after the first payment under said mortgage became due and payable; and setting forth, also, that said Hurd had never made any report of said sale under said order, nor procured any confirmation thereof, and that by reason of such neglect, the equitable title to said premises still remained in said William Brown.

The execution of said notes and mortgage is admitted; but the said defendants say that it was not understood between said Hurd and said defendants that in case of failure to pay any one or more of said payments of principal or interest at the time or times when the same are specified to be paid, that the whole sum and interest should become due and payable; and said defendants further say, that it is not true that they intended to insert the words "of failure to pay" so as to make the clause in said mortgage read as an agreement to that effect, but that said clause was surreptitiously inserted in said mortgage after the same was read by J. Tilden Moulton, one of said defendants.

Replication filed.

On the 22nd October, 1855, the complainant filed his supplemental bill, setting forth that on the 29th of March, 1855, said complainant filed his bill in this court against said Charlotte Harden Moulton and J. Tilden Moulton, and giving the substance thereof as hereinbefore set forth; and in addition to the matters in said original bill stated, said supplemental bill sets forth, that before any proceedings were had in such cause, to wit, on the 29th day of September, 1855, said Hurd made report of the sale of said premises to said defendant, Charlotte Harden Moulton, which said report was duly confirmed by said Cook County Court of Common Pleas, and prays the relief substantially asked for in said original bill.

On the 28th October, 1855, the defendants filed their demurrer to the supplemental bill, on the ground that no new matter had arisen since the filing of the original bill which was proper matter of supplement and which would entitle the complainant to file such supplemental bill.

The demurrer was overruled, and the supplemental bill taken as confessed, for want of an answer thereto.

On the 12th day of January, A. D. 1856, the following decree was made, setting forth that the cause was set down for trial in the Circuit Court of Cook county, to be tried on the 31st day of December, 1855, "and the same having been tried on that day by the court, upon the bill, answer, replication, and supplemental

bill and testimony, which supplemental bill was taken *pro confesso;* and it appearing to the court that the mortgage and notes mentioned in said complainant's bill were made and executed as set forth in said bill, and that it was understood and agreed between the said parties, that in case of failure to pay any one or more of the payments of principal and interest at the time and times the same were therein specified to be paid, the whole sum and interest therein mentioned should become due and payable; and it appearing to the court, from the testimony, that the words "*of failure to pay*" were inadvertently left out of the covenant in said mortgage intended to express that understanding and agreement after the words "in case," and before the words "any one or more," etc.

And it appearing that the said mortgage was given to secure the certain promissory notes aforesaid, being four in number, for the sum of $852.46 each, payable in one, two, three, and four years, respectively, with annual interest at six per cent. per annum; and it appearing that default was made in the payment of the first and second of said notes when the same became due; and it further appearing that there is due upon said notes and mortgage the sum of $3,409.86 principal, and $451.80 interest, making in all the sum of $3,861.66;

It is ordered and decreed, that the said mortgage be and the same is reformed and amended, so that the clause above referred to shall read as follows:

"It is further understood, that in case of 'failure to pay' any one or more of the above payments of principal or interest, at the time or times the same are above specified to be paid, the whole sum and interest above mentioned shall become due and payable."

It is further ordered and decreed, that said *defendant* pay to the said complainant the said sum of $3,861.66, on or before the first day of February, A. D. 1856, or that said premises, or so much thereof as may be necessary, be sold to satisfy said sum and discharge the same, with costs, etc., and to make title thereto to the purchaser thereof.

And that, if premises be not redeemed according to law, that defendants shall deliver title papers appertaining thereto.

There is no statement in the record that any evidence was offered at the hearing other than what appears in the recitals of the decree.

This decree was entered by MANNIERE, Judge.

The defendants bring the case to this court by writ of error, and assign for error:

1st. That the court below erred in ordering foreclosure and correction of mortgage, as the answer of the defendants denied

all the equities of said bill, whereon such correction was asked, and there was no evidence to overcome the answer.

2nd. That sale of premises by guardian to defendant, Charlotte Harden Moulton, had not been confirmed by Cook County Court of Common Pleas when said foreclosure was ordered.

3rd. That the court erred in overruling the demurrer to the supplemental bill of the complainant.

4th. The court erred in rendering a decree on the original bill without evidence in support thereof.

5th. The court had no power to correct a defect in a deed, as against a married woman.

6th. That the said decree is erroneous for divers other errors apparent upon the face of the record and proceedings.

C. Beckwith, for Plaintiffs in Error.

H. B. Hurd, in person.

Walker, J. This was a bill in equity, filed in the Cook Circuit Court, by Hurd, to reform and foreclose a mortgage executed by Moulton and wife on real estate of the wife, to secure the payment of four promissory notes executed by Moulton to Hurd, for $852.46 each, with six per cent. interest from date, payable in one, two, three and four years, and dated on the 27th day of October, 1853. The mortgage contained a condition, that if Moulton and wife should well and truly pay, or cause to be paid, to Hurd, said sums of money, with interest, in the manner specified in the notes, then and in that case the mortgage to be void. It also contained a further proviso that "it was understood, that in case any one or more of the above payments of principal or interest at the time or times the same are above specified to be paid, the whole sum and interest above mentioned shall become due and payable, this mortgage being for purchase." The bill alleges that the words, "of failure to pay," should have been, according to the understanding of the parties, inserted in the last named covenant, after the words "in case," and before the words "any one or more," but that, owing to inadvertence and mistake, they were omitted. The bill alleges that the first note had fallen due, and that it, together with the interest on the others, remained unpaid. And prayed that the mortgage be reformed and foreclosed for the amount of all the notes and interest. The defendants, as required by the bill, answered under oath, and denied that any mistake had occurred in executing the mortgage, and that the words, "of failure to pay," were not by mistake and inadvertence omitted to be inserted in the mortgage, as charged in the bill. To this answer

a replication was filed. The complainant subsequently filed a supplemental bill substantially the same as the original bill, but alleging that the second note had fallen due and was unpaid, and the prayer was the same as in the original bill. To the supplemental bill defendants demurred, which the court overruled. The supplemental bill was taken as confessed, and the court decreed a foreclosure of the mortgage, for the amount due on the four notes.

This record presents the question whether a court of equity has the power to reform the deed of a married woman.

At the common law, a *feme covert* could not, by uniting with her husband in any deed of conveyance, bar herself or her heirs of any estate of which she was seized in her own right; or of her right of dower in the real estate of her husband. The only mode in which a married woman could, at common law, convey her real estate, or bar her right of dower, was by uniting with her husband in levying a fine. This was a solemn proceeding of record in open court, and the judges were supposed to watch over and protect the wife's rights, and ascertain by a private examination that her participation in the act was voluntary and unconstrained. This is the principle upon which the efficacy of a fine is placed by most of the authorities. 3 Cruise Dig. 153, title 35, chap. 10.

Acting upon the principle that the participation of the wife in the transfer of her real estate must be free and unconstrained, the courts have held that an agreement made by a *feme covert*, with the assent of her husband, to sell her real estate, is absolutely void at common law, and that such a contract could not be enforced in equity. And that the whole system of the common law is opposed to the enforcement of the contracts of married women for the sale of their real estate. And that it is a fundamental principle of the common law, that such contracts are void, except when she conveys her estate by a fine duly acknowledged, or by some matter of record. 5 Conn. R. 492. Our conveyance acts have, however, changed the mode by which a married woman may convey her real estate. It enables her to do so, by joining with her husband in a deed for that purpose. And which, to be effectual, must be acknowledged before one of the officers of the law authorized to take such acknowledgment. To give it validity, he must examine her separate and apart from her husband, after having explained to her the contents and effect of such deed, whether she executes it freely and voluntarily, without the coercion of her husband. R. S. 1845, 106, sec. 17.

This provision of our statute, it will be observed, is an enlargement, and not a restriction, of the common law powers of

a *feme covert.* It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same force and effect of a fine; but if not acknowledged in accordance with the statute, no estate passes. The statute must be complied with, and if it is not, the deed is left, as at common law, absolutely void. *Lane* v. *Soulard*, 15 Ill. R. 123.

In New York and Ohio, where they have statutes similar to ours, their courts have repeatedly refused to enforce the contracts of married women for the conveyance of their real estate, and also to rectify and reform mistakes in deeds made by them for a conveyance of their lands; upon the ground that their deeds, to be effectual, must be acknowledged freely and voluntarily, and in the mode prescribed by the statute. *Knowles* v. *McCambry et al.*, 10 Paige R. 342; *Martin* v. *Develly*, 6 Wend R. 10; *Carr* v. *Williams et al.*, 10 Ohio R. 305; *Purcell* v. *Garhore et al.*, 17 Ohio R. 105.

By reforming the mortgage it was essentially changed. As it was executed and acknowledged, the complainant could only foreclose for the amount of each note as they severally became due, while, by that instrument as reformed, he could foreclose for the whole amount of the notes, upon default in the payment of either of them. This was to change the deed most materially, and to make it altogether a different instrument from the one executed by the wife of Moulton; and against her consent, and against the intention and understanding of the parties at the time the mortgage was made, if her sworn answer is to have any weight—and it stands uncontradicted by any evidence. This would be to make a deed for the wife against her consent. This the court has no power to do; even the legislature could not give it effect, unless she acknowledged it freely and voluntarily in the mode prescribed by the statute. *Lane* v. *Soulard*, 15 Ill. R. 123.

The court below erred in reforming this deed, and in foreclosing the mortgage for more than the first and second notes, the others not being then due. The decree of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

Richard K. Swift and James S. Johnson, impleaded with Lyman P. Swift, Appellants, *v.* James B. Whitney *et al.*, Appellees.

The Same, Appellants, *v.* George B. Marsh, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where there are various objections to testimony, some of which may be removed, the party objecting must indicate his grounds, so as to furnish the opposite party an opportunity to obviate the objection, else he cannot avail himself of it in this court.

Certificates of deposit are admissible as evidence under the common counts.

The court may assess damages on a certificate of deposit, payable in currency.

The facts of these cases are stated in the opinion of the court. The causes were tried before J. M. Wilson, Judge of the Common Pleas, at January term, 1858.

Scates, McAllister, Jewett & Peabody, for Appellants.

E. R. Hooper, and John M. S. Causin, for Appellees.

Walker, J. These cases present the same questions, and will be considered together in our opinion. The plaintiffs sued out summons in assumpsit from the Cook County Court of Common Pleas, which was served on Richard K. Swift and James S. Johnson, Lyman P. Swift not being found. In each case, the common counts only were in the record, when the judgment was rendered by default against the defendants, who had been served. The court assessed the damages severally on the instruments, as follows:

No. 169. Richard K. Swift, Brother & Johnston,

Chicago, Nov. 18th, 1857.

Received from Whitney & Haven four hundred and seventy-seven 23-100 dollars, payable, in currency, to the bearer hereof, for account of certified checks.

R. K. SWIFT, BROTHER & JOHNSTON,
Per R. C. Wright.

No. A. 262,
State of Illinois.

Savings Department of R. K. Swift, Brother & Johnston, Bankers.

Chicago, August 8, 1857.

G. B. Marsh has deposited with us three hundred dollars in funds, as stated below, to the credit of himself, to be paid in like funds to his order hereon.

Currency, $300
Gold,

$300

R. K. SWIFT, BROTHER & JOHNSTON,
By B. B. Chambers.

The objection is urged that these instruments were not admissible under the common counts, without their execution having been proved. This court has held that, "where various objections may be made to evidence, some of which may be removed by other proof, the party making the objections ought to point out specifically those he insists on, and thereby put the adverse party on his guard, and afford him an opportunity to obviate them. He ought not to be permitted, after interposing a general objection, to insist on particular objections in this court, which, if they had been suggested in the court below, might have been instantly removed. A due regard to the character of the courts and the rights of suitors, will not for a moment tolerate such a practice." *Sargent* v. *Kellogg*, 5 Gil. R. 281. And the same doctrine is laid down in the case of *Russell* v. *Whitesides*, 4 Scam. R. 11. These cases are decisive of this point. The bill of exceptions does not show that the objection was made in the court below, and it cannot be taken here for the first time.

It was objected that these instruments were not admissible as evidence under the common counts. This depends upon whether they are promissory notes. It is the well established doctrine, in England and this country, that bills of exchange between the drawer and payee, and promissory notes, are evidence, under the counts for money lent, and for money had and received, and money paid for the use of defendant. Chitty on Bills, 578, and authorities cited. While this is the law, it is not usual, in practice, to rely alone on the common counts, and where they are relied on, the plaintiff should be required to file a copy of the note or bill ten days before the term, or the court should grant a continuance, if asked for, otherwise it might operate as a surprise, and work great injustice to the defendant. It has also been held that, when introduced under the common counts, the defendant may rebut the presumption that the note or bill was given for money lent, money had and received, or money paid, and that it was for some other consideration. These instruments are given to the persons of whom the consideration was received; one was payable to his order, and the other to bearer, and were payable in currency. They seem to possess all the requisites of a promissory note. They specify the amount to be paid, the person to whom payable, are payable on delivery, and without any contingency, and in currency. They might, undoubtedly, have been negotiable under our statute, if not by the law merchant. We are, therefore, satisfied that they were admissible under the common counts. The question whether the court could assess the damages, depends upon

whether currency has a fixed or fluctuating value. By the term currency is understood bank bills, or other paper money issued by authority, which pass as and for coin. And it is the well recognized doctrine that a tender in such bills, in discharge of a money debt, is good, if not refused because it is not in coin. *Snow* v. *Perry*, 9 Pick. R. 539; *Towson* v. *The Havre de Grace Bank*, 6 Har. & J. R. 53; *Lincoln et al.* v. *Cook*, 2 Scam. R. 62; 2 Phillips Ev., 133, and authorities cited. In *Miller* v. *Reid*, 1 Burr. R. 457, Lord Mansfield observed: "These notes are not, like bills of exchange, mere securities or documents for debts, nor are so esteemed, but are treated as money, in the ordinary course and transaction of business, by the general consent of mankind; and on payment of them, the receipts are always given as for money, not as for securities or notes." In the case of *Handy* v. *Dobbin*, 12 J. R. 220, it was decided that bank bills could be levied on by execution, and that they are treated *civiliter* as money. In *Mann* v. *Ex'rs Mann*, 1 Johns Ch. R. 236, it was held that a bequest of all moneys embraced gold and silver, or the lawful circulating medium of the country, and may extend to bank notes when they are known and approved of, and used in the market as cash. And 15 Ves. R. 207, sustained the doctrine of that case. In the case of *Judah* v. *Hains*, 19 J. R. 144, the court decided that a note, payable in bank notes current in the city of New York, was a valid note. The court say they will take notice that notes current in the city of New York are of cash value throughout the State, and are distinguished by those words from other bank notes, which are received at a discount, and hence it is immaterial whether the notes of banks of other States might be tendered in payment, provided they are current in the city of New York; in that case they are considered cash, equally with the current bills of this State.

From these authorities it would seem that current bills, or currency, are of the value of cash, and exclude the idea of depreciated paper money. If, then, currency is taken as and for coin, it follows that such is its value, and the court did right in assessing the damages on these notes; and as no error is discovered in these records, the judgment of the Common Pleas, in these cases, should be affirmed.

Judgment affirmed.

WILLIAM S. WILLIAMS, Appellant, *v.* JOHN REIL *et al.*, Appellees.

APPEAL FROM BUREAU.

In an action of trespass, unless the act complained of is willful, vindictive damages cannot be given.

THIS suit was originally brought by appellees against appellant, before a justice of the peace. The summons was as follows:

STATE OF ILLINOIS, } ss.
BUREAU COUNTY, }

The People of the State of Illinois to any Constable, greeting: You are hereby commanded to summon William S. Williams to appear before me at my office in Milo, on the 17th day of January, 1857, at 7 o'clock P. M., to answer the complaint of John and Thomas Reil, for trespasses on personal property, to their damage $100—a certain demand not exceeding $100—and hereof make due return as the law directs.

Before the justice the plaintiffs filed a statement of their cause of action, as follows:

THOMAS AND JOHN REIL } *Justice's Court, Milo, Bureau County.*
vs.
WILLIAM S. WILLIAMS. }

Trespass on personal property. Damages, $100.

The gist of this action is, in that the defendant's cattle and hogs, between the first of May, 1856, and December of the same year, destroyed the plaintiffs' crops to the damage of $100. The appellees recovered a judgment before the justice; Williams appealed to the Circuit Court.

The transcript of the justice states the action to be an action of trespass on personal property.

The jury found a verdict for the plaintiffs, in the Circuit Court.

The defendant moved for a new trial, which motion the court overruled, and the defendant excepted.

This cause was heard before BALLOU, Judge, at September term, 1857.

GLOVER & COOK, for Appellant.

M. T. PETERS, for Appellees.

BREESE, J. The ninth instruction asked by the defendant, in these words: "If the jury should find the defendant guilty, they

should not allow the plaintiffs damages beyond what they really sustained by the defendant's cattle and hogs trespassing, unless it is proved that the defendant was willing that his cattle and hogs should trespass upon the plaintiffs' crops," should have been given by the court.

It states the true rule, as we understand it, in such cases, that unless the trespass was willful, vindictive damages cannot be given. The court should so have instructed the jury.

The judgment is reversed, and the cause remanded for further proceedings in conformity to this opinion.

Judgment reversed.

Ulyses M. Warner, impleaded, etc., Appellant, *v.* Eliza Crane, Appellee.

APPEAL FROM WINNEBAGO COUNTY COURT.

The giving of further day of payment to a principal debtor, without the assent of the surety, discharges the latter from liability.

Pleas stating the above fact amount only to the general issue, and will be bad on special demurrer; and if there was a plea of non-assumpsit, and no bill of exceptions showing the contrary, it will be presumed that the party availed himself of this defense on the trial, and a judgment against him will be sustained.

This was an action of assumpsit, tried at the June term, 1857, of the County Court of Winnebago county. Both defendants appeared and pleaded, and judgment against defendants for $183.48, and costs of suit, from which judgment defendant Warner alone appealed to this court.

Plaintiff declared in an action of assumpsit against both defendants. The declaration contained one special count and the common counts. The special count was upon the note of said defendants, U. M. Warner and Ben. Davis, for the sum of two hundred dollars, dated August 13, 1856, payable to Edward M. Kitchell, or order, sixty days after date thereof, signed Ben. Davis, U. M. Warner, which note had been indorsed by Edward N. Kitchell, to the plaintiff.

Defendants severed in their pleas.

Defendant Davis pleaded the general issue, and gave notice in substance that the beneficial interest in said note was still in Kitchell, the payee thereof; that the note was for money loaned, and that more than the legal rate of interest was included in said note; and that he had paid said Kitchell money at three different times, for the extension of time of payment of said note,

after maturity thereof, amounting to $28; and plaintiff added similiter to plea of defendant Davis.

Defendant Warner pleaded, in said cause, four pleas:

1st. The general issue.

2nd. That defendant Warner signed the note in question as surety for the other defendant, which Kitchell, the payee of the note, then well knew; that the note was not indorsed until after it became due, and that said Kitchell was then the real owner of the note, and the person for whose benefit the suit was prosecuted. That at the maturity of said note, said Kitchell (then being the owner thereof), without the knowledge or consent of the defendant Warner, for the sum of eight dollars to him paid by said defendant Davis, contracted and agreed with defendant Davis to extend the time of payment of said note for sixty days after maturity thereof, to wit, from October 13, to December 13, 1856.

3rd. That the note in question, in fact, belonged to Edward N. Kitchell, the payee thereof, and that the suit was prosecuted for his benefit. That defendant Warner signed the note as surety for defendant Davis, which fact was known to Kitchell at the making said note; that said Kitchell was the owner and holder of the note at its maturity, and that he, said Kitchell, then, without the knowledge or consent of said Warner, in consideration of eight dollars, then paid him by said Davis, agreed with said Davis to extend the time of payment of the note for sixty days after maturity thereof, to wit, until December 13th, 1856. And that on said 13th day of December, 1856, said Kitchell, he still being the owner of the note, (without the knowledge or consent of defendant Warner,) in consideration of the sum of ten dollars, to him paid by said Davis, agreed with said Davis further to extend the time of payment of said note for the period of sixty days, to wit, until February 13th, 1857. And that on said 13th of February, 1857, said Kitchell, still being the owner of said note, in consideration of the further sum of ten dollars, to him paid by said Davis, again agreed with said Davis to extend the time of payment of said note sixty days, to wit, until April 13, 1857; all of which was unknown to defendant Warner.

4th. That the plaintiff has no interest in the supposed promises upon which action was brought; that the same belong to Edward N. Kitchell; that Kitchell was the beneficial owner of the note in question, and the payee therein, and the same was not assigned until long after maturity. That defendant Warner, at the making said note, signed the same as surety for Davis, and in no other capacity, which was then known to said Kitchell,

the payee; that afterwards, and after the maturity of the note, to wit, on the 13th day of December, 1856, the said Kitchell, he still being the holder and owner of the note, in consideration of the sum of ten dollars, then paid him by said defendant Davis, then contracted and agreed with said Davis, without the knowledge or consent of Warner, to extend the time of payment of said note for the period of sixty days from that date, to wit, until 13th February, 1857; concludes with a verification to the plea so pleaded by the defendant Warner, wherein he put himself upon the country. The said plaintiff added a similiter.

And the said plaintiff, by her counsel, then demurred to the said second, third and fourth pleas so pleaded by defendant Warner, and each of them.

And assigned, for cause of demurrer,

That said second, third and fourth pleas, each amounts to the general issue.

And thereupon the court, upon hearing said demurrer, sustained the same to the said second, third and fourth pleas, so pleaded by defendant Warner, and rendered judgment for the plaintiff thereon, against defendant Warner.

To the opinion of the court, in so sustaining said demurrer to said second, third and fourth pleas, and entering judgment thereon against him, said defendant Warner, by his counsel, excepted.

The said cause was then submitted to Selden M. Church, Judge of said court, for trial, without the intervention of a jury, and the court found the issues for plaintiff, and assessed her damages at one hundred eighty-three forty-eight one-hundredths dollars.

And thereupon, defendant Warner moved the court for a new trial, which motion was overruled by the court.

And thereupon, the court rendered judgment in favor of said plaintiff, and against said defendants, for the sum of one hundred and eighty-three forty-eight one-hundredths dollars, beside costs of suit.

And thereupon, defendant Warner prayed an appeal to the Supreme Court of Illinois, which was granted.

Errors assigned: That the court erred in sustaining the demurrer of the plaintiff to the second, third and fourth pleas of defendant Warner, and each of them, and entering judgment thereon against defendant Warner.

J. L. Loop, and Lathrop & Brown, for Appellant.

J. W. Wight, for Appellee.

WALKER, J. The doctrine seems to be well settled, that the extension of time and giving further day of payment by the creditor, on a valid and binding agreement with the principal debtor, without the assent of the surety, discharges the latter from liability on the contract. *Davis* v. *The People*, 1 Gil. R. 409; *McHatton* v. *The People*, 2 Gil. R. 638. And the special pleas in this case allege that the payee of the note thus gave time to the principal debtor, without the assent of the surety. They substantially presented a good defense to the action against appellant. One of them avers that the assignment to plaintiff was made after the maturity of the note, and after the time given for payment after its maturity had expired; and the others, that the beneficial interest in the note was still in the payee. A person taking negotiable paper over due and dishonored for want of payment, takes it subject to all defenses by prior holders, and if this note was taken by plaintiff after the expiration of the extended time for payment, the rule of *caveat emptor* applies. If the assignment was only colorable, and the beneficial interest still remained in the payee, and he extended the time of payment as alleged, he should still be held liable for his own acts; and as his receipt would have been good against the claim, upon showing that he was the real party in interest, we are unable to perceive any reason why any other description of discharge would not be equally good. But the demurrer was special, and assigned as cause, that these pleas only amounted to the general issue. There can be no question but the defense set up by these pleas would have been admissible under the general issue. And as a general rule, whatever may be given in evidence under the general issue, is considered as amounting to that issue. Some matters must be pleaded specially, and some others may be; but this defense is not embraced in either of them. We are, therefore, of the opinion that there was no error in sustaining this demurrer. If, however, this was not true, the judgment should be sustained on different grounds. The defense being admissible under the plea of non-assumpsit, the presumption is, that the court below permitted the appellant to avail himself of this defense on the trial; and in this case, the presumption is not rebutted by a bill of exceptions, showing that he was denied that privilege; and failing in that respect, the judgment should be affirmed.

Judgment affirmed.

John F. Stafford, Plaintiff in Error, *v.* Alfred G. Low, Defendant in Error.

ERROR TO COOK.

In an action against a surety upon a bail bond, he may plead in defense that the affidavit upon which the *capias ad respondendum* issued, did not show by facts therein stated, that defendant had refused to surrender his estate, or any presumption that he had been guilty of fraud — and if the facts pleaded are true, they will constitute a complete defense to the action.

The officer executing such a capias, it being regular on its face, would be protected.

On the 29th day of May, 1854, the defendant in error prayed out of the Circuit Court of Cook county a writ of *capias ad respondendum* in his favor, against Henry W. Burlingame, Isaac T. Van Duzer, James C. Pomeroy and Alaza L. Hurd, returnable on the first day of the next term, to be held on the fourth Monday of October, 1854, in action of trespass on the case upon promises, and directed to the sheriff of said county. The writ was marked and indorsed for bail in the sum of $588.32, by virtue of an affidavit filed for that purpose, and on the same day delivered to the sheriff, who, on the 7th day of June, 1854, arrested Burlingame, and thereupon he, with Nelson C. Roe, Ethan A. Bruce and John F. Stafford, as sureties, executed a bail bond of that date to the sheriff, in the penal sum of $1,180, in the usual form. At the return term of the writ, no objection was made to the bail, and the defendant in error, on the 3rd day of December, 1855, recovered judgment against Burlingame for $641.85 damages, and $13.35 costs. On the 29th day of February, 1856, a *fi. fa.* was issued, and on the 6th day of December, 1856, returned "not satisfied." On the 6th day of December, 1856, an affidavit was filed and a *ca. sa.* issued, which was on the same day delivered to the sheriff, who, on the 6th day of March, 1857, returned "that Burlingame was not found in his county." Thereupon, the present action of debt was commenced by the defendant in error against Burlingame, Bruce, Roe and Stafford. Stafford, the plaintiff in error, was served, but the others were not found.

The declaration sets forth the above facts. Stafford appeared and pleaded "that the affidavit upon which the *capias ad respondendum* was issued against Burlingame, upon which Burlingame was held to bail, as alleged in the declaration, did not comply with the statute, and was wholly insufficient in the law, in that the affiant did not show by facts therein stated, or circumstances detailed, either that the defendants had refused to surrender their estate for the benefit of their creditors, or any presumption that said defendants had been guilty of fraud."

To this plea a general demurrer was filed. The court below sustained the demurrer, and rendered judgment for the defendant in error for $1,180, debt, and damages $703.09, and costs; and Stafford brings the case to this court by writ of error.

C. Beckwith, for Plaintiff in Error.

Ballingall & Adams, for Defendant in Error.

Walker, J. This was an action of debt brought on a bail bond by Alfred G. Low against Henry W. Burlingame, Nelson C. Roe, Ethan A. Bruce and John F. Stafford, in the Cook Circuit Court, to the April term, 1857. It is averred in the declaration, that on the 29th day of May, 1854, Low sued out of the Cook Circuit Court a writ of *capias ad respondendum* in his favor and against Burlingame, Isaac T. Van Duzer, James C. Pomeroy and Alaza L. Hurd, returnable to the next October term of that court, in an action of case on promises, and directed to the sheriff of Cook county to execute. It was indorsed for bail in the sum of $588.32, which was on the same day delivered to the sheriff, who on the 7th day of June, 1854, arrested Burlingame, and he, together with Nelson C. Roe, Ethan A. Bruce and John F. Stafford, as his sureties, executed the bail bond sued upon in this case, in the penal sum of $1,180, which was in the usual form. No objection was made to the bail bond at the return term. Afterwards, on the third day of December, 1855, Low recovered a judgment against Burlingame for $641.85 damages, and $13.35 costs. Upon this judgment a *fi. fa.* was issued, and returned, no property found. On the 6th day of December, 1856, Low filed an affidavit on which a *ca. sa.* issued against Burlingame, and was returned not found. That the defendants or either of them had not paid the judgment or surrendered Burlingame in execution, and that the judgment remained unsatisfied. Service in this suit was only had upon defendant Stafford, who filed a plea that the affidavit upon which the *capias ad respondendum* had issued, and upon which Burlingame had been arrested and held to bail as alleged in the declaration, did not comply with the statute and was wholly insufficient in law in this, that the affiant did not show by facts therein stated or circumstances detailed, that the defendants had refused to surrender their estate for the benefit of their creditors, or any presumption that the said defendants had been guilty of fraud. To this plea, the plaintiff filed a general demurrer, which was sustained by the court below, and a judgment was rendered for plaintiff for $1,180 debt, and $703.09

damages, and for costs. To reverse this judgment defendant prosecutes this writ of error.

It is urged that this plea avers facts, showing that the affidavit upon which the *capias ad respondendum* issued, was insufficient to authorize that writ to issue, and that the arrest under it was illegal and the bail bond void. The 15th sec. 13th art. of our State Constitution provides, that "No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." The second section of chap. 14, R. S. 1845, p. 80, provides that "in all actions to be commenced in any court of record in this State, and founded upon any specialty, bill or note in writing, or on the judgment of any court, foreign or domestic, and in all actions of covenant and account, and actions on verbal contracts or assumpsits in law, in which the plaintiff or other credible person can ascertain the sum due or damages sustained, and the same will be in danger of being lost, or the benefit of whatever judgment may be obtained will be in danger, unless the defendant or defendants shall be held to bail, and shall make affidavit thereof before the clerk of the court from which process issues, or a justice of the peace of this State, the clerk shall issue a *capias* and indorse thereon an order or direction to the sheriff or officer to whom such process shall be directed, to hold the defendant or defendants to bail in the sum specified in such affidavit, and it shall be the duty of the sheriff or officer serving such process to take bail accordingly." The third section requires the officer to take a bail bond with sufficient security in a penalty of double the sum for which bail is required, gives the form of the bail bond, and provides for its return. This statute is in direct conflict with the constitution, if it was intended to give a plaintiff the right to imprison his debtor merely by making an oath that the debt will be in danger of being lost, or that the benefit of any judgment he may obtain will be in danger, unless the defendant is held to bail. The constitution has prohibited imprisonment for debt, except when the debtor shall refuse to surrender his property for the benefit of his creditors, or where there is strong presumption of fraud, and until one of these is made to appear, the writ cannot issue, no difference what else may be established. The legislature may undoubtedly impose additional requirements, but have no power to abridge or dispense with those imposed by the constitution. Its requirements are indispensable to the validity of a writ to imprison a defendant for debt. Without the affidavit shows a compliance with the requirements of both the constitution and statute, the clerk has no authority

to issue the writ, and if issued, the sheriff has no power to take bail that will be legal or binding. To hold that he might take a valid bail bond under such a writ, would be to hold that the party, by a violation of the provisions of the constitution, acquired the same rights as if he had acted in accordance with its requirements. A party never can obtain any legal benefit by a violation of the law. Chit. Cont. 513. And a violation of the fundamental law of the State must produce the same effect. While the writ was good as a summons, it was void as a *capias*, for the defendants; but like any other void process which is regular on its face, it would protect the officer executing it, as he need look no farther than to the writ. This plea does substantially show that the affidavit upon which the capias was issued, did not comply with the constitution, and if the facts set up in the plea are true, they constituted a defense to this suit, and the court below erred in sustaining the demurrer and rendering judgment for plaintiff. The judgment of that court should be reversed and the cause remanded.

Judgment reversed.

Charles L. Armsby, Appellant, *v.* The People of the State of Illinois, *ex relatione* Eleazar A. Paine, Appellees.

APPEAL FROM WARREN.

There is no redemption from a sale under a proceeding to enforce a mechanics' lien; although the sheriff is directed to execute the decree by a sale of the land.

A judgment creditor cannot, under any circumstances, redeem from a sheriffs' sale until after the expiration of twelve months.

The relator filed his petition in October, 1854, showing the following statement of facts:

In April, 1851, a decree was made in a proceeding under the statute to enforce a mechanics' lien in the Circuit Court of Warren county, Illinois, wherein Jesse Spencer was petitioner and Jeremiah Baily was defendant, ordering and adjudging that the said Baily pay the said Spencer $135 and costs of suit, and that, in default of payment by Baily within six months, that the south-east quarter of section nine, in township eleven north, in range two west, in said county, be sold by the sheriff of said county, upon the delivery to him of a certified copy of said decree. That default was made by said Baily in said payment; that a certified copy of said decree was thereupon delivered to

the sheriff of said county, and that the said sheriff, by virtue of said decree, levied on said land and sold the same on the 23rd day of October, A. D. 1852, after notice given as required by said decree, to said Spencer, for the sum of $160.43; and that a certificate of purchase was then delivered to said Spencer, which was subsequently assigned to George F. Harding.

That at the September term of "the Circuit Court," A. D. 1852, a judgment was rendered in favor of Luzerne Bartholomew, against said Baily, for $640.63 and costs, on which execution was issued and returned within the year; and that on said judgment a second execution was issued on 7th October, A. D. 1853, and delivered to the defendant, then sheriff of Warren county, and was by him levied on said land; and that, on the same day, said Bartholomew then paid said sheriff $183.64 for said Jesse Spencer and assigns, with the view of redeeming said land from said sale to Spencer as a judgment creditor; and that said sheriff on the same day filed in the clerk's office a certificate of redemption "thereof as aforesaid," and having duly advertised, sold said land, on 1st December, 1853, to the relator for $900, and delivered him a certificate of purchase, certifying that he would be entitled to a deed of said premises on 1st February, 1854, unless redeemed.

That no other attempt was ever made by any other person to redeem said land from said sale to Spencer; that two years have elapsed from said sale; that no attempt has been made to redeem the land from the sale to the relator, and that nine months have elapsed since said sale.

That on 15th June, 1854, relator presented to defendant his said certificate of purchase, and tendered and paid his fees, and demanded said deed in accordance with said certificate, but defendant refused and refuses to make and deliver said deed.

The relator then prays that a writ of mandamus may issue against the said defendant, requiring him to make said deed, etc.

The agreement of the parties to said petition, agrees that the petition contains all the facts with relation to the matters therein stated, and that defendant enters his appearance and waives service of alternative writ, and that the facts therein stated may be taken as his return thereto, and that proceedings may be had as if return had been made and issues formed, etc.

The record then shows the judgment of the Warren Circuit Court, at April term, 1855, that peremptory writ issue commanding the defendant to make the deed according to the prayer of the petition, and against defendant for costs of suit.

The defendant prayed an appeal to this court.

The order in this behalf was issued by WEAD, Judge.

The appellant assigns for error the following causes:

1. The court erred in rendering judgment against defendant.

2. The court erred in commanding defendant to make deed to relator.

3. The court erred in not dismissing the petition and rendering judgment for the defendant.

GEORGE F. HARDING, Attorney for Appellant.

GOUDY & JUDD, for Appellees.

BREESE, J. This is an application for a peremptory mandamus, against the appellant, sheriff of Warren county, to compel him to make a deed to Paine, the relator, for a certain tract of land described in his petition, which he alleges he purchased under an execution, and which has not been redeemed as prescribed by law.

The facts are not disputed, and are substantially these: At the April term, 1851, of the Warren Circuit Court, a decree was rendered in a proceeding under the statute, to enforce a mechanics' lien in favor of Jesse Spencer and against Jeremiah Baily, ordering and adjudging that Baily pay to Spencer one hundred and thirty-five dollars and costs of suit, within six months from the entry of the decree, and, in default thereof, the south-east quarter of section nine, in township eleven north, in range two west, in said county, be sold by the sheriff of the county, upon delivery to him of a certified copy of the decree. Baily made default, and a certified copy of the decree was thereupon delivered to the sheriff, who sold the land, under it, on the 23rd day of October, 1852, after notice as required by the decree, to Spencer, for the sum of one hundred and sixty dollars and forty-three cents, and gave him a certificate of purchase, which he assigned to George F. Harding.

At the September term, 1852, of the Circuit Court—of what county is not stated in the petition—a judgment was rendered in favor of one Bartholomew, against the same Jeremiah Baily, for $\$640\,\frac{63}{100}$ and costs, on which execution was issued and returned within the year—what the return was, does not appear—a second execution was issued on the 7th October, 1853, and delivered to appellant, the sheriff, which he levied on the same land above described, and on the same day Bartholomew paid the sheriff $\$183\,\frac{64}{100}$ for Jesse Spencer and assigns, for the purpose of redeeming the land from the sale to him under the decree, which he claimed the right to do, as a judgment creditor, and the sheriff on the same day filed in the clerk's office a cer-

tificate of redemption "thereof as aforesaid," and, having duly advertised the land, sold it, on the 1st December, 1853, to E. A. Paine, the relator, for nine hundred dollars, and delivered him a certificate of purchase, to the effect that he would be entitled to a deed for the land, unless redeemed on the 1st February, 1854.

No attempt was made by any other person to redeem the land from this sale to Spencer under the decree, and none to redeem from the relator, and on the 15th June, 1854, he presented to the appellant, still being sheriff, his certificate of purchase, tendered and paid the fees, and demanded a deed, which the appellant refused to execute. Resort is had to this proceeding to compel him to make the deed in accordance with the certificate of purchase; and the question which arises is, what was the character of the sale under the decree in the proceeding to enforce the mechanics' lien,—the solution of which disposes of all the other points made in the case.

A reference to the language of the decree will determine this, and that is as follows, so far as this point is concerned: "And in default of payment within six months, the premises (describing the land,) be levied upon and sold, upon delivery, to the sheriff of said county, of a certified copy of said order and decree."

It is contended by the relator, that, inasmuch as the sale was not, under the decree, to be made by the master in chancery of the county, or by a commissioner, but by the sheriff, who was required to levy and sell, and did levy and sell, and give a certificate of sale to the purchaser, such sale is, in effect, a sale under execution, or a final process having the effect of an execution.

An execution, or, as it is called in legal parlance, a *fieri facias*, is the ordinary final process on judgments at law, the form and office of which is well known and understood. It will be perceived that the decree awards no execution nor final process of any kind. The decree is, that the land be sold, upon delivery to the sheriff "of a certified copy of said order and decree." A copy of the decree only being delivered to the sheriff, it cannot, in any proper understanding of the terms, be regarded as "an execution or other final process," so as to bring it within the 46th section of the chancery act, chap. 21. That section declares, "when there shall be no master in chancery or commissioner to execute a decree, the same may be carried into effect by execution or other final process, according to the nature of the case, directed to the sheriff or other officer of the proper county, which, when issued, shall be executed and returned by the sheriff or other officer to whom it may be

directed, and shall have the same operation and force as similar writs issued upon a judgment at law.

"Other final process" must be understood such final process as is the practice of a court of chancery to issue, which are ordinarily, besides executions, writs of attachment, of sequestration, and writs of assistance, all which must run in the name of "The People of the State of Illinois." Sec. 26, art. 5, State Const.

All this the court may do, but at the same time, it is not prohibited from the use of other appropriate means to execute its decrees, and it was competent for the court to clothe the sheriff, as a convenient instrument, with authority to sell, without spreading its reasons for so doing upon the record. *Farnsworth* v. *Strassler*, 12 Ill. R. 482.

He is directed by the decree to execute the decree by a sale of the land, upon delivery to him of a certified copy of the decree, thereby making him, *pro hæc vice*, a commissioner for such purpose only. His levying upon the land, and giving a certificate to the purchasers, are his own acts, not warranted by the decree; that instructed him to sell the land. Having done this, he was bound to make a deed to the purchaser, no redemption being allowed in such cases where none is provided for in the decree. *West and others* v. *Fleming*, 18 Ill. R. 248.

It is unnecessary to consider other questions raised on the argument, as they are all subordinate, and merge in the one decided. It may be well to say, however, that on the relator's own showing, his attempted redemption of the land from the decretal sale is a nullity, even if such sale was by execution, and the property subject to redemption. A judgment creditor cannot redeem until after the expiration of twelve months—not within that time. It is a statutory privilege, and must be exercised in conformity to the statute. R. S. 1845, 302.

The judgment is reversed.

Judgment reversed.

The People, *ex relatione* John W. Mitchell, *v.* Richard N. Warfield, County Clerk of Saline County.

APPLICATION FOR MANDAMUS.

Upon the question of relocating a county seat, if the law only authorizes the clerk to canvass the votes cast on the question of relocation, and certify the result, without regard to other votes cast at the same election, he cannot give a certificate which will afford legal evidence that the county seat has been changed, in conformity with the requirements of the constitution.

People, ex rel. Mitchell *v.* Warfield.

A majority of the legal votes cast at a voting for a relocation of a county seat, is sufficient to determine the question. If the law authorizing the vote does not provide for determining the question, the courts may do so on proper application.
Where the parties have commenced proceedings in another tribunal, to obtain an adjudication of the question, this court will not (except in extraordinary cases) interfere by mandamus.

THE People, on the relation of John W. Mitchell, present a a petition for a mandamus against Richard N. Warfield, county clerk of Saline county, to compel him to issue a marriage license authorizing the marriage of the relator and Mollie J. Provine.

The petition states that the relator is a free white male citizen of the county of Saline, over twenty-one years of age; that Richard N. Warfield is the county clerk of Saline county, and that it is a part of his official duty to give marriage licenses to persons entitled thereto under the statute of this State; that on 12th March, 1858, the said Richard N. Warfield was holding, keeping and exercising the duties of his said office at the town of Harrisburg, in the county of Saline; that at such time the relator applied to the said county clerk, at Harrisburg, to give a marriage license authorizing the joining in marriage of the relator and Mollie J. Provine; that the parties were competent to enter upon such relation with each other; that the consent of all persons interested had been obtained, of which the said county clerk had notice.

The petition further states, that the relator tendered the lawful fees to the county clerk, but the said county clerk refused to issue the marriage license demanded, and still refuses so to do.

The petition prays for the issue of an alternative writ of mandamus against the said Richard N. Warfield, county clerk of Saline county, commanding him to give the marriage license, or to show cause why he does not give the same.

The defendant, Warfield, waives the issuing and service of the alternative writ, and makes his return, in which he admits all the statements in the petition, but shows, as the cause why he refused and still refuses to give the marriage license, as follows:

That, by virtue of an act of the General Assembly, entitled "An Act to relocate the county seat of Saline county," approved February 7, 1857, on Tuesday after 1st Monday in November, 1857, an election was held in Saline county for the relocation of the county seat of the said county.

That 1440 votes were polled at the election. That Harrisburg received 725 votes, Raleigh 689 votes; and 26 persons voting at said election did not vote for either place.

That, in compliance with the aforesaid law, and the election thereunder, on the 12th December, 1857, he removed his office of county clerk from Raleigh to Harrisburg.

That on the 19th December, 1857, one Lenson B. Carnes filed his bill in chancery against defendant and other county officers.

That, at a special term, Circuit Court of Saline county, held at Raleigh, 8th March, 1857, their answers and replications thereto were filed.

That, on the 12th day of March, at said court, the court awarded an injunction against said defendant and the other county officers, as prayed for in the bill of complaint.

That, when the relator applied for said license, defendant was at a loss to know how to proceed, the law and election thereunder requiring him to hold his office at Harrisburg, and the injunction (awarded but not issued) requiring him to hold his office at Raleigh.

That he refused to issue the marriage license as stated.

That he submits the question whether it is his duty to remove to Raleigh with his office, or keep the same in Harrisburg, and issue to said relator the marriage license as applied for.

Submits his return, and prays to be dismissed with costs, etc.

And the said relator comes and files his demurrer to said return of the defendant, etc.

The following is an abstract of the bill in chancery, made a part of the answer to the foregoing petition:

The complainant, a tax-payer and citizen of Saline county, shows that by an act of the General Assembly of the State of Illinois, Raleigh was made the county seat of Saline county, and still is said county seat; that courts probate, county and circuit, had been held there, and that the circuit and county clerks and sheriff had resided and kept their offices at Raleigh.

And that public buildings had been erected at Raleigh, at the expense of the county.

Shows the 5th sec., 7th art., constitution, in relation to the removal of county seats.

Shows act of legislature, approved 7th February, 1857, entitled "An Act to relocate the county seat of Saline county."

Avers that said act is unconstitutional, for two reasons:

1st. That the removal of the county seat shall take place upon a majority of those voting for or against such removal casting their votes for Harrisburg, and not a majority of the voters of the county, as contemplated by the constitution.

2nd. That said law does not fix the point to which said county seat was to be removed.

Shows that notice was given and an election held under said law, for the relocation of the county seat, on Tuesday after 1st Monday in November, 1857.

That 1440 votes were cast at said election, 725 for Harrisburg, 689 for Raleigh, and 26 who did not vote for either place

for county seat, showing an apparent majority of five votes in favor of Harrisburg.

He avers that forty or fifty persons entitled to vote at said election did not vote.

He avers that 123 votes cast at said election for Harrisburg were illegal votes; that the number of legal votes cast at said election was 1317—602 for Harrisburg. Schedule of illegal votes annexed.

That the election of Harrisburg was the result of fraud.

And that Raleigh was elected the county seat at said election.

That said election is void by reason of frauds, etc.

That R. N. Warfield, county clerk, since said election, removed his office from Raleigh to Harrisburg; that Hiram Burnett talks of removing his office to Harrisburg.

That Wm. Roark, sheriff of said county, has also removed his office to Harrisburg.

That Moses P. McGehee, James Stricklin and Wm. Watkins, members of the County Court, are threatening to hold the courts at Harrisburg.

That R. N. Warfield, county clerk, removed his office in compliance with an order of said court.

And are about contracting for the erection of public buildings at Harrisburg, to the injury of the tax-payers of the county.

That the County Court threatens to sell the public buildings at Raleigh.

That defendants in concert refuse to recognize Raleigh as the county seat, but claim that Harrisburg is the county seat.

Prays for an injunction against the defendants, restraining and enjoining the clerks and sheriff from keeping or holding their offices at Harrisburg, and requiring the county clerk and sheriff to return to Raleigh; restraining the county judge and county justices from holding their courts at Harrisburg; from contracting for the erection of public buildings there; from selling the public buildings at Raleigh; from making roads to or from Harrisburg, or spending any county funds for the improvement thereof, etc.

The bill is sworn to.

The separate answer of Moses P. McGehee admits that Raleigh was the county seat; denies that it now is the county seat.

Admits the passage of the law of February 7th, 1857; denies its unconstitutionality.

Admits the notice and the election under the law, and the aggregate vote polled at said election, and the vote Harrisburg and Raleigh, etc., and that 26 voters did not vote for either place; denies that a majority of the voters of the county did

not vote for Harrisburg; denies that illegal votes were cast for Harrisburg; gives a list of persons charged in bill to be illegal voters, who are legal voters, etc.; states nothing as to the others.

Charges that Harrisburg received 725 legal votes at said election.

Denies that the persons named upon schedule attached to bill are illegal voters.

Charges that 78 votes, cast for Raleigh at said election, were illegal and fraudulent.

Denies that Harrisburg was elected by fraud; charges that it was the free choice of the people of the county.

Admits that, after it was ascertained that Harrisburg was the county seat, R. N. Warfield, county clerk, removed his office to Harrisburg, about the 12th December, 1857, and entered upon the discharge of the duties of his office there.

Admits that, as county judge (after the county clerk removed his office there), he held his courts at Harrisburg, both county and probate.

Admits that Wm. Roark, sheriff of said county, removed his office to Harrisburg, also.

Denies that the County Court has ever made an attempt to erect public buildings at Harrisburg, squandered any of the public money, or contemplates selling the public buildings at Raleigh.

Knows nothing of persons entitled to vote at said election who did not vote thereat.

Charges that, when the law of 7th February, 1857, was passed, Harrisburg was known as a town near the centre of the county, six miles south of Raleigh; contained a large number of inhabitants; was regularly laid off, platted, and known by the voters of said county.

Signed, sworn to, etc.

W. B. Scates, and G. B. Raum, for Relator.

R. S. Nelson, and B. C. Cook, for Respondents.

Walker, J. The law for the election for the relocation of the county seat of Saline county, under which this election was held, was not as broad as the requirements of the constitution authorizing a relocation of county seats. That provision requires that a majority of the voters of the county shall vote for the change. This law only requires the clerk to canvass the votes cast on the question of relocation, and certify the result, without regard to other votes cast at the same election. Beyond this, in that certificate, he is not authorized to go.

Therefore, under that law, he can give no certificate which will afford legal evidence that a majority of the voters of the county have voted for the one place or the other. His certificate, therefore, cannot afford legal evidence that the county seat has been changed, under the provisions of the constitution. That must be an open question to be tried in any legal mode, the same as if the law had not authorized him to canvass the vote at all. The statute itself cannot be sustained under the constitution, if we adhere to its literal expressions, for it requires, in order to relocate the county seat, but a majority of the votes cast on the question of relocation, whereas the constitution goes farther, and requires a majority of the voters of the county. The law may be sustained by reading it in the light of the constitution, and construe it as giving effect to the affirmative vote, when such affirmative vote is by a majority of the legal voters of the county. The legislature may have assumed, and doubtless did, that all would vote upon the question, and such is the practical effect if we count the votes in the negative, which are silent on the subject. In this mode alone can the law be sustained authorizing township organization, which has been in operation in most of the northern counties of the State since the adoption of the constitution. It is a question of no small difficulty to determine in what mode it shall be ascertained who are the voters of the county, so as to determine whether a majority have voted in favor of a relocation.

The same difficulty arises under the law authorizing township organization. This portion of the constitution must receive a practical construction. We understand it to assume—and such, we believe, was the understanding of its framers—that the voters of the county referred to were the voters who should vote at the election authorized by it. If we go beyond this, and inquire whether there were other voters of the county who were detained from the election by absence or sickness, or voluntarily absented themselves from the polls, we should introduce an interminable inquiry, and invite contest in elections of the most harrassing and baneful character, if we did not destroy all of the practical benefits of laws passed under these provisions of the constitution. We hold, therefore, that a majority of the legal votes cast at this election is sufficient to determine the question of a relocation of the county seat. See 1 Sneed R. 692.

As the law itself provided no mode for the determination of this question, it must be left to the courts of law for their adjudication, whenever a dispute arises, and is presented to them in proper form. Of this subject, the courts of equity have un-

doubted jurisdiction. See case of Horn R. Kneass, 2 Select Equity Cases, by Parsons, 553.

The case before us shows that a bill in equity was filed in due form, and by proper parties, in the Circuit Court of Saline county, for the purpose of settling this very question, which is now pending and undetermined, and in which a temporary injunction has been issued, restraining the present defendant from keeping his office at Harrisburg, to which it is insisted by the relator, that the county seat of Saline county was removed at the election referred to. Admitting that this court has jurisdiction to try the question in this proceeding for a mandamus, we are not bound to do so, nor is it proper that we should do so, when another court has acquired jurisdiction properly, and is proceeding to exercise it, especially when we are asked to compel a party to do a thing from which he is restrained by an injunction issued by a court of competent jurisdiction. We leave the question, therefore, to be settled by that court, which has every facility of purging the poll books, and ascertaining all the facts upon which a correct decision necessarily depends. In the meantime, as there has been, and can be, no other legal mode of determining the result of this question, the county seat must remain unchanged.

The application for a mandamus must be refused.

Julia Lucas *et al.*, Paintiffs in Error, *v.* John Harris, Defendant in Error.

ERROR TO MARSHALL.

On a bill to foreclose a mortgage, the note or bond to secure which the mortgage was given, should be produced, or its non-production properly accounted for.
This rule should be especially regarded in old transactions.
The holder of the obligation secured by a mortgage, can control the mortgage.
A release of a debt secured by a mortgage need not be under seal.

The defendant, John Harris, who was complainant below, filed his bill in the Circuit Court of Marshall county, on the 8th day of February, 1856, alleging that on the 12th day of May, 1837, Edwin Mills, of the State of New York, was indebted to the complainant in the sum of $700, for the purchase money of S. E. 27, 30 N., 1 W., 3rd P. M., and executed a mortgage to complainant for said premises and two other lots, dated May 12th, 1837, a copy of which is set out in the bill.

He avers that on the 8th day of November, 1855, the mortgage was recorded in the recorder's office of Marshall county, being the county in which the land lay.

Avers that the debt of $700 mentioned in the mortgage has never been paid, nor any part of it, nor interest, and that the same became due on the 9th day of September, 1838, and that a note was given for the said debt, falling due Sept. 9, 1838.

He further charges that after the execution of the mortgage to complainant, to wit: on the 13th day of January, 1839, the said Edwin Mills also executed a mortgage to his brother, Harlow Mills, for a pretended debt of $2,000, on said quarter section of land and other lands.

Charges that said Edwin Mills was not, at the time of the execution of the mortgage, indebted to Harlow Mills in $2,000 or any other sum, but that the same was made to hinder and delay complainant in the collection of his debt.

That the said mortgage to said Harlow Mills was recorded on the 2nd day of March, 1839, and prior to the recording of complainant's mortgage.

Charges that said Harlow Mills had notice of the complainant's mortgage at the time of the making of the mortgage to him, and afterwards promised complainant to pay the same, and that said Harlow Mills frequently admitted to others that he knew of complainant's mortgage, and that the same was unpaid.

The complainant further charges that on the 17th day of February, 1842, the said Edwin Mills and Eliza Ann his wife, for the consideration of $2,100, as expressed in their deed, executed a deed of that date to Harlow Mills, and purporting to make the deed subject to the mortgage of Harlow Mills, and stating therein that the mortgage formed a part of the consideration of the deed.

He charges that at the time of the execution of the deed the said Harlow Mills had notice of complainant's mortgage, and agreed to pay the same.

That Harlow Mills died intestate, on or about the 20th day of October, 1845, and that his widow, Julia Mills, since intermarried with one John Wilson, was appointed administratrix of his estate, and that the said John Wilson also died on or about the year 1845, and that Harlow Mills left, as children and heirs at law, Julia, a minor, now intermarried with James P. Lucas, and William Henry and John Gale, also minors, and that said children and widow are yet the legal owners of the said quarter section of land.

Claims that the said quarter section should be subject to the payment of his mortgage, and have preference of the one execution to Harlow Mills, and that no good or valuable considera-

tion ever passed for the execution of the deed, except the pretended debt of $2,000 specified in the mortgage.

The bill prays that said widow and heirs of Harlow Mills be made parties, and that guardians be appointed, and that the land be sold to pay off the mortgage and interest of complainant.

At the April term, 1856, the respondents answered the complainant's bill, denying that Edwin Mills, on the 12th day of May, or at any other time, was indebted to the complainant in the sum of $700 or any other sum, for the purchase money of said quarter. Deny that said Edwin Mills ever executed the mortgage to complainant, as charged in the bill, and that if any such mortgage was made to complainant, it was without consideration. They admit that a certain paper, claimed to be a mortgage, was recorded on the 8th day of November, 1855. Deny that the sum of $700 or any other sum was due complainant at the filing of the bill.

They admit that on the 13th day of January, 1839, Edwin Mills and wife executed to Harlow Mills a mortgage on the land in controversy and other lands mentioned in the bill. They deny that the mortgage to Harlow Mills was for a pretended debt, and aver that the sum of $2,000 had been due and owing from the said Edwin Mills to said Harlow Mills from the 28th day of June, 1837.

They deny that the mortgage from Edwin to Harlow Mills was made to delay, hinder or defraud the complainant or any other person, and admit that the said mortgage to Harlow was recorded on the 2nd day of March, 1839.

They deny that said Harlow Mills had knowledge in any manner of any mortgage to complainant, and deny that said Harlow ever promised to pay the same.

They deny that Harlow Mills ever acknowledged the existence of a mortgage to complainant as charged. They admit the execution of the deed on the 17th of February, 1842, from Edwin Mills and wife to Harlow Mills, of the premises and others for the sum of $2,100, and deny any knowledge of complainant's mortgage by said Harlow at the time of the execution of the deed.

They admit the death of Harlow Mills; that his widow intermarried with John Wilson, and that he died in 1855 and not in 1845, and that he left the children and heirs at law as mentioned in the bill, and that Julia is married to James P. Lucas.

They deny that there was no good and valuable consideration for the execution of the mortgage and deed, but that the same was *bona fide* and for valuable consideration.

They deny that said Edwin Mills ever owed any sum of

money whatever, or made any mortgage whatever to said complainant, and if any ever was made, deny that it was ever known to said Harlow Mills or his heirs.

They insist that the statute of limitations is a bar to the action, and also that the lapse of time bars any recovery on the mortgage.

That at the time of the execution of the mortgage and deed, the lands conveyed in said mortgage and deed did not exceed $1,000.

The complainant put in general replication. A guardian *ad litem* was appointed by the court for the minors, and who filed his answer denying any knowledge of the facts charged in the bill, and calling for proof, and that the rights of the minors be protected by the court.

At the April term, on the 18th day of April, 1856, the appearance of Edwin Mills was withdrawn by leave of the court, and on the 21st day of Oct., 1858, the complainant took his deposition, which was read on the hearing.

There was no proof whatever in relation to the note to secure which this mortgage was given, but the proof related to the mortgage to Harlow Mills.

The case was submitted to BALLOU, Judge, at the October term of the Marshall Court, 1857, who rendered a decree in favor of complainant for the sum of $1,501.50, and in default of the payment thereof within twenty days, that the mortgaged premises be sold to satisfy the same, after giving four weeks notice by publication; and in case the said mortgaged premises should not sell for enough to satisfy the said amount of said decree, that execution issue against Edwin Mills for the remainder, as on judgments at law.

At the October term, 1857, the defendants entered a motion to vacate the decree for the following reasons, and which motion was overruled:

The debt was barred by the statute of limitations.

Because the note was not produced in evidence, and under such circumstances the court ought to presume the debt paid.

Because of the lapse of time the debt ought to be presumed paid.

Because the court erred in admitting the deposition of Mills in evidence when he was a party to the suit and interested in having a decree rendered against the premises.

Because the evidence was insufficient to authorize a recovery.

Because the note described in the mortgage was not produced in the case.

Because the decree was for too large a sum.

Because the bill was insufficient, not setting out the note nor showing when it became due, nor what rate of interest it bore, if any, nor when interest commenced running.

No notice was proven to Harlow Mills before nor at the time he took his mortgage on the premises.

The payment of taxes was a bar to complainant's recovery, the land being vacant and unoccupied.

The bill does not allege, and it was not proven, that the money could not be collected of Edwin Mills.

WEAD & WILLIAMSON, for Plaintiffs in Error.

N. H. PURPLE, for Defendant in Error.

BREESE, J. Without going into the merits of this case, it is sufficient to say that one defect appears which must reverse this decree.

The bill alleges that a note was executed at the date of the mortgage, and for the same sum of money—both on the 9th September, 1838—and the note payable on that day.

Now, it is well understood that the note is the principal thing, the mortgage being only the incident. It is a security given for the debt mentioned in the note, and nothing more, for the mortgagor remains the real owner of the land, if of land, until the breach of the condition and entry by the mortgagee, or foreclosure. Until this time it is personal estate, and passes as personal property upon the death of the mortgagee. The principal right of the mortgagee is to the money, and his right to the land is only as security for the money. A release of a debt secured by mortgage need not be under seal. *Ryan* v. *Dunlap*, 17 Ill. R. 40.

In *Jackson ex dem.* v. *Willard*, 4 Johns. R. 42, Chief Justice KENT says: "Lord Hardwicke held that, at law, a discharge of a mortgage debt by parol was considered as a discharge of the mortgage; that even the law considers the debt as the principal, and the land as an accident only." He further says: "It is but an incident attached to the debt, and in reason and propriety, it cannot, and ought not to, be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. The control over the mortgaged premises must essentially reside in him who holds the debt. It would be absurd in principle, and oppressive in practice, for the debt and the mortgage to be separated, and placed in different and independent hands."

If this be so, and we do not question it, it is all-important, on a bill filed to foreclose, or to sell, that the note should be produced, or a good account given for its non-production. It would be absurd to deal with an "accident," as Lord Hardwicke calls a mortgage, without accounting for the main fact or principal thing.

And this rule should hold, especially in old transactions like this, and not free from suspicions of its fairness.

The mortgage and note were both executed on the 9th September, 1838, the note payable on that day. The mortgagor died in 1845, and the mortgage deed not placed on record until ten years after the mortgagor's death. All these very suspicious circumstances may be explained, and before any decree can pass in complainant's favor, they must be explained, and the non-production of the note clearly and satisfactorily accounted for. It may be that the note has been paid long since, and that is a reasonable presumption; or, it may be in the hands of another party, who, holding it, would have a right to control this security. *Reavis et al.* v. *Fielden*, 18 Ill. R. 77.

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

Decree reversed.

Chester Carpenter, Appellant, *v.* John Ambroson, Appellee.

APPEAL FROM McHENRY COUNTY COURT.

It is not erroneous to refuse to permit a witness to answer a question which assumes that an arrangement had been made where none had been shown.

A conversation between a witness and the plaintiff to a suit, long before the occurrence of the matters in dispute, is not proper evidence.

Conflicting testimony is left to the jury, and it is the province of that body to weigh it, and unless some gross wrong is perpetrated by the jury, the verdict will not be disturbed.

This was an action of assumpsit, commenced before a justice of the peace, brought by appellee against appellant. Judgment was rendered, in favor of plaintiff, for fifty-two dollars and two cents, and costs of suit, and the suit taken to the County Court of McHenry county by appeal, and the cause coming on to be heard, the plaintiff called, as a witness, Ambrose Ambroson, who testified that he was a son of plaintiff; that the spring after Daniel Carpenter went to California, plaintiff sold defendant a yoke of steers for $28. Plaintiff said he would sell the steers

cheap if defendant would indorse the price upon the $48 note that Daniel Carpenter held against him, which note was left with defendant for collection. Defendant agreed to this and took the steers. Plaintiff broke prairie for defendant to the amount of $10.63. Defendant had hay of the plaintiff to the amount of $6.

After Daniel returned from California, the defendant wanted father to let him turn the price of the steers, the breaking and the hay, upon what the plaintiff owed Daniel for lumber, and apply the balance upon the interest upon the $48 note. To this plaintiff objected, and said it must be indorsed on the $48 note.

Plaintiff admitted that this note was held by defendant only as agent for collection for Daniel Carpenter.

The plaintiff then offered in evidence the note above referred to.

The defendant then called *Daniel Carpenter*, who testified as follows:

I am a brother of defendant. I started from McHenry county for California the last of December, 1851. Before I went I owned two notes against the plaintiff, one for $48, and another originally for $55. There were various indorsements on this note, and about $29 due upon it.

Ques. What arrangement was made between the plaintiff and yourself, at or before the time you started for California, about the payment of the note you had against him?

Objected to by plaintiff, and objection sustained by the court, and defendant excepted.

Witness further testified that, at the time he went to California, he informed the plaintiff that he could pay the notes to Chester Carpenter, the defendant.

Ques. State all you said to the plaintiff at that time, and what his replies were to such statements.

Objected to by plaintiff, and sustained by the court. Defendant excepted.

The jury found for the plaintiff, and assessed his damages at fifty-two dollars and two cents.

The defendant then entered a motion for a new trial, which was overruled by the court, and the defendant excepted.

The court then rendered judgment in favor of the plaintiff.

Glover & Cook, for Appellant.

L. S. Church, for Appellee.

Walker, J. The first assignment of error questions the correctness of the decision of the court below, in refusing to

permit the witness Daniel Carpenter to answer this question: "What arrangement was made between the plaintiff and yourself, at or before the time you started for California, about the note you held against him?" This question is objectionable in form, as it assumes that some arrangement had been made when none had been shown. It does not appear that any arrangement which might have been made by them had any relevancy to the issue the jury were then trying. If it was to show the agency of defendant for the collection of the note, plaintiff had already admitted that fact, and this witness so testified, and that he notified plaintiff before he left for California. We are of the opinion that there was no error in refusing to permit the witness to answer the question.

It was again urged that the court erred in not permitting the witness to testify to all that was said at the time that he notified plaintiff that defendant was witness' agent. We are at a loss to imagine in what manner a conversation between witness and plaintiff, long before the occurrence of the matters in dispute, could tend in any way to shed light on those transactions. There was no error in excluding the evidence.

It was urged that the verdict was not warranted by the evidence. The evidence was conflicting, and it was for the jury to determine which was entitled to the most weight. The evidence showed that appellant got of appellee a yoke of cattle, at twenty-eight dollars, hay amounting to six dollars, and appellee broke prairie for appellant, amounting to ten dollars and sixty-three cents, making, in all, forty-four dollars and sixty-three cents. The evidence showed that the oxen were got in the spring of 1852, and if the other articles were obtained about the same time, there would be over three years from the time when they were obtained before judgment was recovered. It was agreed by all parties that the price of these articles was to be applied on the notes which Daniel Carpenter held against appellee, and if the amount was not indorsed or allowed in that manner, the appellee would be entitled to recover interest from the time it should have been so applied. The jury have, by their verdict, found that such application was not made, and the interest on the amount would make fully as much or more than they find by their verdict. We think the verdict is sustained by the evidence.

We are unable to perceive any objections to the instructions given for the plaintiff below. They seem to contain the law as applicable to the evidence before the jury. Upon the whole record, we are unable to perceive any error for which this judgment should be reversed, and it is, therefore, affirmed.

Judgment affirmed.

Richard K. Swift *et al.*, Appellants, *v.* George Green *et al.*, Appellees.

APPEAL FROM COOK.

Where three are sued, and service of process is upon two, and no appearance for all, judgment cannot go against all.

This case is stated in the opinion of the court.

Scates, McAllister, Jewett & Peabody, for Appellants.

G. W. & J. A. Thompson, for Appellees.

Walker, J. This was an action of assumpsit, brought by Green, Ware and Rice, against Richard K. Swift, Lyman P. Swift and James S. Johnston, in the Cook Circuit Court, to the special January term, 1858. The summons was returned served on Richard K. Swift and James S. Johnston, and, as to Lyman P. Swift, not found. On the 16th day of January, 1858, a judgment by default was rendered against all the defendants for the sum of two hundred and ninety-one dollars and seventy-five cents. There was no appearance entered by defendant Lyman P. Swift. And to reverse this judgment the defendants below prosecute this appeal, and assign for error that judgment was rendered against Lyman P. Swift when he had not been served with process and had not entered his appearance to the action.

It is clearly erroneous to render judgment against all of several defendants when any one of them is not in court by service or otherwise. The service on a portion of the defendants does not give the court jurisdiction of those not served. *O' Conner et al.* v. *Mullen*, 11 Ill. R. 116; *Davidson et al.* v. *Bond et al.*, 12 Ill. R. 84; *Brockman et al.* v. *McDonald*, 16 Ill. R. 112.

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

Judgment reversed.

THORNTON WOLFE, Appellant, *v.* EDWARD STONE, Appellee.

APPEAL FROM PEORIA.

In a bill to enforce a mechanics' lien, where the finding is against the weight of evidence, in a matter of damages arising out of the quality of the work, the decree may be reformed in this court.

THE decree in this case was entered by POWELL, Judge, at December term, 1857, of the Peoria Circuit Court.

The evidence is elaborate, and will not furnish instruction in other cases, and is therefore not inserted.

LINDSAY & LANDEE, for Appellant.

H. GROVE, for Appellee.

BREESE, J. It it unnecessary to review the testimony in this cause very critically. It was a petition for a mechanics' lien. The record shows that the instructions given by the court, were by agreement of parties, and of course no errors can be assigned on them.

The original contract price, for the work to be done, was one thousand dollars; the extra work amounted to three hundred and sixty-nine dollars and twenty-one cents; amounting, in all, to thirteen hundred and sixty-nine dollars and twenty-one cents.

There was a controversy about the quality of the work and the damages sustained on account of defects in it. Five witnesses named different sums, the average being three hundred dollars; and five others testified that it was a good common job. He also paid, on the work, six hundred and ninety dollars and five cents. Allowing the damages, the two sums, the payments and damages, amount to nine hundred and ninety-nine dollars and five cents. Deducting this from the amount of work, leaves a balance against the defendant of three hundred and seventy dollars and sixteen cents. The verdict is for four hundred and eleven dollars and twenty-seven cents, making a difference of forty-one dollars and eleven cents.

There was conflicting testimony about the quality of the work, but the weight of evidence is unfavorable to its quality.

The decree is reduced forty-one dollars and eleven cents, and entered here for three hundred and seventy dollars and sixteen cents, and the costs of this court equally divided between the parties.

Decree reformed.

William W. Bishop, Appellant, *v.* Levi Newton *et al.*, Appellees.

APPEAL FROM KANE.

One party to a contract cannot complain until he has put his adversary in default by a substantial performance of the contract on his part, nor until a failure or refusal to perform by the other.

Where a party contracts to give a title free from incumbrances, the purchaser is not bound to pay his money and receive a deed, while incumbrances exist against the property.

Where A contracted to sell land to B, for which the latter paid down $1,000, and was to pay $2,000 more by a day named, or within fifteen days thereafter, or forfeit what he had paid, and satisfy a certain mortgage, except the interest for a named year, which A was to pay; B being in default by not having paid the $2,000 by the day named, within fifteen days thereafter A sold the land to other parties: *Held*, that as A was himself in default, and that B performed a part of his contract and had within a reasonable time, offered to perform entirely on his part, that on a bill filed for that purpose, A should be made to convey to B.

The contract between A and B was of record, and was notice to all other persons; and whoever dealt with A in relation to those lands, was bound to take notice of it.

This was a proceeding in chancery; the bill states that on the 29th day of September, A. D. 1855, the complainant and defendant Newton entered into the following agreement:

Know all Men by these Presents, That Levi Newton, of the county of Kane, and State of Illinois, is held and firmly bound unto William W. Bishop, of the county of Worcester, and State of Massachusetts, party of the second part, in the penal sum of eighteen thousand dollars, to be paid unto the said party of the second part, his heirs, executors, and administrators and assigns, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators and every of them, firmly by these presents: Sealed with my seal, this 29th day of September, A. D. 1855.

The condition of the above obligation is such, that whereas, the above bounden Levi Newton has this day sold to the said party of the second part, his heirs and assigns, for the sum of twelve thousand dollars, payable as follows: One thousand down, and two thousand on the first day of January, A. D. 1856, and the other nine thousand to be paid to one Leonidas Doty, according to a mortgage made on the 14th day of October, 1854, which he is to assume and pay, *except the interest on said mortgage for the year* 1855 — Deed to be made on the second payment being made, subject to said mortgage — all his right, title and interest to the following described lot or parcel of land, to wit: The land conveyed to said Levi Newton, by deed from Leonidas Doty and wife, on the 14th day of October, 1854, and acknowledged the 4th day of December, 1854; the description of lands which is fully set out in said deed, and which said description is made by agreement a part of this bond. It is also agreed that said Newton is to get it surveyed within one year, and is not to cut or sell any standing timber on said land, and have only the right to take firewood for one fire from that which is down; also then give possession of the premises fully. It is also agreed that if said Bishop fails to make pay-

ment within fifteen days after the first day of January, 1856, he forfeits what he has paid, and all rights under this bond. Upon the payment of said sum being made at the time and in the manner aforesaid, the said Levi Newton, his heirs, executors and assigns, covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, to execute a good and sufficient deed of conveyance, in fee simple, free from all incumbrance, with full and proper covenants of warranty, for the above described premises, except said mortgage above mentioned. Now, upon payment being made as aforesaid, if the said Levi Newton shall well and truly keep, observe and perform the said covenants and agreements herein contained on his part, then this obligation to be void, otherwise to remain in full force and virtue.

Signed, LEVI NEWTON. [L. S.]
WM. W. BISHOP. [L. S.]

That the above bond was recorded in the recorder's office, in Kane county, on the 29th day of September, 1855.

That on the day the bond was executed, complainant paid defendant Newton $1,000, which was indorsed on the bond.

That between the first and fifteenth of January, 1856, complainant told defendant that he would not receive funds from the East as he expected, in time to make payment by the 15th of January, 1856, but if defendant required payment by that time, he would borrow the necessary amount and pay him; defendant replied, "a few days will make no difference."

That on the 5th day of February, 1856, being twenty days after the time mentioned in the bond when the payment should be made, complainant called on defendant and told him he was then ready to make payment and receive his deed, when defendant informed complainant that he was too late, as he had sold said premises—defendant refused to accept payment and make a deed to complainant.

That defendant Newton, on the 5th day of February, 1856, conveyed the land in question to defendants Goudy, for $12,750, being $750 more than the same was sold to complainant for.

That defendant Newton refused to refund the sum of $1,000, which he had received on said bond. That complainant was in Batavia, where defendant Newton resided, from the 15th of January till the 5th of February, 1856, which fact was known to defendant Newton. That the sale to defendants Goudy was purposely concealed from complainant for the purpose of defrauding him.

That by the terms of the bond, defendant Newton was to pay the interest on the mortgage, mentioned therein, for the year 1855, which he had not done at the time he sold to the Goudys. That the interest aforesaid amounted to the sum of $1,000, which was a lien on said premises by virtue of the mortgage.

That complainant repeatedly offered to make payment, and upon refusal by Newton to accept the same, has repeatedly demanded a return of the said sum of $1,000.

And prayed that the court would vacate the deed from Newton to defendants Goudy, decree a specific performance against Newton, and for such further relief as to the court might seem equitable and just.

The answer admits the execution and recording of the bond, and the payment of $1,000, as charged in the bill. That defendant Newton knew complainant was in Batavia from the 15th day of January to the 5th of February, 1856—denies that he agreed to extend the time of payment beyond the 15th day of January, 1856. Admits that complainant told him, Newton, on the 5th of February, 1856, that he was then ready to make payment and receive a deed according to the agreement, that he then told complainant he was too late, as he had sold the premises. Admits he sold to defendants Goudy for $12,750. Admits that the interest due on the mortgage to Doty for the year 1855, amounted to $630, and that the same had not been paid on the 5th of February, 1856, the date of the sale to the Goudys, but avers as an excuse, that early in December, 1855, he wrote to complainant, asking him to stop at Buffalo, N. Y., and pay said Doty $1,000, or deposit that sum in a bank to his credit. That he received an answer to said letter, declining to comply with his request. Admits he told complainant, after the sale to the Goudys, that he should keep the $1,000 he had received, and that complainant told him he would have it or sink another thousand with it.

The defendants pleaded, that on the 18th day of March, 1856, complainant commenced an action at law for the recovery of the sum of $1,000 paid on the bond.

To which there is a general replication.

The decree dismissing the bill was rendered by I. G. Wilson, Judge.

T. C. Moore, and Leland & Leland, for Appellant.

J. H. Mayborne, for Appellees.

Walker, J. This was a bill in chancery, filed by complainant against defendants, for the specific performance of a contract entered into between complainant and defendant Newton, on the 29th day of September, 1855. By the agreement, Newton sold to Bishop several tracts of land, for the sum of twelve thousand dollars. Bishop, at the time of the sale and the entering into the written agreement, paid to Newton one thousand

dollars, and agreed to pay him two thousand more on the first first day of January, 1856, and to assume and pay a mortgage on the lands for nine thousand dollars, except the interest, for the year 1855, which mortgage was given by Newton to one Leonidas Doty, on the 14th day of October, 1854. Newton on his part covenanted and agreed that upon the payment of the two thousand dollars at the time and in the manner specified, to make, execute and deliver to Bishop a good and sufficient deed of conveyance in fee simple, free from all incumbrance, with full and proper covenants of warranty for the premises, except the mortgage to Doty. It was further agreed, that in case Bishop should fail to make payment within fifteen days after the first day of January, 1856, he should forfeit what he had already paid, and all rights under the agreement. Bishop failed to make payment by the fifteenth day of January, 1856. Newton, without having paid the interest on the Doty mortgage for the year 1855, or having tendered a deed to Bishop, on the fifth day of February, 1856, sold and conveyed the same lands to William A. Goudy and Franklin J. Goudy, for twelve thousand seven hundred and fifty dollars, and on the same day, Bishop called on Newton and offered to pay the two thousand dollars due on the first of January, previous, when Newton informed him that he was too late, as he had sold to the Goudys. The contract for the sale by Newton to Bishop was duly recorded in the proper office on the day of its execution. These facts all appear from the bill and answer. The cause was tried in the Circuit Court on the bill, answers and replication, without evidence, when the bill was dismissed, and the cause is brought to this court by appeal, to reverse the decree of the Circuit Court.

The first question presented for our consideration in this case is, whether Newton had the right to declare the forfeiture and sell the premises to the Goudys.

Courts of equity always incline to relieve against penalties and hard bargains of this character, and will hold the party seeking such an advantage to a strict compliance with the contract on his part, before he will be permitted to enforce such a forfeiture. We are, then, to examine and see whether Newton had performed his part of the contract at the time and in the manner required by the agreement; and, if he has, then he had the right to insist upon enforcing the forfeiture when Bishop failed to make payment; but, if he was himself in default at that time, he had no such right. This court laid down this principle in the case of *Brown* v. *Cannon*, where it is said: One party to a contract cannot complain of the other until he has put his adversary in default by a substantial performance of

the contract on his part ; and a failure or refusal to perform by the other. 5 Gil. R. 174. By the terms of their agreement, Bishop was to pay the further sum of two thousand dollars on the first of January, 1856, and to assume the payment of the Doty mortgage, except the interest for the year 1855. This they had expressly provided he was not to pay. It was then left for Newton to discharge. Newton had covenanted that, upon the payment of the two thousand dollars at the time and in the manner specified, he would convey the lands to Bishop by good and sufficient deed in fee simple, free from all incumbrances except the Doty mortgage. The conveyance of the lands freed from such incumbrances was, by the contract, a concurrent act with the payment of the money. Newton was bound by the agreement to be in a condition to so convey, by the first day of January, 1856. This interest was undoubtedly a lien and incumbrance on the land to the amount of $630, which was then due, and for which Doty could subject the lands to its payment, by foreclosing the mortgage. This interest was not paid on the first of January, nor until after the sale to the Goudys. Newton was still in default, when Bishop offered to pay the money, and demanded the conveyance. But, if this was not the true construction of this contract, still the law would not compel Bishop to pay his money and receive the deed, while incumbrances existed against the property, when he had contracted for a title free from such incumbrances. This court, in the case of *Brown* v. *Cannon*, say, that a person who has bargained for a good title will not be compelled to take one subject to suspicion ; the title must be free from suspicion. And in Sugden's treatise on Vendors, the rule is stated to be that where an incumbrance is discovered to exist previously to the execution of the conveyance and payment of the purchase money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel the payment of the purchase money. Sugden on Vendors, 553.

We think these principles are decisive, that Newton had no right to insist upon the forfeiture while he was himself in default.

Then has complainant a right to insist upon a specific performance of the agreement. This branch of equity jurisdiction is regulated, to a considerable extent, by a sound legal discretion. The rule governing courts was stated by Chief Justice MARSHALL to be, that when a bill is exhibited by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances ; and that a condition always entitled to great weight is, that the contract, though not fully executed, has been in part performed ; 6

Wheaton R. 528. And, in a subsequent case, the same court lay down the rule that time may be of the essence of the contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication, from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been exceedingly negligent in performing the contract on his part, or if there has been, in the intermediate period, any material changes of circumstances, affecting the rights, interests or obligations of the parties ; in all such cases, a court of equity will refuse to decree a specific performance, upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this nature, time is not treated by courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not strictly complied with the terms of the contract. *Taylor* v. *Longworth et al.*, 14 Peters R. 172.

The complainant has brought himself clearly within the principles of these rules. He, in part performance of the contract, paid, on the purchase, one thousand dollars. It is true he did not pay or offer to pay the next installment on the day, but he did offer to pay twenty days afterwards. While this is not a strict compliance, it is not gross laches or unreasonable delay, when it is remembered that Newton was himself in default, and not in a position to require payment. And we are, therefore, of the opinion that his conduct was such as entitles him to the relief sought.

It was urged on the argument that complainant had, previously to filing his bill, brought a suit at law for the recovery of the purchase money paid on the agreement ; and had thereby rescinded the contract, and barred his right to relief in this proceeding. In answer to this objection it is only necessary to remark, that, if this be true in point of fact, the record contains no such evidence. It only appears from Newton's plea and unsworn answer. It is new affirmative matter, set up as a defense, and should have been proved to entitle it to consideration by the court.

The contract was duly recorded in the proper office on the day it was executed, and became notice to all the world. And the Goudys were chargeable with notice and took the property subject to all the equities with which it was charged. They acquired no other or better title than Newton then held, and cannot be heard to object to a specific performance of the agree-

ment. From the circumstances of the case, then, in every point of view, we are satisfied that complainant is entitled to the relief sought. And the decree of the Circuit Court is reversed, and the cause remanded, with instructions to that court to enter a decree, for a specific performance of the contract, that complainant pay into court the two thousand dollars, with interest from the first day of January, 1856. That defendant Newton have leave to withdraw it upon delivering a deed of conveyance with the covenants stipulated for in the agreement conveying the premises to complainant, and upon filing a receipt from Doty for the interest on his mortgage for the year 1855; and if he shall fail or refuse to deliver such deed and to file such receipt within a reasonable time to be given for that purpose, that the master in chancery, or a commissioner, be appointed for that purpose, to be empowered and required, on behalf of the said defendants, to convey the premises to said complainant, with covenants by defendant Newton according to his agreement, and with covenants by the said William A. Goudy and Franklin J. Goudy against their acts, and to pay the interest on the Doty mortgage for the year 1855 out of the deposit, unless the same has been already paid; and, that when such deeds of conveyance shall have been delivered, that Newton be allowed to receive the balance of the deposit, after paying the costs of the court below.

And it is ordered that complainant pay one-half of the costs of this court and the defendants pay the other half.

Decree reversed.

JOHN C. CHAMPLIN, Plaintiff in Error, *v.* REES MORGAN, Defendant in Error.

ERROR TO LA SALLE.

If the public is to be charged with the abandonment of a road, the proof of the fact must be accompanied by the further proof that another road has been adopted in its stead.

A public road, established by public authority, continues as such until it shall be vacated by a like authority.

THE conflict before the jury in this case resulted from the fact that two highways crossed the land of the plaintiff in error, one a State and the other a county road. Both of these roads were laid out upon or near the same line. Owing to some inconveniences or obstructions in the laid out lines of road, the

travel had been diverted, and had taken a different route across the close of the plaintiff than that indicated by the surveys. It was insisted that public labor had been employed upon the surveyed line of road at different points, to make it convenient for public use, until the year 1854, but the greatest travel, and for the last few years, the entire passing, had been over another than the surveyed line, which had been inclosed by fence. Some of the witnesses testified that there never was any general travel on the surveyed line of road. There had been a controversy between those who fenced the surveyed road and some of the road officers, the latter insisting that the fence covered the proper line of road. The public generally used the substituted road.

This cause was tried before HOLLISTER, Judge, and a jury, at June term, 1857, of the La Salle Circuit Court. There was a verdict of not guilty, and a judgment for costs against the plaintiff.

O. C. GRAY, for Plaintiff in Error.

LELAND & LELAND, for Defendant in Error.

BREESE, J. This was an action of trespass *quare clausum fregit*, brought by Champlin against Rees, to which the defendant pleaded, among other things, that the *locus in quo* was a common or public highway, across which the plaintiff had erected a fence, and that he removed the rails, etc., as he had a right to do. It was admitted by the parties that he did break and enter, but that, in doing so, he did not go off the surveyed line of the road mentioned in his plea, and that he did no unnecessary damage.

The question before the jury was as to the *locus in quo* being a public highway, and they found the issue for the defendant.

Certain instructions were asked for by the plaintiff, one numbered eight, which the court modified, and then gave to the jury, to which the plaintiff excepted. The instruction as asked was as follows: "If the jury believe, from the evidence, that the public, from 1832 until the commencement of this suit, had ceased to use the said surveyed road, and that the public had adopted another and different line of travel voluntarily, and by so doing, had intended to abandon said surveyed road, as well as all other roads upon the same line, then the jury should find for the plaintiff, even although no other public highway was legally laid out from Ottawa to Dayton by the public authorities."

The instruction was so modified as to include the idea that,

upon abandonment, "the public had acquired the legal right to use of such other line of travel," then they should find for the plaintiff.

We think the modification was a very necessary and proper one, for it does not follow because the public have adopted another and different line of travel voluntarily, that they have, therefore, acquired the right to use such newly adopted line.

It is true the public can be charged with abandonment of a road, but the proof to establish it must be strong enough to establish another line as the road.

A road is of public necessity, and is indispensable to public convenience. It cannot, therefore, be alleged that they have abandoned such an indispensable necessity, without showing they have acquired another in lieu of it.

We think the true principle is, that a road, such as the one in question is claimed to be, laid out and established by the public authorities, must remain such until it is vacated by the same authority, the mode for doing which is plainly pointed out in the statute (R. L. 1845, chap. 93, title "Roads," secs. 10, 19), or be abandoned by non-user, on acquiring the legal right to another road, or the necessity for another road having ceased to exist. The instructions given on the part of the defendant recognize this principle, and though liable to the objection we have before made (*Merritt* v. *Merritt*, ante, 65), that an argument is injected into them, they declare the law.

We think the objections to the legality and validity of this road have all been considered and answered by this court in former cases. *Nealy* v. *Brown*, 1 Gil. R. 10; *Ferris* v. *Ward et al.*, 4 ibid. 499; *Dumass* v. *Francis*, 15 Ill. R. 543; *Louk* v. *Woods*, ibid. 256; *County of Sangamon* v. *Brown et al.*, 13 ibid. 207; *Dimon* v. *The People*, 17 ibid. 416.

We think the evidence establishing the fact that the *locus in quo* was a public highway, and the evidence of an abandonment of it by the public, is of such a character as to justify the verdict, and seeing no error in the instructions given by the court to the jury, the judgment is, therefore, affirmed.

Judgment affirmed.

Erasmus Woodworth *et al.*, Appellants, *v.* Jacob Woodburn *et al.*, Appellees.

APPEAL FROM KENDALL.

In an action upon a promissory note, where the defendant pleads partial failure of consideration, by alleging that the note was given for spokes and hubs, which were warranted to be well seasoned, it is erroneous to refuse to let the defendant ask questions of a witness to elicit evidence tending to show a breach of the warranty.

Special damages in such a case cannot be shown, unless specially claimed by the pleadings.

The measure of damages in the breach of such a warranty, is the difference in value between those delivered and those contracted for.

This declaration was in assumpsit, on three promissory notes and common counts, in the Kane Circuit Court.

First plea, general issue; second plea, set-off; third plea, special warranty; fourth plea, part failure of consideration.

General replication to each of said pleas. There was a change of venue to Kendall county. Jury sworn at October term, 1857, of Kendall Circuit Court. Verdict for plaintiff, $1,700. Hollister, Judge, presiding. Motion for new trial overruled.

The facts connected with the points decided are fully stated in the opinion of the court.

Leland & Leland, and Parks & Fridley, for Appellants.

W. H. L. Wallace, for Appellees.

Caton, C. J. This was an action upon promissory notes, given for spokes and hubs, sold by the plaintiffs to the defendants. The defense was a part failure of the consideration, on account of a breach of a warranty of the quality of the spokes and hubs. There was evidence tending strongly to show that the articles were warranted to be well seasoned and fit for immediate use. To prove that they were not well seasoned and fit for immediate use, the defendants asked of a witness the following questions: "Did you ever put up any wheels from these spokes and hubs? If yea, how did they stand? and if they came down or fell to pieces, what was the reason of their so falling?" "Do you know of any wheels, put up of those spokes and hubs, being returned to defendants on account of the defects of the timber, or on account of want of being seasoned? If yea, how many, and for what cause? State fully." "From your knowledge of the defendant's business, what damage was it to them, if anything, aside from the difference in the value of

the spokes being green or seasoned, and fit for ready use? If you know, state to the best of your judgment." "State what you know about wagons made from those spokes and hubs being returned to defendants, and why they were so returned; and, if in consequence of a defect in the timber being seasoned, state." To which objections were sustained and exceptions taken.

The evidence sought to be elicited by the first, second and fourth of these questions was undoubtedly proper, as tending to show a breach of the warranty, and the first and fourth are unobjectionable in form. Strictly speaking, the second is somewhat leading in form, and, perhaps, the court, in its discretion, was justified in ruling it out for that reason. We will not say that we would reverse the judgment because objection to it was sustained.

The objection to the third interrogatory was properly sustained. Its object, undoubtedly, was to show special damages, by the interruption to the defendants' business for the want of such spokes and hubs as it was claimed these were warranted to be. Under the pleadings, such damages could not properly have been allowed. To entitle the party to such damages, they should be specially claimed in the declaration, with an averment and proof, showing that the warranty was made with express reference to such damages. In this case, the measure of damages was the difference in value between the articles as delivered and such articles as they were warranted to be, which was the rule correctly adopted by the court. But the judgment must be reversed, because the objection was sustained to the first and fourth questions quoted.

The judgment must be reversed and the cause remanded.

Judgment reversed.

James S. Beach *et al.*, Plaintiffs in Error, *v.* Joseph Schmultz, Defendant in Error.

ERROR TO COOK.

A party may take a second deposition from a witness, without leave for that purpose; but it is discretionary with the court to say, which shall be read.

Where a writ is in the hands of and executed by a coroner, it will be presumed there was no sheriff, and that an elisor was properly appointed by the clerk, to serve a writ of replevin upon the coroner.

A party who has wrongfully produced a confusion of goods, consisting of a cargo "of plank, boards and scantling," by an unauthorized intermixture, forfeits his right to the whole, and his creditors cannot levy an attachment upon such cargo.

Beach et al. *v.* Schmultz.

This was an action of replevin for a cargo of lumber, (one hundred thousand feet, more or less), brought by the defendant in error against the plaintiffs in error, on the 3rd day of October, A. D. 1856, returnable to the October term, A. D. 1856, of the Cook Circuit Court.

The affidavit on which the writ issued was made by the defendant, and filed in the court below on the 3rd day of October, 1856, and sets out in substance, that said Schmultz was the owner of a cargo of pine lumber, which was shipped from Green Bay to Chicago, on the schooner "*Main*," to said Schmultz, and that he is justly entitled to possession of said lumber, and that James S. Beach, as acting sheriff of Cook county, and in his capacity as sheriff, and A. M. Crawford, on the 2nd day of 1856, wrongfully took possession of said lumber, and wrongfully detain the same, etc.

Thereupon a writ of replevin issued out of said court, directed to one J. O. Wilson, as an elisor appointed by the clerk of said court to execute said writ, who executed the same by replevying said lumber and summoning said plaintiffs.

The defendant filed his declaration in the cepit, complaining that said plaintiffs on the 2nd day of October, 1856, took a cargo of lumber which was shipped from Green Bay to the port of Chicago, to said defendant, on the schooner Main, of the value, etc., and wrongfully detain the same, etc.

Plaintiffs filed their motion to dismiss said suit, and for return of property, because of defect of *affidavit*, etc.

Defendant filed cross-motion to amend bond.

Court overruled plaintiffs' motion to dismiss, and sustained defendant's cross-motion to amend his bond.

The following pleas were filed:

First, non-cepit; second, property in Oscar Gray; third, property in plaintiff Crawford; fourth, property in Gray, Densmore & Phelps; fifth, plaintiff Crawford pleads special property in himself for demurrage; sixth, plaintiff Beach pleads specially that by virtue of writ of attachment against the goods, etc., of Oscar Gray, he seized the property in question as the property, and the same was the property of Oscar Gray.

Defendant took issue to the country on the foregoing pleas:

April 21st, 1857, plaintiffs moved to suppress the deposition of Oscar Gray, filed April 4th, 1857; first, because said deposition was retaken without leave of court; second, because the interrogatories and the testimony of said witness were illegal and incompetent, etc., which motion was overruled by the court, and the plaintiffs then and there excepted.

October 17th, 1857, the cause was submitted to the court, MANNIERE, Judge, for trial, without the intervention of a jury. And at the January special term, A. D. 1858, of court, the court found the issues for the defendant, and assessed his damages at one cent. The plaintiffs thereupon entered their motion for a new trial, for the reason that the finding of the court is against the law and evidence, which motion is overruled by the court, and the plaintiffs excepted.

And judgment was thereupon entered upon the said finding of the court.

The following is the substance of the bill of exceptions taken on the trial of this cause in the court below, viz.:

The defendant offered in evidence the two depositions of Oscar Gray, taken by him and filed on 28th February, 1857, the other filed 14th of April, 1857, to the introduction of which and to each respectively the plaintiffs objected, but the objection was overruled by the court, and the plaintiffs then and there excepted, and the depositions were read in evidence. In the first deposition taken, the witness, Oscar Gray, states in answer to the first interrogatory, that he acted as agent for Schmultz during the summer and fall of 1856, in manufacturing and shipping lumber to him. That he shipped from Green Bay about 75 to 100 M. feet of lumber on the schooner Main, to Milwaukee, on or about the 29th of September, 1856, and that it arrived at Milwaukee, but the captain of the schooner, without unloading, went, as witness was informed, to Chicago, but where the lumber was finally unloaded, witness knows not. That he owned part of said lumber, and Schmultz a part, but he is unable to state the parts belonging to each severally; he and Schmultz were the sole owners of the cargo. That he had instructions from Schmultz, as his agent, to ship his lumber to him at Chicago. He shipped said lumber partly by his own authority, and by the general powers he held under Schmultz as his agent; cannot say whether said lumber was mixed or not. The said lumber belonged to Schmultz and myself *severally*. The said lumber was made from logs owned by Schmultz, myself and Pierce, Talbott & Co. That *his means* of knowledge as to the ownership of said lumber, are derived from *having myself purchased the logs with money belonging* to the *said Schmultz and myself*, and getting the lumber manufactured from said logs. Believes the said lumber was taken to Milwaukee by his direction; part of said lumber belonged to Schmultz, whose agent I was.

He also states, that he directed the said captain to take said lumber to Milwaukee, and that he would meet him there. Witness says he was short of lumber at that time to load said

schooner, and borrowed lumber to complete the cargo of Pierce, Talbott & Co. Witness states that he carried on said saw mills as his own, purchasing and selling lumber in his own name, and never used the name of Schmultz in his business; have known Schmultz five or six years, and he is engaged in the clothing business in Chicago.

In the second deposition, the said witness, Oscar Gray, states in answer, after preliminary interrogatories, that he was agent for Schmultz during summer and fall of 1846, and only for the purpose of manufacturing and shipping of lumber at Green Bay. That he was, as Schmultz's agent, to have sawed and shipped about 600 M. feet of lumber. He cannot tell how many feet of logs Schmultz had to saw when he commenced acting as his *agent*, nor does he know what portion he had sawed, but thinks he shipped to Schmultz about three or four hundred M. feet. That he shipped a cargo of lumber, about seventy-five to one hundred M. feet of lumber, consisting of plank, boards and scantling and shingles, but cannot tell how much of each, on the 29th of September, 1856, on the schooner Main. I was the owner of the shingles, and Schmultz and myself were the owners of the balance of the lumber. Schmultz and myself owned said cargo separately, Schmultz owned probably one-half of said cargo, and I the other half; it consisted of plank, boards, joists and scantling. I can't tell the number of feet belonging to each of us. That he understood, and such were his instructions, if he he had any from Schmultz, to ship his lumber to him at Chicago. No person could have identified Schmultz's lumber from his on the vessel; said lumber was taken to Milwaukee by his direction, without authority from Schmultz; he understood from Crawford that said lumber was taken to Chicago. That Gray, Densmore & Phelps, and Michael Doyle, were the owners of the schooner Main—witness has an impression that Crawford knew Schmultz was the owner of the cargo, and thinks Crawford notified Schmultz of the arrival of the cargo, but he is not positive, and knows nothing about the time. He had, prior to the 29th Sept., 1856, shipped lumber on the schooner Main, Capt. Crawford, to Schmultz, at Chicago. Also, that he made out no shipping bill at Green Bay, but made out in Chicago, and delivered it with other papers to B. W. Thomas, consigning the lumber to Schmultz, and requested him to deliver the bill to Crawford on the arrival of the schooner. This occured about the 4th or 5th of October, 1856. Witness also left with bill of lading, an order, bill of sale, etc., referred to in exhibits; the order left was not for sawing that cargo, but on general account for sawing. That the reason why he made out the bill of lading consigning the lumber to Schmultz, was because I wished him

to have the lumber, intending to make myself good from his logs. I settled my account as agent with Schmultz, about the close of navigation in the fall of 1856. There was nothing specifically mentioned about this lumber nor any other, it was a sort of jumping accounts, so that all and every account with Schmultz was included. In this settlement there was a balance found due Schmultz; I gave him, Schmultz, a stipulated amount, I think $450, in full settlement for his interest in any and all logs, and lumber of which I had charge of as his agent, shipments inclusive, more or less. That he don't know that he specified in whose name he borrowed lumber to complete said cargo. He does not recollect whether he borrowed said lumber in his own name or as agent, and he does not recollect from whose lumber it was repaid. He knows that said lumber was made from his and Schmutlz's logs. He thinks he never used Schmultz's name except in connection with his agency.

The following errors are assigned:

1st. The court below erred in overruling plaintiffs' motion to dismiss said suit.

2nd. The court below erred in overruling motion to suppress Oscar Gray's deposition.

3rd. The court below erred in admitting in evidence the depositions of Oscar Gray.

4th. The court below erred in admitting in evidence the order and shipping bill of Oscar Gray, the receipt of Crawford, and the demand upon, and refusal of Beach to deliver said lumber.

5th. The court below erred in finding the issues for the defendant, and entering judgment thereon.

6th. The court below erred in overruling motion for a new trial.

7th. The finding of the court below was against the evidence and law of the case.

C. B. Hosmer, for Plaintiffs in Error.

J. J. McGilvra, for Defendant in Error.

Breese, J. Several questions are presented by this case, and the first is as to the affidavit made by Schmultz, the plaintiff below, on which to obtain a writ of replevin. It is in substance as the statute requires—it sufficiently describes the property, and has all the necessary averments.

The objections to the deposition of Oscar Gray are not tenable either as to his first or second deposition.

It is not true that a party has to apply for leave to the court

to retake a deposition. The statute does not require it, nor is such the practice. A *dedimus potestatem* issues by the clerk, without any application to the court, and a party might, if he chose to incur the expense, indulge a passion for taking the deposition of the same person more than twice, but the court would take care as to which, and how many, should be read. It is purely discretionary with the court, and is like recalling a witness, which the court may or not allow.

As to the appointment of an elisor by the clerk, to serve the writ of replevin, there can be no objection to that, as it is to be presumed there was no officer competent to serve it, the case showing that the writ of attachment on the cargo of lumber was in the hands of, and executed by, the coroner of the county, which could not legally be if there was a sheriff competent to act. We will intend the *casus* had arisen rendering it necessary, for the purposes of immediate justice, that an elisor should be appointed by the clerk.

The question of real moment in the case brings up the doctrine of confusion of goods, so far as the principal cargo is concerned, which the proof shows consisted of different kinds and qualities of lumber, of different grades—"of plank, boards and scantling," and some shingles. As to the lumber, Gray swears that he owned one-half, and Schmultz the other half of the cargo, separately, and were so mixed together as that the several parts were incapable of identification. Besides this, some lumber was borrowed of others to make up the cargo, and the vessel ordered to Milwaukee, against the directions of Schmultz, that she should deliver her cargo at Chicago. There are circumstances in the case tending to show an intention, on the part of Gray, to dispose of the cargo at Milwaukee, and thus defraud Schmultz; and for this bad purpose, the several portions belonging to Schmultz and Gray, and that borrowed, were mixed up, without the knowledge or consent of Schmultz, so as to deprive him of his share, as it would appear.

The doctrine on this subject is thus stated by Blackstone, at page 405, vol. 2, of his Commentaries. After treating of title to goods by accession, he says: "But in the case of confusion of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with and partly differs from the civil. If the intermixture be by consent, I apprehend that, in both laws, the proprietors have an interest in common, in proportion to their respective shares. But if one willfully intermixes his money, corn or hay with that of another man, without his approbation or knowledge, or casts gold, in like manner, into another's melting pot or crucible, the civil law, though it gives the sole

property of the whole to him who has interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his own consent."

This doctrine, as thus laid down, is not disputed any where in courts where the common law is the rule of decision.

Gray, then, having wrongfully produced this confusion, by an unauthorized intermixture, necessarily forfeits his right to the whole, and the plaintiffs in error, his creditors, can have no right or claim to levy an attachment upon it. The court could do no otherwise than to find for Schmultz, the defendant in error, that it was his property.

The case shows that shingles were a part of the cargo, and were Gray's separate property, and as they can be readily distinguished and separated, and as they belonged to Gray when shipped, it is contended they are yet his, and subject to the attachment. It is a sufficient answer to this to say, that the facts show the whole cargo was consigned to Schmultz, and that he paid the freight on it. He, as consignee, had, therefore, a right to the possession of the shingles.

The merits of the case are wholly with the defendant in error, and the judgment of the Circuit Court is affirmed.

Judgment affirmed.

Roswell E. Goodell, Appellant, *v.* Norman W. Woodruff, Appellee.

APPEAL FROM LA SALLE.

If a principal ratifies a purchase made by his agent, he will be responsible for the acts of the agent, and the question of ratification is for the jury to determine.

Unless a verdict is manifestly against the weight of evidence, it will not be disturbed.

The facts of this case are stated in the opinion of the court.

The cause was tried by Hollister, Judge, and a jury, at February term, 1858, of the La Salle Circuit Court.

Glover & Cook, for Appellant.

Bushnell & Gray, for Appellee.

WALKER, J. This was an action of assumpsit, brought by Woodruff against Goodell, in the La Salle Circuit Court, to recover the price of lumber, alleged to have been sold by Woodruff to Goodell. The cause was tried by the court and jury, when a verdict was found in favor of appellee. A new trial was granted. The cause was again tried by the court and a jury, which resulted in another verdict in favor of appellee. Appellant entered a motion for a new trial, which was overruled, and judgment was rendered by the court on the verdict, from which he appeals to this court.

It appears, from the evidence preserved in the case, that one Lighthall was the owner of a lumber yard, which he sold to appellee, and before the time of the sale, he had received money on contracts for the sale of lumber, to be delivered on these contracts. When he sold his lumber yard to Woodruff, it was agreed between them that Woodruff should fill these contracts, and Lighthall should have the profits of the sale. Woodruff was to have the right of filling other contracts, upon which Lighthall had not received the pay, or not, as he chose. These contracts were to be filled out of the lumber purchased by Woodruff of him, a part of which was to come forward, but which never arrived. Goodell had contracted with Lighthall for a quantity of fencing lumber before this sale, but had paid him nothing on this contract. Irvin, the brother-in-law of Goodell, came to Woodruff's lumber yard, and got about twenty thousand feet of fencing lumber, which was used on Goodell's farm, upon which Irvin resided. Woodruff did not receive of Lighthall as much of the kind of lumber as was required by Goodell, and he furnished the balance from lumber which he had purchased in Chicago. Goodell resisted payment to Woodruff, upon the ground that his contract was with Lighthall, and not with Woodruff. This was a question of fact for the jury to pass upon, and they have found that the purchase was made of the appellee. The evidence certainly tended to show that Lighthall had not furnished lumber, as he had agreed, out of which to fill this and other contracts, and we are not disposed to find fault with their finding. It was urged that the evidence did not show whether Irvin's authority to make the purchase was general or special. This, it is apprehended, can make no difference, if appellant ratified the purchase made by Irvin. *Fisher* v. *Stevens*, 16 Ill. R. 397. This was a question for the jury to determine from all the evidence and circumstances before them. They, by their verdict, have found that appellant ratified the contract, and the verdict should not be disturbed, unless it is manifestly against the weight of evidence, and the jury were the judges of the weight it was entitled to receive. There

was evidence from which the jury might infer that appellant ratified the purchase. The property was procured by his agent, and if he had no authority to purchase of appellee, he should have returned the lumber and disclaimed the purchase, and not have appropriated it to his own use. And we are not disposed to grant a new trial where the probabilities are that another trial would be attended with the same result as the two already had.

There is not any error perceived in the instructions given. They seem to lay down the law of the case correctly, as it was raised on the facts in evidence. And upon the whole record, we are not able to discover any error for which the judgment should be reversed, and, therefore, the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

Charles S. Hempstead *et al.*, Appellants, *v.* William Dickson, Appellee.

APPEAL FROM JO DAVIESS.

Where a testator bequeaths land to his wife and two other persons, and to the survivor or survivors of them, to have and to hold until his youngest child should, if a male, attain twenty-one, or if a female, eighteen years of age, in trust for all his surviving children, their heirs and assigns, as tenants in common, all of the children of the testator living at the time of his death, became his devisees.

And the devisees, at the death of the testator, took a vested fee simple estate in the land, subject to the trust estate created by the will, which they might alienate, and which was descendible to their heirs; and also subject to sale and execution, subject to the trust term.

Plaintiffs file declaration and notice in ejectment, for the undivided fourth of lot No. one, block "A," on the west side of Fever river, in the city of Galena, Jo Daviess county, Illinois.

Defendant files plea, "not guilty."

At October term, 1857, jury waived, and cause submitted to the court, Sheldon, Judge, upon agreed statement of facts. Issue found for defendant.

Bill of exceptions sets out submission of cause to court upon the pleadings and agreed state of facts. Statement of facts admits Lawrence Ryan died February 25, 1851, seized in fee of lot in dispute, leaving four children his heirs at law; the youngest, a daughter, became eighteen years of age on the —— July, 1852; that Lawrence Ryan left a will, which is set out in full.

The lot in dispute was given and bequeathed by will of said Lawrence Ryan, to wife of Lawrence Ryan, M. Loras and Michael Murphy, and to the survivor or survivors of them, and to the executors and assigns of such survivors, to have and to hold the same until the youngest child of said Lawrence Ryan, if a male, should attain the age of twenty-one years, or if a female, eighteen years, in trust for all said L. Ryan's surviving children, their heirs and assigns, as tenants in common. If said wife of L. Ryan should marry, to cease to be trustee under said will. Upon the determination of the trust deed aforesaid, all the property bequeathed in trust to be equally divided amongst the surviving children of the testator, their heirs and assigns, as tenants in common.

That on the 13th November, 1849, Francis Ryan, one of the heirs at law of said Lawrence Ryan, executed to plaintiffs a deed of all his estate in said lot.

That defendant is owner of three-fourths of said lot, being all interest of Lawrence Ryan's heirs, except Francis Ryan, whose interest was one undivided fourth of same; that two judgments were rendered against Francis Ryan before he was of age; and the interest of said Francis in said lot was sold under said judgments to Thomas Drum, and a sheriffs' deed executed to Drum.

That the proceedings were regular, except that Francis Ryan was an infant when judgments were obtained.

That administrator of Drum conveyed interest of Drum to Higgins & Strother, November 20, 1851; Strother conveyed to Higgins, September 16, 1852; Higgins conveyed to Newhall, March 16, 1853, and Newhall conveyed to defendant, January 19, 1854.

That Francis Ryan was twenty-one years of age, November 13, 1849, and defendant was in possession of lot when suit was commenced, and ever since.

No other testimony was offered on trial. Court found for defendant, to which plaintiffs excepted, and moved for a new trial, which motion was overruled, and plaintiffs excepted, and the court rendered judgment for defendant.

E. B. Washburne, and Glover & Cook, for Appellants.

V. H. Higgins, for Appellee.

Walker, J. This record presents two questions for our consideration. The first is, whether Francis Ryan, upon the death of his father, took such an estate as was liable to execution until the youngest child attained the age specified; and

secondly, whether the estate of a minor defendant is liable to sale under a judgment recovered against him before he attains his majority. It will be necessary to determine the effect of this devise, to arrive at a proper solution of this first question. The phraseology of the testator, in devising the lot in controversy, is peculiar and somewhat ambiguous. It does not specifically determine whether all of his children who were surviving at the period of his death, were intended to take, or only those who might be living at the time his youngest child should attain the age specified. But survivorship is referred to the period of the death of the testator, if there be no special intent manifest to the contrary, so as not to cut off the heirs of the remainder-man who should happen to die before the tenant for life. They are vested and not contingent remainders. This is now become the settled technical construction of the language, and the established English rule of construction. *Doe ex dem. Weinz* v. *Prigg*, 8 Barn. & Cress. R. 231; *King* v. *King*, Watts & Serg. R. 205. In *Moore* v. *Lyons*, 25 Wend. R. 119, it was held, in the Court of Errors, that in a devise of real estate to one for life, and after his death to three other persons, or to the survivors or survivor of them, their heirs and assigns forever, the remainder-men took a vested interest at the death of the testator. In this case there is no special interest manifested to limit the estate to the heirs only who survived the event of his youngest child coming of age. And the language is certainly as definite to limit the estate to all his children who were living at the time of his death, as the case of *Moore* v. *Lyons*. And we are, therefore, upon these authorities, as upon principles of natural justice, disposed to give this clause of the will the construction, that all of the testator's children who were living at the time of his death, became the devisees of this property.

It then remains to determine what estate they took at the death of the testator. Chancellor KENT defines a vested remainder to be a fixed interest, to take effect in possession after a particular estate is spent. 4 Kent Com. 202. And reversions and all such future uses and executory devises as do not depend upon any uncertain event or period, are vested interests. Ibid. He also lays down the doctrine, that if there be a devise to trustees and their heirs, during the minority of the beneficial devisee, and then to him, or upon trust to convey to him, it conveys a vested remainder in fee, and takes effect in possession when the devisee attains twenty-one. The general rule is, that a trust estate is not to continue beyond the period required by the purposes of the trust; and notwithstanding the devise is to trustees and their heirs, they take only a chattel interest, for

the trust, in such a case, does not require an estate of a higher quality. If the devisee dies before the age of twenty-one, the estate descends to his heirs as a vested inheritance. The Master of the Rolls said, the trustees in such a case had an estate for so many years as the minority of the devisee might last. 4 Kent Com. 204. And *Doe* v. *Lea*, 3 T. R. 41; *Stanley* v. *Stanley*, 16 Ves. R. 491, and *Doe* v. *Nicholls*, 1 Barn. & Cress. R. 336, are in support of this doctrine. He also lays it down that "vested remainders are actual estates, and may be conveyed by any conveyances operating by force of the statute of uses." Ibid. A vested executory devise passes the same estate as a vested remainder, and may be disposed of in precisely the same manner. It would then follow, from these authorities, that Francis Ryan, at his father's death, took a vested fee simple estate in this lot, subject to the trust estate created by the will, and that he had the power to alienate it by conveyance, and it was descendible to his heirs upon his death. It was also subject to sale on execution, subject to the trust term.

It is admitted that the sale under these judgments was regular, unless the minority of the defendant at the time of their rendition rendered it irregular. It is said by Chitty, in his work on Pleading, that "Although an infant cannot, in general, be sued in an action in form *ex contractu*, except for necessaries, he is liable for all *torts* committed by him, as for slander, assaults and batteries, etc.; and also in detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he fails to return." 1 Chitty Pl. 87. And in all actions except assumpsit it has been held that infancy, when relied upon as a defense, should be pleaded. In this case, it does not appear what the actions were, whether for *torts*, for necessaries, or on other contracts. One judgment was rendered by default, and if infancy had been a defense to that action, it should have been interposed. If infancy was properly pleaded and wrongfully disregarded by the court in the other case, it was an error which cannot be inquired into collaterally, but should have been reversed in a direct proceeding. We must, therefore, hold that these judgments, and the sale under them, were binding. And that there is no error in this record, and that the judgment of the court below should be affirmed.

Judgment affirmed.

The President and Trustees of the Town of Mendota, Plaintiffs in Error, *v.* Charles E. Thompson, Defendant in Error.

ERROR TO LA SALLE COUNTY COURT.

To prove the existence of a corporation, it is sufficient to produce the charter, and prove acts done under it, and in conformity with it. Written proof that all the preliminary steps, etc., were taken, is not necessary.

A corporation, acting as such, cannot be questioned collaterally on the ground that it has not complied with its charter.

A municipal corporation is not dissolved because, at its organization, persons not eligible were elected trustees. If their authority is questioned, it should be by *quo warranto*.

This was an action of debt, for a penalty for selling liquors. There was a trial before a justice of the peace, which was appealed to the County Court of La Salle county, and tried before the judge of said court, at the June term, 1857. There was a finding for the defendant. Motion for new trial overruled.

The issues were oral. One plea was *nul tiel* corporation.

At the trial, the plaintiffs below, and plaintiffs in error here, introduced an ordinance, passed by persons purporting to be the president and trustees of the town of Mendota, and acting as such, which is as follows:

Be it ordained by the president and trustees of the town of Mendota:

Sec. 1. That the sale of all spirituous, intoxicating or mixed liquors, wine, beer, ale, porter, cider, or any fermented or malt liquors, is hereby declared to be a nuisance; and any person selling any spirituous, intoxicating or mixed liquors, wine, beer, ale, porter, cider, or any fermented or malt liquors, in any quantity, shall upon conviction, be fined five dollars for each offense, and the term each offense, as herein mentioned, shall be construed to mean the selling by the glass, quart, or in any quantity, and for each separate glass or quantity, sold or disposed of for gain or profit.

Sec. 4. Penalties incurred for a violation of any ordinance of said town of Mendota may be sued for and recovered before any justice of the peace, or before any other court having jurisdiction.

A copy of the Mendota Press, a newspaper published in Mendota, which contained said ordinance, published before the time of the sale of liquor, as offered to be proved, as hereinafter mentioned.

The plaintiffs then offered to prove that the defendant, in the

year 1856, and after the publication of said ordinance, sold, on two different occasions, to two different persons, a quantity of spirituous liquors, and that the place of sale was within the corporate limits of the said town of Mendota. To the introduction of this evidence the defendant objected. The court sustained the objection, and the plaintiffs excepted.

The plaintiffs then introduced, in evidence, the following copy of the proceedings, certified to be on file in the county clerk's office of La Salle county: 1st. The proceedings of the inhabitants of Mendota, at a meeting called to vote for or against incorporating said town of Mendota, showing a vote, on the 31st of October, 1854, in favor of incorporation, which proceedings were signed and certified by the chairman and clerk of the meeting. 2nd. The poll book of an election for trustees of said town, held on the 7th of November, 1854, at which five trustees, to wit, George A. Richmond, F. M. Baldwin, Benjamin West, Roswell Webster, and J. Hastings, were elected. The poll book is certified by the chairman and clerk. 3rd. The oath of office of said five trustees. 4th. A communication, addressed to the clerk of the county court, signed George A. Richmond, President of Trustees of town of Mendota, stating that an accompanying seal was that of the town of Mendota, and requesting the same to be entered as such.

A copy of proceedings, certified by the clerk of said county as on file in his office, which are—1st. The proceedings of a meeting of the white male residents of lawful age, and qualified voters of the town of Mendota, on the 20th June, 1855, for the purpose of deciding whether they would be incorporated or not, certified by Benjamin West, president, and Samuel P. Ives, clerk, at which the vote was for incorporation. 2nd. The oath of office of five persons, as trustees of Mendota, taken on the 28th day of June, 1855.

The plaintiffs also proved that the town of Mendota, through persons acting as president and trustees, had exercised the powers that they would have been entitled to exercise if they had been duly incorporated. The book containing the proceedings, purporting to be the various and usual acts of an incorporated town, was also introduced in evidence, and was proved to be the book used as and for a record of the proceedings of the president and trustees of the town of Mendota. The first meeting appearing to have been held was on the 28th day of June, A. D. 1855. The only evidence of the election of the board of trustees for the year A. D. 1855 was the oral evidence of a witness, who testified that he was present at an election of trustees in June, 1855, and that such an election was held. He also testified that there had been an annual election of trustees

since then, and that there was a record made of such election. The court decided that such evidence of the election of trustees, and the other facts mentioned, were not sufficient to prove the election of the first board, and that it was necessary to prove an election of the first board of trustees by written evidence thereof, in order to establish the fact of incorporation. On the 6th day of July, 1855, and during the term when, by said record book, J. H. Adams, Lansen Lamb, W. P. Galliday, C. H. Johnson and D. G. Bly appeared to be acting as trustees. The lines of section thirty-three, of township thirty-six north, of range one east of the third principal meridian, were declared to be the bounds and corporate limits of the town of Mendota, as appears by an entry on said book.

On the 9th of July, 1855, as appears by said book, Galliday tendered his resignation, in consequence of living out of said town; and it appeared he did not live within said section when elected. On the same day, as appears by said book, Lamb and Johnson also resigned. It was proved that the reason they resigned was, that they were not freeholders.

The record book shows that George Wells, C. H. Gilman and John Hastings were appointed to fill the vacancies. The vacancy occasioned by the resignation of Galliday was filled by George Wells, before the resignation of Lamb and Johnson, and the record recites that they severally took the oath of office when appointed. The record contains ordinances on various subjects—orders allowing bills, appointing and removing officers, and contains a recital of the usual and ordinary acts performed by the trustees of an incorporated town; recites the presence of the trustees and clerk (naming them); and there is a change of the names, showing different persons acting as trustees during the different years. The record contains no other evidence of the election of trustees, except mentioning them as the trustees elect having met.

And it was also proved, by oral evidence, that persons acting as the president and trustees of Mendota had, since the election in June, 1855 (and whose election was proved orally, as before mentioned), acted in that capacity.

The court found the issue of *nul tiel* corporation for the defendant.

Plaintiffs moved for a new trial. The court overruled the motion, and plaintiffs excepted.

The following are the errors assigned:

The court erred in excluding the evidence offered of the sale of liquor by the defendant.

The finding of the court on the plea of *nul tiel* corporation was against the evidence.

The court erred in deciding that it was necessary to prove on the part of the plaintiffs, by written evidence, that the first board of trustees was elected, in order to establish the fact of incorporation.

The court erred in overruling the motion of plaintiffs for a new trial, and rendering judgment for the defendant.

LELAND & LELAND, for Plaintiffs in Error.

O. C. GRAY, for Defendant in Error.

BREESE, J. The question on this record arises on the plea by defendant, in the court below, of *nul tiel corporation*, and found for him.

As a general principle, it is sufficient, in order to prove the existence of a corporation, to produce the charter, and then prove acts done under and in conformity with the charter. *Utica Ins. Co.* v. *Tilman*, 1 Wend. R. 555; *Gaines* v. *Bank of Miss.*, 7 English (Ark.) R. 769; *Bank of Manchester* v. *Allen*, 11 Verm. R. 302; 3 Wend. R. 296.

Proof that all preliminary steps were taken, and that too by written evidence, as was insisted on in this case, would produce not only great public inconvenience, but, owing to those omissions to record facts with which all public bodies are chargeable, would be impossible.

It is also a general rule, that a corporation acting as such, cannot be questioned collaterally, on the ground that it has not complied with its charter. *State* v. *Carr*, 5 N. H. R. 367.

It seems there were two efforts made to incorporate the town of Mendota—the first on the 31st Oct., 1854, and again on the 20th of June, 1855. It is objected against the regularity and legality of the last election, and which is the only objection, that it does not appear that the persons named as having been elected trustees, were in fact elected, and if they were, that it also appears that three of the five were ineligible. Galliday, by not being a resident within the limits of the corporation, and Lamb and Johnson, by not being freeholders, both of which were necessary qualifications.

The record also shows that Galliday resigned, and the rest, being a majority, elected one Wells in his place, who was qualified and took his seat as trustee; after this, Lamb and Johnson resigned, and their places were filled by the board by the election of Gilman and Hastings in pursuance of the charter, and these persons, with Adams and Bly, first duly elected, composed the board, at the time of the passage of the ordinance under which the defendant was prosecuted.

It is insisted, that by the election of three disqualified persons, the corporation was dissolved.

That certainly cannot be the rule, for as it did not appear they were not qualified until after the election, such an occurrence can be no more fatal than the election at any subsequent period of a disqualified person; and no one will say that such an election would *ipso facto* dissolve a corporation, *non constat* but they were qualified when elected; and if not, the fact can only be inquired into by the people's writ of *Quo warranto*. They cannot be attacked collaterally in this manner. *The People* v. *Watkins*, 19 Ill. R. 117.

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

Judgment reversed.

John V. A. Hoes, Appellant, *v.* Abram J. Van Alstyne *et al.*, Executors, etc., Appellees.

APPEAL FROM LA SALLE.

When the representatives of a deceased party are substituted in his stead, the declaration need not be amended by the insertion of their names.

The statutes of a foreign state cannot be proved by parol. But the construction given to such statutes by the tribunals where they are in force, may be given in evidence by witnesses learned in such laws.

This was an action of assumpsit commenced by Isaac Van Alstyne during his lifetime, against the defendant. During the pendency of the suit the plaintiff died, and his death was suggested, and the executors of the will were substituted as plaintiffs. No amendment of the declaration was made, nor was there any new declaration filed. The declaration was filed in the name of Isaac Van Alstyne during his lifetime.

The trial was before the court, Hollister, Judge, without a jury, at June term, 1857, on the declaration and plea of the general issue.

The only evidence was the note and the indorsement of payments, and the evidence of Joseph O. Glover, who testified, that he resided in the State of New York prior to the year 1835, and that when he left there to move to this State, and which was in 1835, the rate of interest according to the statute of New York, where no rate of interest was mentioned in a note, was seven per cent. per annum.

And the evidence of Washington Bushnell, who testified, that he was an attorney at law, and that he was acquainted with the statute law of New York; that by the said statute law of New York, in 1835 and also in 1846, where no rate was mentioned in a note, it was seven per cent. per annum.

To the competency of this evidence, in relation to the rate of interest, the defendant objected. The court overruled the objection and admitted the evidence; the court allowed interest on the note at the rate of seven per cent per annum.

LELAND & LELAND, for Appellant.

W. H. L. WALLACE, for Appellees.

CATON, C. J. This declaration was in assumpsit. During the pendency of the action, the plaintiff died, and his representatives were made parties, under our statute, but the declaration was not amended by inserting their names as plaintiffs. The cause was tried upon the general issue, which was found for the plaintiffs, and it is now assigned for error, that their names were not inserted in the declaration. It has not been the practice, under our statute, where the representatives of a deceased party are made parties, to amend the declaration by the insertion of their names, nor do we think it required by the statute. Whether the other course would not have been the better practice at the beginning, it is unnecessary now to say; but we think the statute will fairly bear a construction conformable to the practice, and after that has been so long and uniformly acted upon and acquiesced in by the courts and the bar, we ought not to hunt up ingenious pretexts for overturning it. We cannot reverse this judgment for this cause.

The other error assigned, however, must be sustained. That is, that the court allowed the statute of a foreign State to be proved by parol. We have looked into the cases on this subject, and find two decisions tending to sustain the decision of the court below. One was recently decided in England, and by a divided court; and the other is in Vermont, where it is said, the court may take notice of a foreign written law. In the first of these, Lord CAMPBELL certainly sustains his position by strong reasons. Those reasons, however, tend to show that we may learn by parol what is the true meaning or construction of a foreign statute, as settled by the practice or courts of the foreign country, rather than to show how the foreign law is written. The first may undoubtedly be done, and courts have uniformly taken notice of the construction given to foreign statutes by the foreign tribunals; and to enable them to do this,

they have always been in the habit of looking to the reports of such tribunals. Whatever the court may take notice of, or may learn from reported decisions, it may also be informed of by the testimony of witnesses learned in the foreign law. But we everywhere meet with decisions, both in this country and in England, that a foreign statute must be proved as any other fact, and by the best evidence of which the nature of the case will admit, unless this rule is changed or modified by a domestic statute. We have such a statute here, which dispenses with an authenticated or sworn copy of the foreign law, and allowing the printed statutes of a foreign country to be used in our courts as evidence of the foreign law. We do not think it necessary to consume time by entering into a review of the cases in support of the view of the law as we understand it, but will content ourselves by citing the cases referred to in the brief of the appellant's counsel:

Compant v. *Jurnegan*, 5 Blackf. R. 375; *Kenny* v. *Clarkson et al.*, 1 John. R. 385; *Consequa* v. *Willings et al.*, 1 Peters' C. C. R. 225; *Lincoln* v. *Battelle*, 6 Wend. R. 475; *Hall* v. *Heightman*, 4 Esp. R. 75; *Clegg* v. *Levy*, 3 Camp. R. 166; *Bochtlink* v. *Schneider*, 3 Esp. R. 58; *Dyer* v. *Smith*, 12 Conn. R. 384.

The judgment of the County Court must be reversed, and the cause remanded.

Judgment reversed.

George O. Kingsley, Plaintiff in Error, *v.* John Kingsley, Defendant in Error.

ERROR TO TAZEWELL.

A release under seal executed to a party in settlement, the party receiving it promising to get certain notes signed by a security, which he attempted to do, but failed in his efforts, will be good against the releasor; no fraud appearing in the transaction. The party might be liable, if sued upon a breach of the contract.

A release under seal may be pleaded in satisfaction of a larger sum than was actually paid.

The defendant, John Kingsley, commenced suit in the Circuit Court of Tazewell county, by bill in chancery and injunction, on the 14th day of April, 1857, against George O. Kingsley and David D. Irons.

The case was tried before Harriott, Judge, at the October term, 1857, and a decree rendered against the defendant, in the court below, from which an appeal was prosecuted.

The complainant's bill alleges, that in the year 1852, George O. Kingsley commenced suit in the Circuit Court of Peoria county, against complainant, in the name of George O. Kingsley and Francis P. Kingsley, for the use of George O. Kingsley, upon a promissory note executed by complainant, to George and Francis P. Kingsley. That Francis P. Kingsley did not have any interest in said note, and utterly disclaimed any ownership of said note, and admitted that the note was not genuine, that it was not due, and that there was no consideration for the said note, and that Francis P. Kingsley executed to complainant a discharge of said note. It alleges that a change of venue was taken in said cause, and tried at the April term of the Tazewell Circuit Court, when a judgment was rendered in favor of the plaintiff, for the sum of three hundred dollars debt, and three hundred and twelve dollars and eighty-six cents damages, and forty-four dollars and twenty cents costs.

Complainant alleges that the note upon which the judgment was obtained was not genuine, that there was no consideration for the same, that it was fraudulent, and that George O. Kingsley admitted that he ought not to collect it. That he also admitted that if he had beaten Francis P. Kingsley in a certain suit previously tried between George O. and Francis P. Kingsley, he would not have prosecuted suit on said note against the complainant.

That afterwards, the said George O. Kingsley proposed to complainant to make a deduction on the said judgment, if the complainant would pay the balance; one hundred dollars to be paid on the 1st of March, 1858, and the remainder in sums of one hundred dollars annually, until the sum of five hundred dollars was paid, in satisfaction of said judgment.

That said complainant, in pursuance of said agreement, executed his notes for the sum of five hundred dollars, in notes of one hundred dollars each, falling due as aforesaid, and that thereupon, George O. Kingsley executed a release of said judgment, in pursuance of said agreement, in full of said judgment and costs, etc.

That after the settlement as aforesaid, George O. requested complainant to have Francis P. Kingsley sign said notes as security, and John Kingsley could not be induced to do so. That on the same day that the settlement was made, complainant told Francis P. Kingsley that George O. had requested complainant to procure the signature of said Francis P. Kingsley, and was about to ask him to sign the same as security, when said Francis P. Kingsley expressly refused to sign the notes, and distinctly said he would never sign them, and never did.

Complainant avers it was no part of the agreement that said notes should be signed by said Francis P., as security.

That about the 25th day of June, 1856, George O. Kingsley had execution issued on the said judgment against complainant, which was put in the hands of David D. Irons, sheriff of Peoria county. That on the 9th day of August, 1856, the said execution was levied on the W. ½ N. E. 27, 9 N. 7 E., as the property of complainant, and that said premises were sold without his knowledge.

That the sheriff advertised for sale, and sold the said land, on the 30th day of August, 1856, to George O. Kingsley, the plaintiff in the execution, for the sum of $691.62, who was the highest and best bidder for the same. And avers he had no notice of the sale until afterwards.

Avers that George O. Kingsley intends to hold the said premises, unless complainant redeems from said sale.

That at the time of the sale, a certificate of purchase was given by the sheriff to George O. Kingsley, and another filed in the recorder's office.

The bill prays for George O. Kingsley, David D. Irons, and Francis W. Smith, the sheriff, to be made parties; and that David D. Irons and Francis W. Smith be enjoined from executing a deed to George O. Kingsley, under said note. That Kingsley be enjoined from transferring his certificate of purchase; and that George O. Kingsley be decreed to convey to complainant.

An injunction was issued on said bill, as prayed for.

George O. Kingsley, by his answer to said bill, admits the recovery of the judgment in 1852, against complainant, as charged, and that the suit was taken, by change of venue, to Tazewell county, where it was tried, and a judgment rendered against complainant, as charged in the bill; but denies that the note upon which the judgment was obtained was fraudulent, or that there was no consideration, or that it was not genuine; and alleges that it was given for full and valuable consideration, that it was genuine, that there was no fraud either in the obtaining the note or prosecuting the same to final judgment, that everything in relation thereto was honest and fair; but alleges that the judgment is conclusive between the parties, and cannot be reviewed in this cause.

Respondent does not know whether Francis P. Kingsley claimed any interest or ownership in said note or not, or whether he admitted the same was not due, or was not genuine or not, but alleges, if ever any such admissions were made, it was to defraud respondent and prejudice the collection of the same, and avers if any such admissions were made as charged

in the bill they are untrue. Respondent sets out the consideration of said note, which was the sale by respondent to complainant of the land sold under the execution, as charged in the bill, and that the note was the property of respondent at the time the suit was brought in, and that it was justly and honestly due him, and that the said judgment was justly and honestly obtained after a fair trial and mature consideration by the court.

Respondent denies that he ever admitted to complainant or any other person that he ought not to collect the note or enforce the judgment; denies all fraud or unfair dealing; denies that he ever said if he had recovered in a suit against Francis P. Kingsley that he would not have collected said note.

Respondent denied that he agreed to take or did take complainant's notes for $500, due yearly, in satisfaction of the judgment; but avers that he did agree to take five notes for the sum of $100 each, payable annually, the first to become due on the first of March, 1858, executed by complainant with Francis P. Kingsley as security, and that such was the positive and express understanding of the parties. That Francis P. Kingsley utterly refused to sign said notes as security. That respondent executed said release upon that consideration and none other. That the said five promissory notes of $100 each were the only consideration for the release of said judgment, and that they were to be signed by Francis P. Kingsley as security, which was never done; and that it was understood and expressly agreed that the release should be of no validity until the notes were signed by Francis P. Kingsley as security.

That the next day after the execution of said release, upon the refusal of said Francis P. Kingsley to execute said notes as security, he tendered complainant the said notes and demanded said release to be given up to respondent, but both of which complainant refused to do; offers to bring said notes into court to be returned to said complainant, and asks the release to be decreed to be given up and cancelled, and charges that the same was obtained of him fraudulently, and denies that the same is any satisfaction or release of the said judgment whatever, either in law or equity.

He admits that he had execution issued, and that the same was levied upon the land described in the bill, and that it was purchased by him for $691.62. The proper notices were given of the sale of said property, but does not know whether complainant had actual notice or not.

Admits that David D. Irons was sheriff, and sold the land, and that Francis W. Smith is present sheriff of Peoria county.

It was then admitted by the parties that George O. and Francis P. Kingsley, for the use of George O. Kingsley, ob-

tained a judgment against complainant for the sum of $300 debt, and $312.80 damages, and $44.20 costs, in the Circuit Court of Tazewell county, at the April term, 1856. That execution was issued and levied upon W. ½ N. E. 27, 9 N. 7 E., which was sold to satisfy the execution by the sheriff of Peoria county.

That George O. Kingsley purchased the same on the 30th day of August, 1856, for the sum of $691.62.

The complainant then offered in evidence the following release, which was admitted, to wit:

In consideration of five hundred dollars, to me in hand paid by John Kingsley, of Peoria county and State of Illinois, I do hereby release and discharge a judgment in my favor against the said John Kingsley, recovered in the Circuit Court at Pekin, Tazewell county, Illinois, at the last April term of said court, in my favor, and a suit wherein George O. Kingsley and Francis P. Kingsley were plaintiffs, and I hereby acknowledge to have received the sum of five hundred dollars, in full of all damages and costs recovered in said action, and I hereby release and discharge said judgment.

Peoria, May 20, 1856. GEORGE O. KINGSLEY. [SEAL.]

Complainant then called *Francis P. Kingsley*, who was sworn; testified that he was acquainted with the parties; that on the day the parties settled, witness met John Kingsley about five miles from Peoria, and John told witness that he had settled with George O. Kingsley, and that George would be along with notes for witness to sign; that witness refused to sign them. That complainant was and is the owner of one hundred acres of good land, and is worth $5,000 over his debts. The settlement spoken of was the one in which the notes and release were given.

It was then admitted that, on the next day after the settlement, George O. Kingsley tendered back the notes to complainant and demanded the release to be given up to him, and further that the notes were in the possession of defendant, George O. Kingsley, ready to abide the decree of the court. This was all the evidence in the case.

The court then decreed that the judgment recovered by George O. Kingsley and Francis P. Kingsley, for the use of George O. Kingsley, against John Kingsley, be decreed satisfied and discharged, and that the execution, levy and sale be vacated, annulled and set aside, and that said George O. Kingsley, within ten days from the date of the decree, execute a deed to complainant to said premises, or, in default, that E. G. Johnson be appointed commissioner to execute the same, and also decree a perpetual injunction against Irons and Smith from executing

George O. Kingsley any deed or certificate of purchase for the same, and that George O. Kingsley pay all costs.

To which decision of the court respondent excepted and filed his bill of exceptions.

WEAD & WILLIAMSON, for Plaintiff in Error.

MANNING & MERRIMAN, for Defendant in Error.

BREESE, J. The controversy in this case grows out of the execution of the release set up by complainant in his bill, and charged to have been executed by the defendant to him.

It is no doubt true, and was the agreement, that the notes, on the execution and delivery of which, by the complainant to the defendant, the release was executed, should be signed by Francis P. Kingsley as security—both parties expected it. But it was not done; he refused to sign them when presented to him by the defendant for that purpose. The release was executed on the delivery of the notes, and there is no fraud shown, either in its execution or delivery. The most that can be said is, that complainant did not perform his contract; but that does not render the release ineffectual. The release being once fairly and regularly executed and delivered, could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given. It could go no further than to charge the complainant with a breach of contract, for which he would be liable. *Fitzsimmons et al.* v. *Ogden et al.*, 7 Cranch R. 19.

It is well settled, though the payment of a smaller sum cannot be pleaded in satisfaction of a larger sum, yet a release under seal may be so pleaded. Com. Dig., " Release," E, 2, 3.

The whole question here depending upon the validity of this release, and there being nothing alleged against it, or if alleged and proved, not going to impeach it, we must regard it as binding.

The decree of the Circuit Court is therefore affirmed.

Decree affirmed.

TIMOTHY WOOD *et al.*, Appellants, *v.* ORLANDO CHILD *et al.*, Appellees.

APPEAL FROM ROCK ISLAND.

The law of 1857, which authorizes the issuing of injunctions to stay proceedings upon judgments by confession under warrants of attorney, upon demands not due at the time the judgments may be entered, was within the power of the legislature, and may apply to antecedent judgments or contracts.

The law of the remedy is no part of the contract.

If debts already due, as well as those not due, are included in the same judgment, they will alike fall under the effects of the injunction.

THIS is an action commenced on the chancery side of the Rock Island Circuit Court, by Timothy Wood and J. G. Salisbury, against Orlando Child and Ezra M. Beardsley, to obtain an injunction against the above named respondents. The complainants presented their bill to the judge of the court below in July, 1857, at chambers, and a preliminary hearing was granted, when the said judge ordered that a writ of injunction issue, according to the prayer in the bill. Said writ was duly issued, returnable to the September term thereof.

The complainants in the court below, in their bill of complaint, set forth substantially that, in October, A. D. 1856, they, the said complainants, executed and delivered to one of the respondents (Child) five promissory notes; that said notes were given for sums of money varying in amount from $480 to $700, and that said notes were made payable as follows, to wit: One on the 19th day of February, 1857; one on the 19th day of February, 1858; one on the 19th day of February, 1859; one on the 19th day of February, 1860; one on the 19th day of February, 1861.

The bill further sets forth that they, the said complainants, at the same time and place, executed and delivered to the said respondent (Child), with the said notes, five several warrants of attorney. The part of said warrants applicable to this case is as follows, to wit:

Now, therefore, in consideration of the premises, and of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby make, constitute and appoint Orlando Child, or any attorney of any court of record, to be my true and lawful attorney, irrevocably, for me, and in my name and stead, to enter my appearance before any justice of the peace, or in any court of record, in any of the States or Territories of the United States, or elsewhere, either in term time or in vacation, at any time from and after the date hereof, at the option of the said Orlando Child, to waive service of

process and confess a judgment in favor of the said Orlando Child, or his assignees or legal representatives, upon the said notes, for the above sums, or for as much as appears to be due according to the tenor and effect of said notes, with interest thereon at the rate aforesaid, and fifteen dollars, attorneys' fees.

The bill further sets forth that, on the 4th day of April, 1857, judgment was caused to be entered on the five several notes in the sum of two thousand nine hundred and seventy-five dollars and four cents, which said sum included the several sums named in the several notes, and fifteen dollars on each of them for attorneys' fees.

The bill further sets forth that, on the 29th day of June, 1857, execution was issued from the office of the clerk of said court upon the said judgment, and that the said execution was duly delivered to the sheriff of said county, Ezra M. Beardsley, one of the respondents in this case, and that said sheriff was about to make a levy upon the property of one of these complainants to satisfy the same.

At September term, a motion was made by the respondents to dissolve the injunction and dismiss the bill. A demurrer was also filed, setting up that the facts set forth in the bill were insufficient to entitle the complainants to an injunction.

At the next ensuing term, on the 26th of December, the court, DRURY, Judge, presiding, ordered a decree to be made in favor of said respondents, and against said complainants, to dissolve said injunction and dismiss the bill, which decree was accordingly made; and from which final decree the said complainants appealed to the Supreme Court.

GRAHAM & WEBSTER, for Appellants.

WILKINSON & PLEASANTS, for Appellees.

CATON, C. J. The complainants, in their bill, set forth substantially that, in October, 1856, they executed and delivered to one of the respondents (Child) five promissory notes; that said notes were given for sums of money varying in amount from $480 to $700, and that said notes were made payable as follows, to wit:

One on the 19th day of February, 1857; one on the 19th day of February, 1858; one on the 19th day of February, 1859; one the 19th day of February, 1860; one on the 19th day of February, 1861.

The bill further sets forth that the complainants, at the same time and place, executed and delivered to the respondent, Child, five several warrants of attorney, varying only to correspond

with the several sums of money named in the notes, and the times when they were severally made payable. The parts of said warrants applicable to this case are as follows, to wit:

Now, therefore, in consideration of the premises, and of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby make, constitute and appoint Orlando Child, or any attorney of any court of record, to be my true and lawful attorney, irrevocably, for me, and in my name and stead, to enter my appearance before any justice of the peace, or in any court of record in any of the States or Territories of the United States or elsewhere, either in term time or in vacation, at any time from and after the date hereof, at the option of the said Orlando Child, to waive service of process and confess a judgment in favor of the said Orlando Child, or his assignees or legal representatives, upon the said notes, for the above sums, or for as much as appears to be due according to the tenor and effect of said notes, with interest thereon at the rate aforesaid, and fifteen dollars, attorneys' fees.

The bill further sets forth that, on the 4th day of April, 1857, judgment was caused to be entered on the five several notes, in the sum of two thousand nine hundred and seventy-five dollars and four cents, which sum included the several sums named in the several notes, and fifteen dollars on each of them for attorneys' fees. Upon this judgment an execution was issued on the 29th June, 1857. This bill was filed to restrain the levy of this execution till the time when the money becomes due by the tenor of the notes.

A preliminary injunction was granted at chambers, and at the next term of the Circuit Court, a demurrer was filed to the bill, upon the hearing of which, the court dissolved the injunction and dismissed the bill. This decree is assigned for error.

This case is precisely within the terms of the fourth section of the law of the 18th of February, 1857, which is as follows: "Whenever any execution shall issue upon any judgment obtained by confession or warrant of attorney, upon any demand which shall not be due at the time of the entering of such judgments, any defendant or defendants may stay proceedings by injunction issued out of the Circuit Court of the county to which such execution shall have been directed, until said demand shall have become due: *Provided*, that the party seeking such injunction shall give bond as now required by law in cases of injunction." The only objection to the applicability of this statute to this case, is the want of power in the legislature, to make such a provision applicable to antecedent judgments, or contracts previously entered into. Of the existence of such a power we cannot for a moment doubt. It in no wise affects the

validity or obligatory force of the contract, but applies solely to the remedy. The law of the remedy is no part of the contract. The argument urged against the existence of the power here exercised, would deprive the legislature of the right to change the terms of the court, so as to delay the party in obtaining a judgment. The legislature must possess the power of prescribing the mode by which the rights of parties shall be enforced in the courts of the State. They would even have the power to declare that no judgments should be entered by confession, except by the defendant in person, in open court, or they may say that judgments may be entered by confession in all courts in the State in vacation. In this case, however, least of all, is there any stretch of legislative power. They have merely said that the party shall not be compelled to pay the money till the time expires by which it becomes due, by the terms of the contract between the parties; and we are very far from admitting, that the Court of Chancery would not have the power to do the same thing without this law, but it is unnecessary to examine that question, for the provisions of this statute have removed any doubt, if any could have existed before. It is true that in this case the notes upon which the judgment was entered fall due at different times, and one was actually due at the time the judgment was confessed; but as the court cannot issue executions by piece meal, the whole must be stayed till the last note falls due. It was the folly of the plaintiff to unite in one judgment, claims already due or those maturing at shorter periods, with those of longer date, and we see no way to help him to collect any until the last is due. In the meantime he must console himself with the fact that his money will be secured by the lien of his judgment and an additional bond, and that his judgment will be drawing interest.

The decree must be reversed and the suit remanded, with instructions to the Circuit Court to enter an injunction and take a bond in conformity to this opinion.

Decree reversed.

JOHN H. DART *et al.*, Appellants, *v.* JOHN HORN, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where part of the property claimed by a writ of replevin cannot be found, and there is personal service, the plaintiff may add a count in trover.

In an action of replevin against several, it is erroneous to assume in instructions to the jury that all are derelict; it should be left to the jury to say, whether all the defendants were engaged in taking the property claimed or not.

Replevin for five stacks of hay. The sheriff returned the writ with the indorsement that he had taken two and one-eighth stacks, the rest not found.

The declaration contained two counts: The first, in the *detinuit*, for two and one-eighth stacks; the second, in the *detinet*, for two and seven-eighths stacks.

The defendants, Dart, Sutherland & Gould, pleaded three pleas: First, property in Charles Horn; second, property in Martin Horn; third, property in Charles and Martin Horn.

The defendant, Lord, pleaded: First, *non-detinuit* and *non-detinet;* second, property in Charles Horn.

Issue was joined on all the above pleas. Leave was given to the plaintiff to add a new count in trover, to his declaration. The count was filed for two and seven-eighths stacks. The defendants pleaded "not guilty," on which issue was joined.

On the 1st of October, the case was tried by J. M. Wilson, Judge, and a jury, when the following verdict was given: "We, the jury, find for the plaintiff on the first count, and the property replevied to be in the plaintiff; and further find said defendants guilty under second count, and assess plaintiff's damages herein at two hundred and eighty dollars."

The defendants then moved for a new trial and in arrest of judgment, which motion was overruled and the defendants appealed.

George Payson, for Appellants.

J. J. McGilvra, for Appellee.

Caton, C. J. We are inclined to the opinion, that by a liberal construction of our statute, where part of the property claimed in the writ of replevin cannot be found, and there is personal service, the plaintiff may add a count in trover. The remedial policy of the statute would seem to require this; and we do not apprehend that any serious difficulty will be found in practice, by adopting the rules of damages appropriate to each count.

But we think the second instruction, given for the plaintiff, improperly assumed facts to be true, which should have been left to the jury, and which it was by no means certain were established by the proof. The instruction is this: "If the jury believe, from the evidence, that the plaintiff was the owner of the hay in question, at the time it was taken, as proved by the witnesses, the jury will find a verdict for the plaintiff on the count in trover, for the hay so taken, at the value of the hay as proved by the evidence." This assumes that the hay was taken by the defendants, and all of them. It should have been left

to the jury to say, whether all of the defendants were engaged in taking the hay, which, from the evidence preserved in this bill of exceptions, was a doubtful question; and especially was it doubtful, whether all of the defendants were jointly engaged in taking all the hay, for which the verdict was rendered. The verdict against all, could be for no more than all were jointly engaged in removing.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

Edward Neary, Appellant, *v.* James Cahill, Guardian, etc., *et al.*, Appellees.

APPEAL FROM LA SALLE COUNTY COURT.

An execution against one of several tenants in common cannot be levied upon personal property held in common with others; the proper way is to make a levy upon the interest only of the judgment debtor.

This was an action orginally brought before a justice of the peace, in the name of the plaintiff below, against defendant below, to try the right of property in a certain mare, levied upon by a constable, by virtue of an execution issued by said justice.

Trial by jury, who found for the claimant, and judgment accordingly.

The cause was tried before Champlin, County Judge.

D. L. Hough, for Appellant.

Strain & Bull, for Appellees.

Caton, C. J. This was a trial of the right of property, under our statute. The property belonged to the defendant in the execution and four others, as tenants in common, and the entire property in the mare was levied upon as belonging to the defendant in execution exclusively; and we think the court properly held that the claimants, who were the other tenants in common, had a right to recover on this trial. Had the levy been upon the interest alone of John Duffy, which was one-fifth, the other tenants in common would have had no cause to complain, and it may be, even, that the constable might have taken exclusive possession of the property for the purpose of selling

that interest; but he had no right to levy upon and sell the entire right or title to the property; and his attempt to do so made his act wrongful, and the claimants were properly allowed to recover.

The judgment must be affirmed.

Judgment affirmed.

John Nash, Appellant, *v.* Marks Monheimer, Appellee.

APPEAL FROM BUREAU.

A contract will not be enforced, which grows immediately out of, or is connected with, an illegal or immoral act. And this, if the contract be in part only connected with the illegal transaction; though it be a new contract, it is equally tainted.

A trial of the speed of a horse, upon a wager, within the corporation limits of a city, where there is an ordinance against fast driving, is such an act against good morals as will preclude a court of justice from enforcing a payment of the wager.

This was originally a cause brought before a justice of the peace, of Bureau county, by the appellee against the appellant, and taken by appeal to the said Circuit Court, in which there was judgment for the appellee; and the appellant, who was the defendant in the court below, brings the case to this court by appeal. The facts of the case are fully set out in the bill of exceptions, as follows:

This cause came on for trial before the Circuit Court of Bureau county, at the October term, 1855, of said court. A jury was waived, and the cause submitted to the court upon the following agreed state of facts: "This cause was originally instituted before a justice of the peace, of said county, and appealed to the said Circuit Court. The plaintiff brought suit against the defendant on the following demand, to wit: 'John Nash to Marks Monheimer, Dr. 1855. To cash won on wager, by said Nash and Monheimer, that he, Nash, could make a certain horse rack one-half mile in one and a half minutes—said horse, on trial, failing to make the same, $25.00.' It was admitted, that in pursuance of a contract between the said parties, which is substantially set out in said statement, the horse of the plaintiff was racked on said wager, within the corporation of the town of Princeton, in said county, by the defendant, previous to the institution of said suit, and said horse failed to rack one-half mile in one and a half minutes; that no place where said horse should be racked on said wager was specified in the contract or wager between the parties, but that when said horse was so

racked upon said wager, the plaintiff was present and made no objection to said racking of the horse being within the corporation of said town. It was further admitted, upon said trial, by the parties to this suit, that said town of Princeton was a legally incorporated town, under the laws of this State, at and before the time of said test or trial of the speed of plaintiff's horse, and that an ordinance of said town had been duly and legally enacted and published, and was still in full and legal force and effect, at and before said test or trial, which prohibited furious riding or driving of horses within the incorporated limits of said town; and that the speed with which said horse was rode, on said trial or test, was such, that he racked one-half mile in one minute and thirty-four seconds, along one of the streets of said incorporated town." Which was all the evidence in the case.

The court found the issue for the plaintiff, and rendered a judgment for plaintiff for twenty-five dollars, to which the defendant then and there excepted, etc. The defendant also moved for a new trial, which the court overruled, to which the defendant excepted.

This cause was tried by HOLLISTER, Judge.

Upon this record the appellant makes the following assignment of errors, to wit:

1st. The court erred in finding for the appellee.

2nd. The court erred in overruling appellant's motion for a new trial.

3rd. The court erred in not finding for the appellant, and rendering a judgment in his favor and against the appellee for costs.

PETERS & FARWELL, for Appellant.

O. C. GRAY, for Appellee.

WALKER, J. This suit was originally commenced before a justice of the peace of Bureau county, who on the trial rendered a judgment against the defendant, which was by him taken by appeal, to the Circuit Court. On a trial in the Circuit Court, the plaintiff again recovered a judgment against defendant, from which he appealed to this court. The action was to recover a wager of $25, that Nash could make a certain horse rack one-half mile in one and a half minutes. It was agreed by the parties on the trial below, that in pursuance of the wager, the horse of Nash was racked within the corporate limits of the town of Princeton, previous to the commencement of the suit, and that the horse failed to rack a half mile in one and a

half minutes. When the wager was made, no place for the trial of the horse's speed was agreed upon, but when the horse was racked, both of the parties were present, and Monheimer made no objection that the horse was racked in the corporate limits. It was agreed that the town of Princeton was legally incorporated under the laws of this State, at the time the horse was racked. That an ordinance of the town was then in full force which prohibited, under a penalty, furious riding or driving of horses in the corporate limits of the town, and the speed of the horse on this occasion was such that he reached a half mile in one minute and thirty-four seconds, along one of the streets of the town.

The only question which we propose to consider in this case, is, whether the plaintiff was entitled to recover on this wager. It is a rule of the common law that all contracts in violation of its principles, or opposed to legislative enactments, or that are opposed to public policy, are void. The object of all laws is to repress vice and to promote the general welfare of the State or society; and an individual shall not be assisted by the law, in enforcing a demand originating in a breach or violation, on his part, of its principles or enactments. Chit. Cont. 513. And the rule was laid down by the Supreme Court of the United States, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid for its enforcement. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is thereby equally tainted. *Armstrong* v. *Taylor*, 11 Wheat. R. 258. From the admitted facts in this case, while no time or place for the trial of the horse's speed is expressly named, yet they do show that the horse was racked when both parties were present and no objection was interposed, and that the ordinance of the town was violated. The parties were both engaged in this transaction, both violating an enactment in executing their wager, and we are therefore irresistibly forced to the conclusion that the parties, when they made the wager, intended to make the trial of the horse's speed just as it was tested. If this was not their intention, there would have been objection to the time, place and manner of trying the speed of the horse; but none was interposed, and the execution of the contract was intended to and did violate the town ordinance. The contract was clearly connected with the violation of a legal enactment. It then follows that the plaintiff below had no right to recover in this case, and the Circuit Court erred in rendering a judgment in his favor. The judgment of that court is reversed.

Judgment reversed.

The Chicago and Milwaukee Railroad Company, Plaintiff in Error, *v.* Ichabod Bull, Defendant in Error.

ERROR TO LAKE.

Expenses attending an assessment of damages in acquiring right of way, include costs, but these are on the same footing as the damages; they are to be paid before the land condemned can be taken. Execution does not issue for such costs.

This was a proceeding commenced by said company under its special charter, (see Private Laws for session of 1851, page 266,) to ascertain the compensation to be paid by said company to defendant in error, by reason of the location and construction of its railroad over and across a certain tract of land in Lake county, owned by defendant.

The report of the commissioners, fixing said compensation and damages, was made and filed with the clerk of the Circuit Court of said county, and a motion made in behalf of said company for the acceptance and approval of said report by the judge of said court. The defendant objected to the acceptance and confirmation of said report, and claiming that he was dissatisfied with the amount awarded, moved that said judge should modify said report as should to him seem just.

At the October term of said court, for the year 1855, Manniere, Judge, presiding, said motion of defendant was tried by the court, and the amount of compensation and damages were increased from $74 to $131.

At the January term, 1856, of said court, the final order accepting and modifying said report was made, in which the court orders as follows: "It is further ordered, that upon payment by said company to said owners and parties in interest of the said compensation and damages, and the expenses of said assessment, said company and its successors shall become seized of said portion of said tract of land, and entitled to the use thereof for right of way for its railroad."

On a subsequent day of said term, on motion of defendant's attorney, said court ordered: "That the fees of the officers of said court for issuing and subpœnaing witnesses, and the fees of witnesses, attending on the part of said Bull, upon the hearing of the motion of said Bull for the modification of said report, be taxed by the clerk of this court against said railroad company." To which plaintiff excepted.

At the October term of said court, for the year 1856, (two terms having intervened after the entry of the last preceding order,) it was, on motion of defendant's attorney, ordered by

the court, that execution issue for the amount of said fees. To which order an exception was taken by the plaintiff in error.

BLODGETT & UPTON, for Plaintiff in Error.

FRAZER & CLARKE, for Defendant in Error.

BREESE, J. The order entered at October term, 1856, awarding execution, was irregular and unauthorized, and must be set aside.

It is true that the expenses attending the assessment of damages for right of way include costs, but they stand on the same footing as the damages awarded for which execution cannot issue. The law does not so provide. They are to be paid by the company before they can take possession of the land condemned or acquire any right to it whatever.

The judgment awarding execution is reversed and the cause remanded.

Judgment reversed.

HUGH MCGAVOCK, Paintiff in Error *v.* PORTER E. CHAMBERLAIN, Defendant in Error.

ERROR TO WINNEBAGO.

Where an action is commenced in replevin, but is changed to trover under the authority of the statute, the rule of damages which governs in actions of trover will control.

THE action in the court below was replevin for a span of horses and a set of harness. The writ of replevin was issued to the sheriff on the 27th day of June, 1857, and the following return made thereon by him: "June 27, 1857. The within named Porter E. Chamberlain refused to deliver up the within described property, and thereupon I served the within by reading the same to the aforesaid Chamberlain, as I am therein commanded."

On the 14th day of September, 1857, the plaintiff filed his declaration in said action in trover and claimed damages to the amount of four hundred dollars.

The defendant pleaded not guilty, and issue was joined thereon.

At the February term, 1858, the cause was submitted to the court for trial, without a jury. The said plaintiff, to maintain the issue on his part, read in evidence a stipulation signed by the attorneys of the respective parties, as follows:

"It is hereby stipulated that the property in question in this action, to wit: Two horses and one set of harness, was, on the 23rd day of June, 1857, at said county, wrongfully taken by the said defendant from the possession of the plaintiff, the same being the property of the said plaintiff, and wrongfully converted to his, the defendant's, own use, and that the said property was, on that day, of the actual value of two hundred dollars, and that the use of said property was worth fifty cents per day from the time of said conversion to this day, above expenses and depreciation."

And thereupon, without other or further evidence, rested his case. And the defendant, without introducing any evidence, rested his case. And the court, SHELDON, Judge, presiding, found the said defendant guilty, and assessed the plaintiff's damages at two hundred and ten dollars. And the said plaintiff, by his counsel, moved the court for a new trial.

1st. The damages of the plaintiff were assessed at too small a sum by the court.

2nd. The assessment of damages by the court was not in accordance with the law and the evidence.

The court overruled the said motion. And judgment was thereupon rendered in favor of the plaintiff for two hundred and ten dollars and costs.

J. WIGHT and P. SHELDON, for Plaintiff in Error.

J. MARSH, for Defendant in Error.

CATON, C. J. This action was commenced by issuing a writ in replevin, upon which the sheriff was unable to seize the articles mentioned in the writ and deliver them to the plaintiff. The plaintiff then filed a declaration in trover, upon which an issue was regularly formed, and the cause tried. Upon the trial the plaintiff claimed to recover for the use of the articles, as in an action of replevin, but the court held that the rule of damages which governs in actions of trover should be applied, and so instructed the jury, and this presents the only question in the case.

The second section of the act of 1851, under which this trial was conducted, is as follows:

"In such action of replevin, in case the property named in the writ shall not be found or replevied, or shall not have been

delivered as aforesaid, and the defendant shall have been summoned as aforesaid, the plaintiff may file his declaration in trover, and the cause shall be heard and determined as other actions of trover; and the plaintiff, if he shall recover, shall be entitled to judgment and execution for the value of such property, or of his interest therein, and such damage as he shall have sustained by reason of the wrongful taking or detention thereof, together with the costs of suit."

The question is, whether the legislature intended, by this section, that the action should substantially be converted into trover and be governed by the rules of law applicable to such actions, or whether it is still to be considered an action of replevin and controlled by rules peculiar to that form of action.

In our opinion, it must be tried and treated as an action of trover. Indeed, the statute so declares, in express terms. "It shall be heard and determined as other actions of trover." In actions of trover it would be an unheard-of thing to allow the plaintiff to recover fifty cents per day for the use of a horse, for the time between the taking and conversion and the filing the declaration. That rule of damages is peculiar to replevin. By changing his form of action into trover, the plaintiff elects to treat the wrongful act of the defendant as a conversion, and thereby declares that by the conversion the title vested in the defendant. In replevin, the title is considered as not having passed to the defendant; while it is otherwise in trover. If the plaintiff elects to treat the title to the property as having passed, he cannot claim for the use of it, as if it were still his. It is only while it is his property, that he can claim compensation for its use. We think the court decided properly, and its judgment must be affirmed.

Judgment affirmed.

The Joliet and Northern Indiana Railroad Company, Appellant, *v.* Robert Jones, Appellee.

APPEAL FROM WILL.

If the bill of exceptions includes the pleadings of the parties, the costs of so much of the record as contains these pleadings in the bill should be taxed against the party who caused their insertion.

If a deed has been given to one corporation, and assigned by it to another, or if the name of the corporation has been changed, proof of such averments must be made where the plea of the general issue has been interposed.

Joliet and Northern Indiana Railroad Company *v.* Jones.

In a suit against a railroad company for injuries to sheep, arising from neglect to build a fence, as it had contracted to do, the question is not whether the fence would have made a perfect inclosure as against the road, but whether the neglect contributed to the injury.

Where the negligence charged is not in the running of the train, but in not building a fence, if it does not appear that the sheep got upon the track because this fence was not built, other parts of the field not being inclosed, the plaintiff will not be relieved from the exercise of proper care, and he cannot recover if his negligence was the direct and proximate cause of the injury.

THIS was a suit in case brought by appellee against appellant, in Will Circuit Court, and tried at the May term, A. D. 1857. Verdict for plaintiff, $231.50.

The declaration contains but one count. It first recites that defendant, "under and by the corporate name of the Oswego and Indiana Plank Road Company," on the 13th October, 1853, being about to construct a railroad from Joliet to State Line, applied to plaintiff for right of way across his land, being E. half N. E. qr. section 14, township 35 N., range 10 E., in Will county; that plaintiff, in consideration, among other things, that defendant, before their railroad went into operation, would make a fence along south side of the road, conveyed to them, "then a corporation, under the name of Oswego and Indiana Plank Road Company," by deed, a certain tract, describing it, situated in the north-east corner of the said tract, and that defendant accepted the deed upon that condition, and with express promise to build such fence. It then avers that, on 24th day of June, 1855, after the road was built across the land and in operation, and while plaintiff still owned and possessed the land adjacent on the south, defendant neglected to build the fence; and that certain sheep, then feeding in plaintiff's close, escaped, got on to the railroad, and "were run over by the locomotives and cars, then and there passing and repassing on said railroad," alleging the killing of some, the injury of others, and costs of necessary care and attendance to the injured. Damages laid at $500.

Plea, general issue and *similiter*.

Plaintiff offered, in evidence, the record of a deed from himself to the Oswego and Indiana Plank Road Company, dated 13th October, 1853, being the same referred to in the declaration, and conveying *the premises*. Contained the following words in the *habendum* clause: "Subject to the following covenants of the said party of the second part, to wit: they are to erect and forever maintain a good and sufficient fence along the south side of their said railroad, and are to build, and maintain in suitable repair, a sewer, of suitable materials, under their said railroad, so that the water from the spring, and the surface

water from the adjacent premises of the first party, may pass freely off at all times after said railroad shall be built."

John W. Stevens, called on the part of the plaintiff, said, in substance: Knew localities in question; land in possession of plaintiff, who resided there at the time of the accident. No fence on the south side of the railroad at the time. Plaintiff's flock of sheep in the habit of laying around the barn on the hill, opposite the track; they were not inclosed at the time, but running at large. The south line of eight acre tract conveyed about half way between barn and railroad. In the morning, found nine sheep dead on the track, and forty-four injured; sixteen more were killed; six or seven of the wounded sheep died afterwards—rest recovered. In addition to twenty-five which were killed, seven or eight more died within six weeks.

He further testified that the most natural place for the sheep to get on the track from the barn was straight across. There were no fences at the time on the east and west lines of plaintiff's land, extending to the south line of the railroad; there was a highway crossing east of the east line of plaintiff's land, and there was no inclosure along the highway from the barn to the railroad. Accident occured early in the morning. Did not know what company were operating the road; did not know whether the train in question belonged to Michigan Central or Chicago and Mississippi.

Henry Johnson, called by the plaintiff: Lived near land in question. From the barn there was no difficulty in getting on to the track anywhere. Quite a wide bottom between bluff where barn stood and railroad, extending for some rods along the highway, which crosses the railroad on the east.

Richard Newkirk, next called for plaintiff: The track was from five to six feet high; grass on each side, in the bottom. At night, it was natural for the sheep to seek the track to lie down upon. There was a highway crossing not more than three or four rods from east line of land in question. It was from ten to twelve rods from where nearest sheep was killed.

Joel A. Matteson. The possession of the road was transferred to Michigan Central Company in the early part of June, 1855. Defendant never operated road with freight or passenger trains. The trains were of Michigan Central or Chicago and Mississippi, which then ran trains on road. Witness was the agent of the Oswego and Indiana Plank Road Company.

N. D. Elwood, then called for defendant. Transfer to the Michigan Central Company consummated 4th June, 1855.

Defendant then moved to exclude from jury the evidence relating to deed in question, upon the ground that the identity of the Oswego and Indiana Plank Road Company with the

defendant had not been proved, and was not presumable from identity of name, which was overruled, and defendant excepted.

The defendant's counsel then asked the following, among other, instructions:

2nd. If no evidence has been produced by the plaintiff, satisfying the jury that the defendant, the Joliet and Northern Indiana Railroad Company, are the same identical corporation with the Oswego and Indiana Plank Road Company, which made the contract for which the plaintiff sues, then the plaintiff has failed to sustain his declaration, and the law is for the defendant.

Which the court refused to give.

3rd. Although the jury should believe, from the evidence, that the defendant was bound, by the conditions in the deed of the right of way from Robert Jones, to build a fence along the railroad on the south side thereof, and had failed to do so, yet this breach of duty on their part did not absolve the plaintiff from the exercise of such care and prudence in the management of his stock as the actual condition of his farm and the circumstances of the case seemed to call for at the time.

Which was given.

4th. If, from the evidence, the jury believe that the immediate agency which killed or injured the plaintiff's sheep was a locomotive engine on the railroad track, running against them, then, although from all the circumstances the jury might imagine it probable that the sheep would not have been on the track if a fence had been built, according to contract, yet, if such want of fence is not the immediate and proximate cause of the injury, that fact would not of itself make the company liable.

Which was given.

5th. That although the defendants may themselves have been guilty of negligence in the management of the train in question, either by not giving the proper signals in time, or by not keeping a proper look-out, or by not slackening the speed of the train, yet if the plaintiff was also guilty of want of proper and reasonable care and prudence on the occasion, by leaving his sheep in an uninclosed field on the side of and open to the railroad, then, unless the proof shows that the conduct of the engineer was wanton and malicious, and not merely careless and imprudent, the law is for the defendants, and plaintiff cannot recover for the damage done.

Refused, and the defendant excepted.

7th. First clause: "In order to make the defendant liable in respect to the condition inserted in the deed to fence the road on the south side, it is incumbent on the plaintiff to prove, by evidence either positive or circumstantial, that the sheep got

on to the railroad track at some point in the line which the defendant was so bound to fence, and not elsewhere."

Which was given.

Second clause: "And it is also incumbent on him to prove that such fence, if built, would have formed a perfect inclosure for said sheep from and against the railroad."

Which was refused, and defendant excepted.

10th. If the jury believe, from the evidence, that the entire agreement in regard to the fencing of the plaintiff's land in question was finally contained and embodied in the condition or provision in the deed on which the suit is brought, then the said agreement forms the only measure of the rights of the parties, and no evidence of previous agreements or negotiations between the parties in regard to said fencing is admissible.

Which was given.

This cause was tried by NORTON, Judge, and a jury.

PARKS & ELWOOD, for Appellant.

W. K. MCALLISTER, for Appellee.

BREESE, J. The right to maintain this action by Jones against this Railroad Company, is established by the case of *Conger* v. *The Chicago and Rock Island Railroad Company*, 15 Ill. R. 366, a case, in its legal aspect, identical with this. The errors assigned in this record are, in refusing the second instruction asked for by the defendants below, the appellants here, to the effect that "it was incumbent on the plaintiff below to prove the identity of the Joliet and Northern Indiana Railroad Company with the Oswego and Indiana Plankroad Company, with which the contract sued on was made;" in refusing to give the second clause of the seventh instruction asked for by the appellants; in refusing the fifth instruction; in not excluding from the consideration of the jury the deed from Jones to the Oswego and Indiana Plankroad Company, upon the motion of the defendants below; in admitting testimony after the deed had been produced, designed to prove verbal agreements made previously, touching the same subject matter; in refusing the motion for a new trial for the reason assigned, that the verdict was against law and evidence; and in refusing to arrest the judgment for the reason assigned, that the declaration did not state a legal cause of action.

As preliminary, we may notice here, that the bill of exceptions contains the declaration and pleadings in the cause, thus incumbering the record and occasioning costs for no good purpose. It is the office of a bill of exceptions to bring before the appel-

late court matters *de hors* the record only, not the pleadings of the parties, for they are intrinsic, and are necessarily on the record, without being preserved by a bill of exceptions. The costs of so much of this record as contains these pleadings in the bill of exceptions, should be taxed against the party who caused them to be put in it.

As to the first error assigned, the rule is, in all cases, that the best evidence of which the nature of the case is susceptible, must be produced; and another is, that the material averments of a declaration must be proved. The averment in this declaration is, that the defendant, "then a corporation under the name of Oswego and Indiana Plankroad Company, received the deed for the land, and that defendant accepted the deed upon the condition therein contained, and expressly promised to build the fence." The deed was made to the Plankroad Company, and the inquiry arises, where is the evidence that this company and the defendant are identical? The averment is, the defendant accepted the deed, by the name of the Oswego and Indiana Plankroad Company, and the testimony of Matteson and Elwood shows, that the defendant was the owner of the railroad up to June 4, 1855, at which time it was transferred from the defendant to the Michigan Central Railroad. It is very true, where a deed is made to a corporation or individual, by a name different from the true name, the plaintiff may sue in their true name, and aver in the declaration that the defendant made the deed to them by the name mentioned in the deed. But that is not this case. The deed was made to the party by its true and proper corporate name, but there is no proof tending to show that the corporation now defending is the same corporation as that which received the deed. If it be the fact, it is susceptible of proof. The mere averment of identity is not sufficient, and the plea of the general issue puts that fact, as well as every other one not protected by our practice act and rules of pleading, directly in issue. We think there is an entire absence of proof establishing this identity.

As to the second clause of the seventh instruction, we think there was no error in refusing it, as it is immaterial, so far as the duty of the defendants is involved, whether the fence they engaged to make would have formed "a perfect inclosure for the sheep from and against the railroad," or not. The duty, under the contract, was to build the fence; its effect or utility, when built, is another and different question. The liability of the company, in this action, for the neglect of this duty would depend entirely on the question of fact to be found by the jury, whether this neglect of duty contributed to the injury of which complaint is made.

The fifth instruction raises the question, as to which party the negligence is most properly chargeable.

It will be observed, that the declaration does not go upon the negligence of the defendants in running their train. It proceeds solely upon the ground of neglect to build the fence, by means of which the injury resulted by the destruction of the sheep. This being so, the question is still behind, though the defendants neglected their duty, does this excuse the plaintiff from the exercise of that ordinary care every prudent man bestows upon his own? We think not. All the testimony in the cause shows, if the few rods of fence the defendants were required to make, would not, when made, have constituted an inclosure; for the other sides were open and uninclosed, and there is no evidence to show that the animals got upon the railroad by the line the defendants were to fence; and the inference is as fair that they did not so get upon it, as that they did.

It cannot be denied, that the plaintiff kept his sheep, whose habits he should know, very negligently, far more so than an ordinarily prudent man takes of such property. They were subject to destruction every hour in the day, by trains running at their usual speed; and although the defendants might be bound to make the fence, it did not exempt the plaintiff from the obligation to take ordinary care for the protection of the animals. His negligence was the direct and proximate cause of the injury, and the defendants should have the benefit of that principle.

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

Judgment reversed.

Jacob Darst, Appellant, *v.* Israel M. Marshall, Appellee.

APPEAL FROM KNOX.

Where there is a contract for the sale of land unexecuted, it makes no difference so far as claim and color of title is concerned, whether the taxes are paid by the vendor or vendee, or by the assignee of either.

Where a party had a contract for a deed of land, to be delivered when he should make certain payments, the contract providing also, that he should repay the taxes assessed after a certain date, which contract was assigned by the vendor as the payment of money, and the assignee of the contract paid taxes for three years, and until the deed was delivered; when the party purchasing paid those taxes and all others for a period of seven years, during all which time he was in actual possession, this established such claim and color of title as would defeat an action of ejectment brought by any other claimant.

PLAINTIFF filed his declaration for the recovery of the north-west quarter of section thirty-two, township ten north, range one east of the fourth principal meridian, at the September term of the Knox Circuit Court, to wit: the 24th day of September, 1855. Plea, not guilty.

The cause was tried by the court, without a jury, at the April term of said court, 1857, and taken under advisement by the court until the October term, 1857, when judgment was rendered for the defendant, at which last named term plaintiff filed his bill of exceptions, which shows that the plaintiff proved title from the United States by a regular chain of conveyances to himself, which were read in evidence, without objection.

The possession of the said premises by defendant at the time of commencing suit was admitted.

Here the plaintiff rested.

Defendant, to prove title on his part, offered in evidence a deed for said premises from the Auditor of State, under a tax sale made 16th January, 1828, dated 5th July, 1830, to John Tilson, Jr., which was offered for the purpose of defense, under the limitation laws, and admitted for that purpose by the court; also a deed from John Tilson, Jr., and wife, to Moses Allen, conveying said premises, dated 27th April, 1830, for the purpose of making defense under the limitation laws. To the admission in evidence of said two last named deeds, the plaintiff objected, which objections were overruled by the court.

Defendant next offered in evidence a deed from Moses Allen and wife, to Chas. F. Moulton and others, dated 14th November, 1835, and a deed from said Moulton and others, to Thomas Dunlap and Lemuel Lamb, dated 30th April, 1838, to the land in question, both of which last named deeds were objected to by plaintiff, and excluded by the court.

Defendant next offered a deed from said Lamb and Dunlap, to himself, for said premises, dated 1st November, 1841, which last named deed was never recorded. Also, a copy of agreement for a deed from the Illinois Land Company to Israel M. Marshall, the defendant, dated 15th June, 1841, whereby said land company bound themselves to convey to said Marshall the land in question, in consideration of the payment by Marshall of $50 cash in hand, $150 on 1st June, 1842, $150 on 1st Monday of June, 1843, and $142 on 1st Monday of June, 1844, with interest. Said agreement contained the following clause by which defendant agreed, "at the time of the delivery of the deed for said premises by the said parties of the first part, to repay to the said parties of the first part all taxes assessed on said premises from the fifteenth day of June, one thousand eight hundred and forty one, and the interest thereon, at the rate of

six per centum per annum, until paid," upon which agreement were receipts for the purchase money paid by Marshall.

One of which receipts was dated 27th June, 1842, for $19.25, signed "John Tilson, Jr., Agent for C. Morton."

Another for $51.77, dated 28th June, 1841, signed "John Tilson, Jr., Agent for Chas. Morton."

Another for $110, dated 13th July, 1843, signed "Lucius Kingman, for the owner, J. R. Randolph."

Another for $205, dated 3rd July, 1843, signed "Lucius Kingman, for the owner, J. R. Randolph." Which said agreement never was recorded.

Defendant next offered the deposition of Lucius Kingman, dated 14th January, 1857, to which was attached and exhibited said agreement from the land company, and said deed from Lamb and Dunlap, to the defendant, and also three several tax receipts for the payment of the taxes on said land, as follows:

STATE OF ILLINOIS, } ss.
KNOX COUNTY. }

COLLECTOR'S OFFICE,
Knoxville, May 25th, 1842.

Received of John Tilson, Jr., twelve dollars and seventy-two cents, tax due State and County, for year 1841 on the following lands:

S. E. 31, 10 N., 1 E.,	$3 90
N. W. 31, 9 N., 3 E.,	2 94
N. W. 32, 10 N., 1 E.,	2 94
N. E. 18, 9 N., 1 E.,	2 94
	$12 72

Signed, G. PLYMALE, *Collector.*

STATE OF ILLINOIS, } ss.
KNOX COUNTY. }

COLLECTOR'S OFFICE,
Knoxville, May 22nd, 1843.

Received of Lucius Kingman, the sum of three dollars and sixty-eight cents, being in full for State, County and Road Tax, on the following described land, for the year 1842:

N. W. 36, 10 N., 3 E.,	$1 84
N. W. 32, 10 N., 1 E.,	1 84
	$3 68

GEO. LOWMAN, *Collector.*

STATE OF ILLINOIS, } ss.
KNOX COUNTY. }

COLLECTOR'S OFFICE,
Knoxville, Feb. 22, 1844.

Received of John R. Randolph, the sum of three dollars and five cents, being in full for State and County Tax on the following described land, for the year 1843:

N. W. 32, 10 N., 1 E., } N. W. 34, 10 N., 3 E., }	$3 05
	$3 05

Paid by N. SELBY.

GEO. LOWMAN, *Collector.*

Said Kingman states, the Illinois Land Company owned the land; Lamb and Dunlap were the trustees, and held the title; the company owed John Tilson, Jr., money.

That the contract to Marshall was executed by the Illinois Land Company, by John Tilson, agent for said company, by Chas. Morton.

That in April or May, 1842, said contract and its value was given to John Tilson, Jr., by the Illinois Land Company, instead of money due said Tilson, and the taxes for 1841 were paid in name of said Tilson for himself. John Tilson, Jr., then gave the contract to Robert Tilson, as cash, and Robert gave it to one John R. Randolph, as so much cash; and the taxes of 1842 were paid in the name of Kingman, for said Randolph; and tax of 1843 was paid by witness, in the name of said Randolph for him, and so charged to him on the books.

That said contract, the deed to Marshall, and tax receipts, were all left with witness, in Quincy, by John Tilson, Jr., Robert Tilson, and John R. Randolph: the tax receipts contained other lands than the one in question.

The land in question was sold to defendant as a tax title.

Tilsons and Randolph only claimed the land as above stated, under the title sold by said land company, to Marshall; and they paid the taxes as such owners under said sale and contract, in the place of the land company.

Defendant next offered in evidence tax receipts for the payment of taxes on the land in question, for the years 1844, 1845, 1846, 1847 and 1848; to all of which evidence the plaintiff objected, (but not because signatures were not proved, nor because copies were used,) but because the same were irrelevant and improper evidence; but the court overruled the objections and allowed the evidence to be read for the purpose of showing color of title or connected title to protect the defendant under the limitation laws.

John C. Latimer sworn, stated that the land in question was vacant when he first knew it in 1831; in 1833 a man by the name of West cut a set of cabin logs on the land. In 1834, brother of witness bought the logs and West's claim, for defendant.

In 1835, defendant moved from Kentucky on to the land, in his wagon, put up a temporary camp, then put up a cabin with the logs, made arrangements to winter his stock: in winter of 1835 and spring of 1836 he made rails and fenced a small field; has had possession by actual residence thereon ever since, but had only a small part of the quarter inclosed. Broke up four or five acres in 1836, and planted an orchard; has used it as his farm.

He continued his improvements in 1837, the house has been occupied by tenants ever since; these improvements were continued until there is now a pasture fenced of from sixty to eighty acres, besides the orchard. The defendant's barn is on this ground. The whole of the pasture and orchard were inclosed by 1842 or 1843.

Defendant first squatted on the land, and said he intended to buy it as soon as he could find the title; has claimed it as his own since 1840; built a large barn on it in 1841.

That West never lived on the land, nor had any title to it. That defendant came out from Kenteky in 1834, to look at the country, saw this land, said if he could get West's claim, he would settle on it, and buy the title when he could find it. He bought the tax title in 1840; claimed nothing but a squatter's claim when he first went on to the land, and never claimed any title until 1840. Sixty or seventy acres of prairie on the quarter; the balance is brush and timber. Defendant has openly claimed the land as his own since he bought the tax title.

Defendant then offered a deed from Peter Franc, sheriff, to Abraham D. Swartz, under tax sale of 1840, for tax of 1839, dated November 15th, 1842, conveying the land in question. Also, a deed from Abraham D. Swartz and wife, to Charles Morton, dated 27th May, 1842, conveying said land. Also, a deed from Charles Morton and wife, to defendant, dated 15th January, 1845.

To the introduction, in evidence, of said three last deeds, plaintiff objected; the defendant stated that he offered the deeds to show connected title, or color of title, to protect him under the limitation laws of 1835 or 1839, or either of them, for which purpose only the court admitted the same.

It was agreed that no exceptions should be taken to any papers, on account of signatures not being proved, nor because copies were used instead of originals.

John G. Sanborn sworn, stated that the receipts for money on the contract were in the handwriting of Charles Morton. Recollects that the papers were left with him (witness), and presumed the deed was delivered by him to Marshall, when the last payment was made, in 1844 or 1845. Can't say that the contract shown is the one left with him, but thinks it is. Had received at various times papers from Land Company, for Marshall. Don't recollect delivering the deed to Marshall. Can't identify the deed as being the one left with him; it resembles the one.

Last payment on contract was made in 1844 or 1845; of this he has no recollection, except from the papers; thinks he

received a small sum of money from Marshall, for Morton, and delivered him the contract and deed;—this he states from his general recollection of the transaction.

Thinks he delivered a deed to Marshall; can't say the one shown was the one, but thinks it looks like the same.

The above was all the evidence in the case.

Appellant assigns for error:

That said Circuit Court erred in permitting the said deed from the auditor of said State, to John Tilson, Jr., and from John Tilson, Jr., to Moses Allen, to be read in evidence.

In permitting said deed from Lamb and Dunlap to said defendant, to be read in evidence.

In permitting said contract from the Illinois Land Company to said defendant, to be read in evidence.

In permitting the deposition of Lucius Kingman to be read in evidence.

In permitting so much of said deposition of Kingman to be read as shows, or tends to show, title, or color of title to said premises, in the Illinois Land Company, or in John Tilson, Jr., or John R. Randolph.

In permitting each and every of the said tax receipts attached to the deposition of said Kingman, to be read in evidence.

In permitting parol evidence that the tax of A. D. 1842, paid in the name of Lucius Kingman, was paid for John R. Randolph.

In admitting evidence of the payment of the taxes for the years 1841, 1842 and 1843, and each of them, under any title, or color or claim of title, in the Illinois Land Company.

In admitting the evidence of the payment of taxes as stated in the deposition of said Kingman, under any claim and color of title attempted to be shown in said cause, to entitle the defendant to a defense under the act of A. D. 1839, as a limitation law, or for any other purpose under said act.

In permitting the said tax deed from Peter Franc, sheriff, to Abraham D. Swartz, to be read in evidence.

In permitting said deeds from Swartz to Charles Morton, and from said Morton to the defendant, to be read in evidence.

In rendering judgment in favor of said defendant in said cause.

In determining that said defendant was entitled to the benefit of the limitation act of A. D. 1835, or the act of A. D. 1839, upon the facts shown in said cause.

In not rendering judgment for the plaintiff upon the facts shown in said cause.

H. M. Wead, J. Manning, and Lander & Lindsay, for Appellant.

G. F. Harding, for Appellee.

Walker, J. This was an action of ejectment, commenced in the Knox Circuit Court, by Darst against Marshall, at the September term, 1855. On a trial by the court, by consent, without the intervention of a jury, the plaintiff introduced in evidence a regular chain of title from the United States to himself. Defendant admitted possession. The defendant introduced in evidence a deed from the Auditor of State, under sale of January, 1828, dated July 5th, 1830, to John Tilson, Jr.; a deed from Tilson to Moses Allen; a deed from Allen to Charles F. Moulton and others; a deed from Moulton and others to Lemuel Lamb and Thomas Dunlap, for the premises in dispute. Also, a deed from Lamb and Dunlap to himself, dated the 1st of November, 1841. And a copy of an agreement for a deed from the Illinois Land Company to defendant, dated July 15th, 1841, by which the Land Company bound themselves to convey the land to defendant upon the payment of the purchase money as therein specified; the last payment of which fell due on the 1st day of June, 1844. The defendant agreed by this contract that, upon the delivery of the deed, he would repay all taxes assessed on the land after the 15th of June, 1841, and interest thereon until paid. On the back of this agreement were receipts of purchase money: one for $51.77, June 28, 1841, signed J. Tilson, Jr., for Chas. Morton; one for $19.25, June 27, 1842, signed J. Tilson, Jun., agent for C. Morton; one for $205, July 3, 1843, signed Lucius Kingman, for the owner, J. R. Randolph; and another for $110, the 13th July, 1843, signed, Lucius Kingman, for the owner, J. R. Randolph. The defendant read a tax receipt for this land for the taxes of 1841, paid by J. Tilson, Jr., dated the 25th May, 1842; one for taxes of 1842, paid by Lucius Kingman; one for 1843, paid by John R. Randolph. Kingman testified that Lamb and Dunlap were the trustees for the Illinois Land Company. The Company owed Tilson, and Tilson, as their agent, sold the land to defendant. That in April or May, 1842, the contract was given to Tilson as money, and the taxes of 1841 were paid in his name for himself. He afterwards gave the contract to Robert Tilson as cash, and he in like manner gave it to John R. Randolph as so much cash, and that the taxes of 1842 were paid by Kingman for the use of Randolph; the taxes of 1843 were paid by witness in the name of Randolph, for him, and so charged on the books. The contract, the deed to Marshall, and

tax receipts, were all left with witness by John Tilson, Jr., Robert Tilson, and John R. Randolph. The Tilsons and Randolph only claimed the land, as above stated, under the title of the Land Company sold to Marshall, and they paid the taxes as such owners under that sale and contract, in place of the Land Company. Defendant then read in evidence tax receipts to himself for the years 1844, 1845, 1846, 1847, and 1848. The evidence shows that in 1835 defendant went into the actual possession of the land, and had resided on it since that time. That in 1835 he built a cabin, made rails and fenced a small field. In 1836 he broke up four or five acres and planted an orchard, and used the place as his own. He continued the improvements until sixty or eighty acres were inclosed, besides the orchard; has his barn on the land, and the whole inclosure was made as early as in 1842 or 1843. The barn is a large one, and was built in 1841. Defendant then introduced in evidence a deed from Peter Franc, sheriff of Knox county, to Abraham D. Stewarts under tax sale of 1840, for tax of 1839, dated November 15th, 1842, for the land in question. Also, a deed from Stewarts to Charles Morton, dated May 27th, 1842; and a deed from Morton to defendant, dated 15th January, 1845. On this evidence the court found for the defendant, and rendered judgment in his favor. From which plaintiff appeals.

In giving a construction to the 8th sec. of the 24th chap., R. S. 1845, in the case of *Cofield* v. *Furry*, 19 Ill. R. 183, this court say: "The true question in such cases is, under what title were the taxes paid? If they were paid under no claim and color, or under a title adverse to that to which they are sought to be applied, the payment is unavailing. But if paid by the tenant, his payment, like his possession, is, in legal effect, the act of the landlord. If payment is made by the *cestui que trust*, the effect is the same as if made by the trustee, for the two interests united make the estate, or the legal and equitable title to the land, standing together, and not in hostility to each other."

In the case under consideration, the defendant held the actual possession of the premises, under a contract which he entered into with the agent of Lamb and Dunlap, made the 15th of June, 1841. And, whatever the authority of the agent might have been, they executed a deed of this land, in pursuance of this agreement, on the 1st day of November following, which was not delivered until the purchase money was paid. They undoubtedly, by the execution of that deed, fully ratified the act of their agent in this sale. The defendant was, then, in possession under this title, and so continued for some years after his purchase, as also after the ratification of it by Lamb

and Dunlap. This was clearly claim and color of title. The defendant paid the taxes for five years, about which there is no dispute. But it is insisted that the payment by Tilson and by Randolph, and by Kingman for Randolph, for each of the three years which completed the seven years, was not available. The evidence shows that Lamb and Dunlap assigned the contract with defendant to Tilson as a payment of money. He thereby succeeded to all their rights under the contract, and Randolph, by assignment, succeeded to Tilson's rights, in the same manner. And these taxes were paid by them while they held this interest. They paid them under it, and to protect it from sale. They did not pay the taxes claiming under no title, nor did they pay them under a title adverse to this, but as connected with it by their assignment of the contract. It can make no difference whether the taxes are paid by the vendor or by the vendee, while the contract of sale remains unexecuted; nor can it make any difference whether by the assignee of the vendor or of the vendee; for, whether paid by one or another of them, it would be equally under the same claim and color of title. Any other construction would defeat the obvious intention of the legislature, and fail to prevent the mischief intended to be remedied.

The contract of defendant for the purchase of this land, provided that he would refund to the persons of whom he purchased, all taxes that should accrue after the purchase and which they should pay. This was, then, an authority to the vendor, or his assigns, to pay the taxes for him. And when they made those payments, they did so as his agents; and what a person does by another, he does by himself. Upon this principle, the payments thus made are equally availing as the payments made by himself, and formed a part of the seven years' payment of taxes, concurring with his seven years' possession.

Judgment affirmed.

The Peoria Bridge Association, Appellant, *v.* Lyman J Loomis, Appellee.

APPEAL FROM MARSHALL.

Juries may give exemplary damages in cases of willful negligence or malice, if the proof exhibits such a state of case.

To constitute willful negligence, the act done, or omitted, must be the result of intention. Mere neglect cannot ordinarily be ranked as willfulness.

Peoria Bridge Association *v.* Loomis.

The proprietors of a bridge, if it should be applied to the uses of a railroad, should provide increased guards against consequential new dangers.

In actions for negligence, that the plaintiff, if not wholly free from fault, must be as compared to the negligence of the defendants, so much less culpable as to incline the balance in his favor, both being in some fault.

Where there is an absence of proof of willful negligence, and no foundation for the damages awarded, and the finding of the jury manifests feeling and prejudice, the verdict will be set aside.

The rule of damages for personal injuries resulting from the negligence of others, is measured by the loss of time and expense incurred in respect of it; the pain and suffering undergone; permanent injuries sustained; impairing future usefulness, and consequent pecuniary loss.

THIS is an action of trespass on the case, commenced in Tazewell, and, by change of venue, sent to Marshall county, where it was tried at January term, 1858.

The declaration contains two counts, which are as follows:

Lyman J. Loomis, the plaintiff in this suit, complains of the Peoria Bridge Association, a corporation created by and under the laws of the State of Illinois, passed on and since the 26th day of January, A. D. 1847, entitled "An Act to authorize the construction of a bridge across the Illinois river," and also, an Act amendatory thereto, entitled "An Act in addition to an Act entitled 'An Act to authorize the construction of a bridge across the Illinois river,' approved January 26th, 1847," defendants in this suit, of a plea of trespass on the case; for that whereas before and at the time of the committing of the grievances hereinafter next mentioned, the said defendants were the owners and possessors of a certain bridge across the Illinois river, extending from the city and county of Peoria across the Illinois river, in the county of Tazewell, and State aforesaid, and were also the owners and possessors of certain lands adjacent thereto, and lying and adjoining their (the defendants') said bridge, and whereas all and every person was entitled, and of right, to cross and pass over, along and upon said bridge of said defendants aforesaid, on paying tolls therefor to said defendants; and said defendants were bound by law to keep their said bridge in good repair, so as to furnish a safe and convenient passage to all and every person and persons, and their teams, horses, wagons and property, on payment of the tolls aforesaid to said defendants; and said defendants were also bound by law, and of right should and ought to have kept their said lands and premises adjacent to and adjoining said bridge free and clear of and from any and all cars, locomotives, railroad tracks, fixtures, steam engines, and free and clear of and from the running, noise, confusion, whistling and alarm, on, over and upon their said lands and premises so adjoining, adjacent and next contiguous to their said bridge, whereby the horses, teams and property of any and all

persons crossing over, along and upon said bridge of said defendants could become frightened and alarmed, and run or back off, through or over said bridge. Yet the said defendants, not regarding their duty in this behalf, willfully, negligently and carelessly suffered and permitted divers persons, corporations and railroad companies to lay down their certain railroad track on the land and premises of and belonging to said defendants, adjacent to, next adjoining and contiguous to their said bridge aforesaid; and said defendants also authorized, contracted, and agreed to and with, and knowingly suffered said divers persons, corporations and railroad companies to lay down their said road track as aforesaid, and build and construct their fixtures thereon, and run their cars, to wit: one hundred cars and engines, to wit: ten engines and locomotives, to wit: ten locomotives, over and upon said railroad track so laid down and constructed on and over the said premises of defendants as aforesaid, and which said cars, engines, machinery and locomotives were moved, driven and propelled by steam power, with great force, noise, confusion and whistling, to the great fright, consternation, alarm, dread, hazard and danger of all and every person and persons, their horses, teams and property passing and crossing over, upon and along said bridge of said defendants as aforesaid, to wit: on the 15th day of December, A. D. 1856, at the county of Tazewell aforesaid; and by reason whereof, and by reason of the running, driving and propelling of said cars, engines, locomotives and machinery of said divers persons, corporations and railroad companies over and upon the said land and premises of said defendants as aforesaid, with great force, noise, confusion, disturbance and whistling of said locomotives and engines, the team and horses of said plaintiff, so crossing along, upon and over said bridge as aforesaid, as he lawfully might do, and of right was entitled to, took fright, became greatly alarmed, and run and pushed over and through said bridge, and fell, and were precipitated and hurled with great violence to the ground, a great distance, to wit: the distance of fifteen feet, together with the plaintiff, his wagon, team and property, wherewith he the said plaintiff was then and there passing over, upon and along said bridge of said defendants aforesaid; and whereby and by reason of said fall off, through and over said bridge of said defendants aforesaid, the said plaintiff was bruised, injured, wounded and maimed for life, and his bones broken; and whereby, also, his said horses and team were bruised, damaged, injured, wounded and rendered entirely valueless to said plaintiff; and his said wagon and property which said plaintiff was crossing over, along and upon said defendants' bridge, as aforesaid, became broken, injured and worthless, and entirely useless and

valueless to said plaintiff, to wit: at the county aforesaid; and the said plaintiff, in consequence of such falling and being hurled and precipitated to the ground, together with his said horses, team, wagon and property as aforesaid, and in consequence of such bruises, maims, wounds, injuries and broken bones to himself and horses as aforesaid, and the damage and breaking of his wagon, team and property so crossing along, over and upon said bridge of said defendants as aforesaid, and in and about the curing, healing, care, skill and attention of and to himself and horses, and the repairing of his wagon, team and property, was forced and obliged to pay, lay out and expend divers large sums of money, amounting in all to a great sum of money, to wit: the sum of one thousand dollars, to wit: at the county of Tazewell aforesaid.

And also for that whereas, before and at the time of committing of the grievances by said defendants, as hereinafter next mentioned, the said defendants were the owners and possessors of a certain other bridge, extending from the city and county of Peoria, across the Illinois river, into the county of Tazewell and State of Illinois, and over, across and along which said bridge any and all persons were entitled to cross, pass, and of right might cross, pass and travel, and use for the purpose of crossing the said Illinois river, together with their and each of their horses, wagons, teams and property, on payment of toll to said defendants; and said defendants being so possessed of and the owners of said other bridge as aforesaid, and entitled to have, demand and receive tolls from any and all persons so crossing and passing over said other bridge, either with or without their and each of their horses, wagons, teams and property as aforesaid, and by reason whereof the said defendants ought of right, and were bound by law, to repair said bridge and keep the same in good repair, so as to admit of convenient and safe passage for all persons, and their property, teams, wagons and horses, on payment of the tolls to said defendant. Yet the said defendants, not regarding their duty in this behalf, willfully, negligently and carelessly, and by and through their negligence, carelessness and default, and for want of due care and attention in this behalf, suffered and permitted their said other bridge aforesaid to be, remain and continue out of repair, unsafe, and in a rotten, dangerous and hazardous condition, insomuch that the said other bridge did not admit of convenient and safe passage to any and all persons, and their property, on payment of the tolls to said defendants as aforesaid, to wit, at the county aforesaid; and by reason whereof, and by reason of the said other bridge of said defendants being, remaining and

continuing out of repair, and in a dangerous, hazardous and unsafe condition, as aforesaid, to wit, on the day and year aforesaid, at the county aforesaid, the plaintiff, together with his horses, team, wagon, and property wherewith said plaintiff was crossing, passing over and along said other bridge, with due care and skill, as he lawfully might do, were violently hurled, thrown and precipitated down, through and over said bridge to the earth, a great distance, to wit, the distance of fifteen feet, whereby said plaintiff was then and there cut, bruised, maimed for and during his whole life, injured, crushed and wounded, and his bones broken, and remained so for a great length of time, and was thereby hindered and prevented from attending to his necessary and lawful affairs and business during all that time, and is forever maimed and deprived of ability to attend to business, to wit, hitherto; and the said horses, team, wagon and property which he, the plaintiff, was then and there crossing along, over and across said bridge, as aforesaid, also fell and were hurled, thrown and precipitated through, off of and over said bridge a great distance, to wit, the distance of fifteen feet to the ground beneath said bridge, and whereby the said horses were and became bruised, injured, wounded and maimed, and entirely worthless and valueless to said plaintiff; and whereby said wagon, team and property were broken, damaged, injured and destroyed, to wit, on the day and year aforesaid, at the county of Tazewell, aforesaid; and the said plaintiff, in consequence of such falling, bruises, wounds, maims, injuries and broken bones to himself and horses, and the damage and breaking of his said wagon, team and property, so crossing along and over said bridge, and in and about the healing and curing of himself and horses, and repairing of his said wagon, team and property, was forced and obliged to pay, lay out and expend, and actually did lay out and expend, divers large sums of money, amounting in all to a great sum of money, to wit, the sum of one thousand dollars, to wit, at the county of Tazewell, aforesaid. To the damage of the plaintiff ten thousand dollars, and therefore he brings suit, etc.

The defendants filed pleas to the same, as follows:

And the said defendants, for plea to the first count of said plaintiff's declaration, say that they are not guilty in manner and form, as stated in said count of said declaration, and of this they put themselves upon the country, etc.

And for further plea in this behalf to the first count of the plaintiff's declaration, the said defendants say that they did not suffer or permit the said companies, corporations or individuals in said first count of said declaration mentioned, to erect or

construct their said road at the time and place where, etc., in said declaration mentioned, as stated in said declaration, and of this they put themselves upon the country, etc.

Issue to the country.

Upon the trial of this cause, the plaintiff, to maintain the issue on his part, called, as a witness, *David Sloane*, who testified as follows: I know the bridge across the Illinois river at Peoria. I was along at the time his (plaintiff's) horses backed off the bridge and injured them and himself. It was in November, 1856. The bridge was built in 1847. The horses took fright at a locomotive which was on the railroad track of the Peoria and Oquawka Railroad, which was located along the side and near to the bridge, and backed up against the railing, which was thereby broken down, and the horses and wagon of the plaintiff were precipitated to the ground, together with the plaintiff himself, some fifteen feet in distance, by means of which one of the plaintiff's horses was rendered nearly or quite useless, the other one stiffened and lamed, and the plaintiff seriously and dangerously wounded. There was a railing on the bridge at the place, constructed of posts about five inches square, which were attached to the sleepers of the bridge, about one-half of the lower end of the posts being cut away, and then nailed to the sleepers with large nails or spikes. These posts were nine feet apart, and every other one was braced on the outside by a brace, from the top of the post, extending to a cross timber of the bridge, which extended beyond the railing and planks of the bridge. There was a string-piece in the centre of the posts, running from one post to another, two inches by six in size, and another on the top of the posts, about three inches by five, both nailed on. I do not know whether the nails of the posts were pulled out or the posts broken off. I cannot tell how close the horses were to the locomotive; they backed off very quick. The rails on the top were spliced between the posts by being nailed together, and were not strong. Only one of the posts broke when the wagon went over, and one part of the railing, eighteen feet long, went over with the posts. The end posts did not give way. I did not see Loomis, except at a distance, the day of the accident; he was then walking, with the assistance of a man on each side; his head was bloody. I did not see him again for two or three weeks. I do not think he has got over the injuries yet; he sometimes spits corrupted matter. The accident occurred four or five rods from the depot house toward Peoria. My horses were frightened at the same time. I knew the locomotive was there when I first came on the bridge; it was in plain sight. I could see it for a quarter of a mile before I came on to the bridge, but

the locomotive was standing still. We waited to see it move, but it did not move; we went on. The bridge was safe to pass over if horses were not frightened or scared. Loomis whipped his horses several times after they were scared, and before they went over the bridge. They were ordinarily gentle horses. The locomotive was about forty feet from plaintiff's horses' heads when they backed off. The horses would not have backed off if the railing had been strong enough to have prevented them. I did not consider the bridge safe, principally on account of the weakness of the railing. I did not see Loomis jerk his horses; I did see him strike them. I was paying particular attention to my own horses, which were also frightened, and was not paying particular attention to the plaintiff. I had long considered the bridge unsafe. There are holes in it; the railing was insufficient, and many of the posts which held it were loose and rotten. If the railing had been sufficient, the accident would not have happened. Defendants have since built a new bridge, and put on strong railing. The railing that was then on was not as good as ordinary railing on bridges.

Eri Gray being sworn, stated: I live in Tazewell county. Know and have often crossed the bridge. I was there on the bridge at the time the accident occurred. Loomis' team passed Sloane's at or near the depot; that there was a pile of lumber lying on the right hand side of the bridge, and a team of horses unhitched from the wagon. The lumber, team and wagon occupied about one-half the space of the bridge. The engine was about to start as Loomis passed the lumber. His horses' heads were turned towards the engine. They took fright at the engine and backed off the bridge. They had to back not more than eight or ten feet. There was a railing on the bridge, constructed of posts cut into the string pieces, five inches square, with a cross piece two by six inches in the centre, and three by five inches at the top, with a brace at each bent, but none at the centre posts; cross pieces and braces were all nailed with nails. I don't know whether the posts broke off or the nails pulled out. The posts were nailed—some with three nails, and some with one or two. It is my impression that the nails of the post that gave way were drawn out. The last I saw of Loomis he was standing up in the fore part of his wagon, and he struck his horses once. One horse was badly injured. The other horse was not much injured. Loomis was taken up to Mr. Parker's, injured and in great distress. He has not got over it yet. Loomis' team was about sixty feet from the locomotive track. The track runs near the bridge—forty to forty-five feet off. There is no screen between the two—the railroad and the bridge. There was a timber string-piece on the side of the bridge, on

the top of the plank where the horses backed off the bridge, extending along the edge of the bridge, ten or twelve inches square, and the plaintiff's wagon backed over the said timber string-piece. It was not over three or four seconds from the time the horses were frightened till they went off the bridge. I think said Loomis was so wrapped up in Buffalo skins that he could not have got out of his wagon. The accident was occasioned by the steam of the engine frightening the horses. If the post which held the railing had been sufficient, it would have stopped the horses from going over the bridge. I was close by the plaintiff at the time of the accident. I saw him standing up, whipping his horses, but can't say whether it was with a stick, a whip, or the lines.

Joseph C. Frye being sworn, testified as follows: I am a physician and surgeon, and reside at Peoria, Illinois. In November, 1856, I was called on to visit the plaintiff. I found him at Joseph Parker's, in Peoria. He was cold, had great difficulty in breathing, and but little pulse. He had received a severe shock; was very much bruised about the face. His upper jaw was broken on the right side, and he was badly bruised on the hip, breast, forehead and head. He had a severe contusion on the top of his head. His difficulty of breathing and want of pulse continued about forty-eight hours. He was in great pain, and I thought he would die. I consulted with other physicians, and they thought so too. I attended him twenty days, during which time he was unable to go home. He paid me thirty dollars for my fees, etc. His jaw is not yet sound; he discharges corrupted matter from it. I do not think he is, either mentally or physically, the same as he was before he received the injury. His jaw, I think, will not get well, unless a surgical operation is performed on the same.

Washington Cockle, also called by plaintiff, testified: I am Secretary of the Peoria Bridge Association. The said Association owned the bridge at the time the Peoria and Oquawka Railroad was built, and it is a toll bridge, and at the time of the accident to the plaintiff, in November, 1856. The witness then, at the request of the plaintiff's counsel, produced the minute book of the Peoria Bridge Association, and the plaintiff offered to read from the same an order under date of October 8, 1853, which is as follows: "On motion of Mr. Curtenius, Ordered that the President and Secretary execute a release of the right of way over the lands of this Association in Tazewell county, to the Peoria and Oquawka Railroad Company, for the purpose of the road of said Company, reserving for the use of this Association the timber upon said land." To this evidence the defendants objected as irrelevant and incompetent. The court admitted

the evidence. Witness further stated that the Peoria and Oquawka Railroad was located before the passage of said resolution, at the place where it is now built, and where the plaintiff's horses took fright, before the above recited order was made, and the Peoria Bridge Association was not consulted at all in relation to this location; they never received any compensation for the right of way, and made no objection to the railroad being located where it is; they claimed the land, and had their bridge on it when the railroad was located.

The plaintiff then offered in evidence an Act of the General Assembly of the State of Illinois, entitled "An Act to authorize the construction of a bridge across the Illinois River," approved January 26th, 1847. Also, "An Act in addition to an Act entitled 'An Act to authorize the construction of a bridge across the Illinois River,'" approved January 26th, 1847; approved June 19th, 1852.

The bridge was built under the authority of said acts, by the defendant.

The plaintiff next called *Joseph Parker*, who stated: I live in Peoria, Loomis came to my house, in November, 1856, badly hurt and wounded. He remained about three weeks. He paid me $20 for taking care of him. I saw the bridge on Monday after the accident, the railing had been broken; there was a board nailed over the railing where it had been broken. I saw the plaintiff's horses and wagon. One of the horses was badly wounded in the shoulder, and is not well yet. The wagon, except the wheels, was pretty much broken up; harness also. The other horse appeared to be lame and stiff. I examined the railing and posts of the bridge; about one-third of them were loose at the bottom; some were rotten, and some I could push off with my hands. I did not consider the bridge safe. The team of the plaintiff was a gentle, ordinarily quiet team, and the plaintiff was a prudent and careful driver, so far as I know. I think the timber on the side of the bridge, on the top of the plank, was about six inches thick and ten inches wide, and was lying on the flat side.

Henry Price, called by the plaintiff, stated: I am a veterinary surgeon. I doctored Loomis' horses in November, 1856; one was badly cut in the shoulder, the other lame in the back; one never got well, he was worth $100 before he was injured. Loomis paid me forty dollars for doctoring his horses; it was worth that sum.

Plaintiff next called *Nathaniel Brown*, who stated: I live in Tazewell county, three-fourths of a mile from Loomis'. Loomis drives horses as well as common men. He is a careful and prudent driver, and his horses were as gentle as horses

ordinarily are. Since his accident, he is not able to perform near as much labor as he could before.

Plaintiff then called *Ira Pratt*, who stated: I live in Tazewell county, three-fourths of a mile from plaintiff. I knew his horses, they went well enough,—were gentle. I mended Loomis' wagon after the accident occurred, for which he paid me $20.

Here the plaintiff rested.

The defendant then called *O. Chaunte*, who testified: I live in Peoria, and am a civil engineer by occupation. The railroad, as appears by the books and records of the Peoria and Oquawka Railroad Company, was located in 1851 and 1852. In July, 1854, when I came to Peoria, the tressel work of the road where plaintiff's accident happened, was up. The location of the road at that place is an eligible one, and there is no other proper or eligible location than the one then and now occupied by said road. In order to raise the bluff and to get on to the highlands east, it was necessary for the railroad to keep up Farm Creek; and the road could not cross the river at Peoria at any other place, without great additional expense, and considerable more distance. There was a necessity of crossing the bridge at some place, and the line where the said road is located, crosses at a point where it is less likely to interfere with the travel over it, than at any other place. I was present at the time of the plaintiff's accident, about five hundred feet off. My attention was first attracted by the noise of horses' feet upon the bridge. Same time I saw the engine moving slowly, it moved about four feet; steam was escaping from the cylinder. The horses of plaintiff jumped and backed some. Loomis, the plaintiff, stood up in his wagon and whipped his horses once or twice, then sawed their heads with the lines. They then cramped the wagon round, and backed against the railing of the bridge. The railing snapped, and the hind wheels of the wagon went over, the reach hung poising upon the edge of the bridge about five seconds; the seat slipped back; plaintiff fell down first, then the wagon, then one horse, then the other. There was time for the plaintiff, after the hind wheels were over the bridge, to have got out of the wagon upon the bridge. It was about a minute and a half after the horses took fright, that they went off the bridge. The team being frightened by the locomotive was the cause of the accident. The team was about seventy feet from the engine when the accident occurred. It was fifty-five feet from the outside of the bridge to the railroad track. The posts of the railing of the bridge which I saw, were halved into the sleepers with a dovetail, and the top pieces and the top railing were morticed on;

and the bridge was safe and strong for all ordinary use. The railing was made of upright posts, five inches square, attached to the sleepers, braced on the outside at every other post, with a railing two by six inches in the centre, and three by five inches at the top, and three and a half feet high. I think Loomis, the plaintiff, managed his horses with all the judgment and prudence that a man in his situation would be likely to do. But he sawed their heads while they were backing, and while the wagon was poised upon the bridge, and after the hind wheels had gone over. The top railing at this place was not sound; it was dozy; but outwardly it being weather-beaten, there was nothing to indicate unsoundness. After it was broken, it showed that it was partially decayed. But one of the posts were broken off at the time of the accident. There was no brace to this post; but there were braces to the two on each side, nine feet distant from this one; neither of which were broken or thrown off. The braces were at each bent, when the timbers projected beyond the planks of the bridge. The string-piece, or timber on the edge of the plank where the horses backed the wagon off, was twelve inches square, and the wagon was backed over the timber.

George Rodgers, called by defendant, testified: I am a carpenter and bridge-builder, and have been so for more than seven years. I saw the plaintiff's wagon going over the bridge at the time of the accident. I was about twenty feet from the bridge, on the lower side. The wagon, team and plaintiff came off that side. I considered the bridge a safe bridge for the passage of teams. The railing is as good as is generally put on bridges. When I first saw the wagon of plaintiff, it was nearly against the railing. Plaintiff was standing up. From the time I first saw it in this position, five or six seconds of time elapsed before it went off the bridge. Plaintiff was pulling on the lines. The wagon was poised on the bridge, after the hind wheels were over, four or five seconds. I think the plaintiff might have jumped out on the bridge. I think he was pulling the horses; don't remember of his striking them. None of the posts were broken. The railing appeared sound on the outside, but upon examination, on the inside it had commenced decaying. I built two bridges within the past year, and put upon them the same kind of railing as was on this bridge.

Defendants then called *Henry Maxwell*, who testified: I saw the accident. I was standing at the engine. The hind wheels of the wagon, when I first noticed it, were against the railing of the bridge, and Loomis, the plaintiff, was pulling back on the lines, and when the hind wheels hit the railing, it snapped,

and over they went. The wagon, after the hind wheels were over, stopped five or six seconds on the bridge, before it finally went over. I was about two hundred feet off at the time. The engine was hauling up iron and tin. The plaintiff's horses took fright at the engine. There were timbers lying along the top of the bridge, on the planks, on both sides. The bridge was safe for all ordinary travel. Large loads and teams were daily in the habit of crossing it.

Hiram Bunn, called by defendant, testified: I was standing on the bridge, thirty or forty feet from the plaintiff's team, at the time the accident occurred. The team was frightened at the engine, and backed off the bridge. Plaintiff was jerking his horses and slapping them with the lines. It was a minute or over, after the horses were frightened, before they backed off. The bridge was safe if teams were not frightened. Other teams passed over safely. Loomis had time to get out of his wagon, after the horses were frightened, before the wagon was backed off the bridge. I have often seen men with teams, when an engine was passing, get out and hold their horses by the heads; I have seen a great many do so. I think Loomis had time to jump from his wagon on to the bridge, after the hind wheels were over the edge of the bridge; I said at the time, he was foolish for not doing so. I saw him pulling on the lines before the wagon struck the railing.

The defendant then read in evidence an Act of the General Assembly, entitled, "An Act to incorporate the Peoria and Oquawka Railroad Company," approved February 12, 1849; and also, an Act entitled, "An Act to amend an Act entitled 'An Act to incorporate the Peoria and Oquawka Railrad Company, approved February 12, 1849,'" approved February 10, 1851. And also an Act entitled, "An Act to amend an Act entitled 'An Act to amend an Act entitled an Act to incorporate the Peoria and Oquawka Railroad Company, approved February 10, 1851,'" approved June 22, 1852.

The plaintiff objected to the admission of this evidence, but the court overruled the objection and admitted the same. This was all the evidence.

The court, at the request of the plaintiff's counsel, instructed the jury as follows:

1. The defendants were bound in law to keep their bridge in good repair, so as to admit of the *convenient* and *safe* passage of all persons with their property, and if the jury believe from the evidence that the bridge was not in such repair as to render the passage thereof *safe* at the time the injury happened to the plaintiff, the defendants are liable for such injury if it was

occasioned by the bridge so being unsafe, if the plaintiff used reasonable care.

2. The defendants were bound to keep their bridge in such repair as to render it reasonably safe from the consequences of *such accidents* as might be justly expected to occasionally occur thereon; and if the jury believe from the evidence that the want of such repair co-operated to produce the injury in this case, the defendants are liable, if plaintiff used reasonable care.

3. The defendants were bound to keep their bridge in such repair as to render it safe against such accidents as might reasonably be supposed to occur, and if the jury find in this case that the bridge was not safe so as to protect the plaintiff from such injury, the defendants are liable if plaintiff used reasonable care.

4. It is not sufficient that the bridge was safe for *gentle horses;* it must be so built and kept in repair as to reasonably protect persons from injury whose horses are not gentle and well trained, and so as to guard against such accidents as may be reasonably expected to occur.

5. If the jury believe from the evidence that the injury would not have happened if the bridge had been in suitable repair, and sufficiently strong to reasonably prevent the wagon from going over, then the defendants are liable if plaintiff used reasonable care.

6. The charter of the Peoria and Oquawka Railroad did not repeal that part of the bridge charter which requires them to keep their bridge in repair so as to render its passage safe; and they were bound in law to keep it in such condition as to admit of its *safe* passage at the time of the accident complained of in this cause.

7. The defendants had no right to place any obstruction on or near their bridge which would render its passage perilous or unsafe; nor had they a right to authorize or permit any one else to do so; and if they have done so, they are liable if such obstruction caused the injury complained of, if the plaintiff used reasonable care.

8. If the defendants authorized the Peoria and Oquawka Railroad Company to build their road and run their engines thereon contiguous to the defendants' bridge, and on the defendants' land, and the running of such engines frightened the horses of the plaintiff, and caused the injury complained of, the defendants are liable, if the plaintiff used reasonable care.

9. 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 allowance for them, and leaves the circumstances of their conduct to the jury.

10. The jury may give such damages in this case, if they find for the plaintiff, as will fully compensate him for all the injuries he may have sustained by reason of the accident, including any moneys expended by him in curing himself and horses and repairing his wagon, the diminished value of his horse, and the injury occasioned to his person and intellect, and for his sufferings, pain, danger to his life and loss of time in consequence thereof.

11. If the jury believe that the defendants were guilty of criminal and gross negligence in not keeping their bridge in repair, then the jury may give exemplary damages, if they find for the plaintiff.

To the giving of which said instructions the defendants, by their counsel, then and there objected, and excepted to the opinion of the court in giving the same.

The counsel for the defendants then requested the court to instruct the jury as follows:

1. That the law and the charter of the Peoria and Oquawka Railroad Company authorized said company to construct their railroad upon the most eligible route from Peoria to the Indiana State line, and that the question of eligibility in relation to the route was a question to be decided and determined alone by said company; and that if they had located and established their road at the place where the grievances complained of in the declaration occurred, as stated in the declaration, the plaintiff, as against the defendants, had no right to complain of said location.

2. That as far as the plaintiff is concerned, it is wholly immaterial whether the defendants donated the land to the Peoria and Oquawka Railroad Company, or whether they gave said company the right of way for an agreed price, or their damages were assessed as provided by law.

3. That if the Peoria and Oquawka Railroad Company had, pursuant to law, located and constructed their road over the land of the defendants, at the place where the alleged grievances in the plaintiff's declaration are supposed to have occurred, prior to the time of the happening of the same, and the injury to the plaintiff was occasioned by his horses being frightened by the noise of the cars, or the noise or whistling of a locomotive upon said railroad, the defendants are not liable in this action.

4. [That the owners of a toll bridge are not liable as common carriers; that they are not insurers of property passing over the same,] and are only bound to use reasonable care and diligence to keep their bridge in good repair, so that ordinarily gentle teams may pass in safety over the same, and that they are not responsible for any injury arising from horses taking

fright at a railroad, or engine running upon the same, when said road has been constructed under the authority of law, or under a charter from the General Assembly of this State.

5. That the owners of a toll bridge are only bound to keep their bridge within its own limits in good repair, so as to afford a safe passage to ordinarily quiet teams, and to prudent and careful drivers; and that they are not responsible for any accident or injury which may occur by reason of any railroad, structure or other thing existing, set up or operated outside of the limits of such bridge, and which had been placed, or set up or operated there under the authority of any law of this State.

6. If the jury believe that the plaintiff himself was grossly careless and negligent, and had sufficient opportunity to prevent the injury by leaving his wagon and holding his horses by the head while the engine was passing, and that he neglected to do so, and thereby the injury was occasioned, the plaintiff cannot recover.

7. That the owners of a bridge are not bound in law to construct any railing along the sides of the said bridge, to prevent frightened horses from running or backing off the same.

8. That if the jury believe, from the evidence, that the plaintiff knew or might have known that his horses were accustomed to become frightened at a locomotive, and if they further believe that the locomotive which frightened his horses was in plain sight for at least half a mile before he approached the same, and that as he approached, he or any other person of ordinary understanding and prudence could plainly perceive that said locomotive had her steam up and was ready to start, then the plaintiff would be guilty of gross carelessness and negligence if he drove his team up to within a few feet of said locomotive, and if they believe that the horses became frightened at such locomotive, and the accident occurred in consequence thereof, under such circumstances the plaintiff cannot recover.

9. That if the jury shall believe, from the evidence, that the railing of the bridge was not sound and sufficient, still it would not excuse the plaintiff from using reasonable care and diligence to avoid the accident; and if the jury shall believe, from the evidence, that the plaintiff did not use such reasonable care and diligence, they will find a verdict of not guilty.

10. That if the jury believe, from the evidence, that the injury done to the plaintiff and his property was the result of the fault or negligence of the plaintiff, or the fault or negligence of both the plaintiff and defendant, without any intentional wrong on the part of the defendant, then the plaintiff cannot recover, and the jury must find for the defendant.

11. That the burden of proof lies upon the plaintiff, not only to prove that he himself used reasonable care to avoid the injury, but that the bridge was not sufficient to allow the plaintiff to pass over safely.

12. That notwithstanding the jury may believe, from the evidence, that the defendant may have been in the wrong in giving the right of way to the Peoria and Oquawka Railroad Company, still, if the jury shall believe, from the evidence, that the plaintiff might, by using reasonable care and diligence, have avoided the accident, he was bound to use reasonable care and diligence; and if the jury believe, from the evidence, he did not do so, they will find a verdict for the defendant.

13. That if the jury believe, from the evidence in this case, that the plaintiff is entitled to recover at all, he can only recover such damages as he has proved that he actually sustained; and that no vindictive or exemplary damages can be allowed, unless it is shown that the injury (if any) to himself and property was occasioned by some malicious act or acts of the defendants.

The court gave the instructions numbered 9, 10, 11, 12 and 13, and refused to give all the others, numbered 1, 2, 3, 4, 5, 6, 7, and 8, except so much of number 4 which reads as follows: "That the owners of a toll-bridge are not liable as common carriers. That they are not insurers of property passing over the same."

To the decision of the court, in refusing to give all said instructions asked, the defendants excepted.

The jury returned a verdict for the plaintiff, for the sum of $5,750.

The defendants' counsel entered a motion for a new trial, for the following reasons:

1. The verdict is against law and evidence.
2. The damages are excessive.
3. The court gave improper instructions to the jury at the request of the plaintiff.
4. The court refused proper instructions asked by the defendants.
5. The court admitted improper evidence offered by the plaintiff.

The court overruled said motion.

The cause was heard before BALLOU, Judge, and a jury.

N. H. PURPLE, for Appellant.

MEAD & WILLIAMSON, for Appellee.

BREESE, J. There can be no doubt, as urged by the counsel for the appellee, that juries may give exemplary or punitive damages, in cases of willful negligence or malice. But it is requisite such a case must be made.

We look in vain into the evidence of this cause for the proof of any willful negligence on the part of the Bridge Association. Some of the witnesses say, the bridge was unsafe before and at the time of the accident, whilst others, equally credible, give a contrary opinion. That the appellants were negligent in not providing additional precautions against the increased dangers occasioned by the construction of the railroad, and its operation by noisy machinery, may be true, but it is not of that degree denominated willful. To constitute willful negligence, the act done, or omitted to be done, must be intended. Mere neglect to keep a bridge in repair, cannot, ordinarily, be alleged to be willful; and we see no facts in this case to encourage such an idea.

It is of but little importance, whether the bridge company permitted the railroad company the use of their bridge, or that it had been condemned for such use; the obligation pressed alike upon the bridge company to provide increased guards against new dangers. This they did not do, but it is very doubtful if the injury to the defendant was wholly caused from this neglect.

The proof shows, that the want of care of the plaintiff contributed very essentially to produce the accident. He saw and heard the locomotive; he had time and opportunity to get down and take his horses by the head, as prudent men do every day even when plowing in their fields, on the approach of a locomotive. It is required of them, that they shall put themselves to some little trouble to avoid these accidents. Even when the wagon was pushed on the railing, some of the witnesses say, he had time to get out and save himself. He did not attempt to do anything, but sat in his wagon, wrapped in his buffalo-skin, whipping his horses, sawing their mouths with the reins and bits, and so carelessly and unskillfully managing them as to have contributed very materially to produce the disaster.

We have said, repeatedly, in such actions for negligence, that the plaintiff, if not wholly free from fault, must be, as compared to the negligence of the defendant, so much less culpable as to incline the balance in his favor, both being in some fault.

It is true, the jury, by their finding, have ignored any negligence on the part of the plaintiff, and found willful negligence against the defendants. We do not think the testimony sustains them in such finding; that it is vastly the other way, and, taken

in connection with the damages assessed, $5,750, manifests feeling and prejudice.

Our statute, L. 1853, p. 97, which is a copy of 9 and 10 Victoria, ch. 93, in case death ensues from such negligent acts, allows no more than five thousand dollars damages, however willful or malicious the act may be.

With what propriety the jury, in this case, for an injury, great, to be sure, but not endangering life, could find this verdict, if not influenced by prejudice, we do not well understand.

We think there is an absence of proof of willful negligence, and no foundation established for the damages awarded.

The tenth instruction was too broad, and must have had great weight with the jury in finding these damages. A man's life may be in danger, and he receive no injury. The rule of damages, for personal injury inflicted by negligence, is loss of time during the cure, and expense incurred in respect of it, the pain and suffering undergone by plaintiff, and any permanent injury, especially when it causes a disability from future exertion, and consequent pecuniary loss. The judgment is reversed, and the cause remanded.

Judgment reversed.

Chief Justice CATON did not hear the argument, and gave no opinion.

JOHN S. WRIGHT *et al.*, Plaintiffs in Error, *v.* THE CITY OF CHICAGO, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

The City of Chicago has no authority to levy special assessments for deepening the river.

THIS was an application for judgment against certain property, for non-payment of a special assessment, levied by the common council of the city of Chicago, upon said property, for dredging or otherwise deepening the Chicago river and its branches, between the west line of Franklin street, north line of Lake street, north line of Kinzie street, and the established dock lines, and which assessment was ordered by said common council, upon the report and recommendation of the city superintendent of said city of Chicago. There was an order of sale

under the assessment, of certain lots benefited, the owners of which lots sue out this writ of error.

W. B. SCATES and S. W. FULLER, for Plaintiff in Error.

E. ANTHONY, for Defendant in Error.

CATON, C. J. We have arrived at our conclusion in this case with reluctance. That there is as much propriety in requiring the owners of property benefited by the deepening of the harbor, to pay the expense of the improvement, as there is in requiring those benefited by widening it, or improving a street, would seem to be self-evident. To say that the owner of a dock which is useless because of the want of water to bring vessels to it, shall not pay the expense of deepening the harbor in front so as to make it valuable, while the owner of a lot shall be compelled to pay for paving the street in its neighborhood, we cannot doubt is unjust, and had we the making of the laws, we could not hesitate to affirm this judgment. Our duty is confined to finding out what the laws are, and expounding them. It is admitted in the argument, for it could not be denied, that there is no provision in the city charter and no law upon the statute book authorizing special assessments to deepen the river, and it cannot be pretended that they are authorized by the common law. The city government has express authority to raise funds by general taxation for general purposes. Its has general authority by the second clause of the fourth section of the fourth chapter of its charter, "to remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten and deepen the same," and by the fifty-third clause of the same section, very ample jurisdiction over the harbor is conferred upon the city government, and the extent of the harbor is defined. By the fifty-fourth clause of the same section, exclusive control is given to the city government over the streets, alleys, side-walks and bridges of the city, and to open, widen and straighten the same, and to put drains and sewers therein. By conferring these powers, it was not supposed by the legislature that authority was given to levy special assessments upon the property benefited thereby to pay for such improvements. If this were not sufficiently manifest from the fact that these provisions are silent about any such authority, it becomes so when we see that by other provisions of the charter express authority is given to levy such special assessments to defray the expenses of a part of such improvements. The sixth and seventh chapters of the charter are devoted to

the subject of the improvements of streets, etc., and defines for what improvements special assessments may be laid upon the property benefited, and the mode of levying and collecting them, the particular provisions of which it is unnecessary to state. It is enough that the legislature deemed it necessary to make special provisions, granting particular authority to levy special assessments for certain specified improvements. It shows that there was no intention to grant authority to make such special assessments by simply conferring authority to make the improvements. This view is more especially confirmed, if possible, by the fact that the legislature has, by a separate clause, conferred special authority upon the common council to levy special assessments upon property benefited thereby, for *widening* the river. This is found in the fifth section of the act of 27th February, 1845, concerning wharfing privileges in Chicago, and which is substantially an amendment to the city charter. That section authorizes the common council to widen the Chicago river and its branches within the city, by cutting away lots and streets on its borders, and "such proceedings shall be had for the condemnation and appropriation of such lot or lots or part of a lot, and the assessment of damages and benefits, as are authorized and directed by the act to incorporate the city of Chicago and the acts amending the same, for the opening of streets and alleys; and the provisions of said act shall apply to the widening of said river and its branches so far as they are applicable." This evidently refers to and adopts the sixth chapter of the city charter, the tenth section of which expressly authorizes special assessments upon property benefited by the improvement. While we thus find a special provision authorizing, by a fair and reasonable construction, special assessments to widen the river, there is no authority any where to be found even by implication, for such assessments to deepen the river, and this special provision in the one case and not in the other, by every known rule for construing statutes, is a clear indication of the legislative will, that no such power was intended to be granted in the case omitted. We must hold then that this special assessment was void for the simple reason that the legislature has not seen proper to confer any authority to levy it. Without law it could not be done.

The judgment must be reversed.

Judgment reversed.

JOHN S. MOORE, Plaintiff in Error, *v.* WILLIAM MORRIS, Defendant in Error.

ERROR TO PEORIA.

The words, "good current money," in a contract, will be understood to mean the coin of the constitution, or foreign coins made current by act of Congress, unless it appears those terms have a different local signification.

If the person who is to pay under such a contract is led to suppose, by the declarations of the other party, that other money than coin will be received, he should, upon a refusal to take paper money, be allowed a reasonable time within which to procure coin.

THIS was an action of assumpsit, commenced February 12, 1856, in Rock Island Circuit Court, and change of venue to Peoria county, and trial, March term, 1858, before POWELL, Judge, and a jury.

The declaration contained the common counts, and for goods and chattels, oxen, steers, cows and heifers, sold and delivered to defendant.

The pleas set forth an agreement in writing, dated June 27th, 1854, between the parties, by which Moore agreed to sell to Morris from eighty to one hundred cattle, to be kept by Moore until 1st of May, 1855, and then to deliver the same to Morris at Samuel Carnahan's scales in township 14 N. 4 W. in Mercer county, Illinois, Morris to pay for the same, three dollars and fifty cents per 100 pounds, in good current money of this State. The agreement acknowledged receipt of $500 on the contract.

The pleas also set up another agreement of the parties, of date, May 3, 1855, which agreement, after reciting the first agreement of June 27, 1854, and that a difficulty had arisen in reference to the true construction thereof, and also in reference to the performance of the terms and conditions thereof, and that Moore had that day delivered 96 cattle under said agreement, averaging about 1,329 pounds gross weight, and Morris had paid for the same the price agreed on under the first contract; they agreed that the delivery was made upon the above, and in part consideration of the terms and conditions of this contract, the delivery and payment not to affect the questions that may arise between the parties in reference to the performance or non-performance of the conditions and terms of the first contract, and further agreed to submit the whole matter to the decision of Ira O. Wilkinson, which decision to be made within three months from the date of the agreement, each party binding himself to abide by such decision; that the time for such de-

cision was by agreement postponed till 20th November, 1855, which last agreement was indorsed on the said agreement of submission.

MANNING & MERRIMAN, for Plaintiff in Error.

N. H. PURPLE, for Defendant in Error.

BREESE, J. This was an action of assumpsit, brought by plaintiff in error against the defendant in error, for goods and chattels, oxen, etc., sold and delivered to the defendant.

The defendant set up, by proper pleas, an agreement with the plaintiff to receive payment for the cattle at three dollars and fifty cents per hundred pounds, "in good current money of this State," and the controversy turns principally on the defendant's performance of this agreement by so paying.

There was also another agreement to arbitrate the matter set up in the pleadings, Judge Wilkinson being chosen as arbitrator.

On the trial, the two agreements were read, together with the agreement of extension of time to Wilkinson, to 20th November, 1855, to make his award, and the evidence then showed that on the first day of May, 1855, Moore drove ninety-six cattle to and had them weighed at Carnahan's scales, which cattle were admitted to be the cattle specified in the contract; that some one of defendant's men proposed to take charge of the cattle after they were weighed, to which plaintiff objected until he received pay, to which the defendant said yes, the cattle were not his until he paid for them, and asked plaintiff to go to the house and count the money, to which plaintiff answered that they could count it there. Morris said the wind blew too hard. Plaintiff said the money he wanted would not blow away. They went to the house, and Morris tendered the amount of money in bank notes of the State Bank of Indiana, of banks of the States of Ohio, Kentucky and Pennsylvania, which money plaintiff refused, saying that was not the money the contract called for. Morris said it was the kind of money the contract called for, and he should not give him any other. Moore said to Morris he would give him a reasonable time to get other money; that he did not wish to take advantage of him. Morris replied that he had offered him the kind of money the contract called for, and that he would make it the dearest lot of cattle the plaintiff ever had; defendant then mounted his horse, and rode away, forbidding the plaintiff from moving the cattle. Plaintiff drove the cattle away about two miles. Defendant returned the next morning and left with Mr. Carnahan

a sack of gold, and on the third of May took the gold away in company with plaintiff.

It was proved by defendant's witness, *L. Howe*, that at the time the first contract was made, June 27th, 1854, the defendant paid plaintiff four hundred and eighty-five dollars, being the first payment of five hundred dollars, less $15, which was to be paid in a few days, which payment was made in bank notes of the State Bank of Indiana, and that plaintiff said that was good enough—that he wanted money that he could pay his debts with, and if all the money was as good, he would be satisfied. This evidence was objected to by plaintiff, but the objection was overruled by the court.

Plaintiff proved by *Kinzie Cecil* that on the 12th of February, 1856, plaintiff went to defendant's house and showed defendant a letter from Wilkinson, and said he had come to get the time extended for the award; that Judge Wilkinson would not otherwise make the award; and Morris replied that he had concluded not to do anything more about it, and that if plaintiff came at him, he would give him the best fight he could. Plaintiff then said if he (defendant) would go to Rock Island, he would take him up and bring him back; but defendant said he would not go; that if he were at Rock Island he would not do anything until he had seen his counsel, and whatever he said he would do. Plaintiff and witness then returned to Rock Island. On the next day Morris came to Rock Island, when Moore told Morris that he had put the matter in the Circuit Court. Morris replied that he could not have suited him better. It was proved that on the first of May, 1855, cattle were worth in market $4.50 per one hundred pounds by agreement of the parties at the time the second agreement was drawn up.

Lewis Howell, a banker in Peoria, testifies that on 1st of May, 1855, there was no material difference between the value of the currency of Ohio, Kentucky, Indiana, and Illinois; if anything, the currency of those States was worth more than that of Illinois, for the reason that it was worth more in New York. Specie was worth from one and a quarter to one and a half per cent. more than currency.

We leave out of view all the testimony in relation to the reference to arbitration, as our opinion is not affected by it.

The plaintiff asked the court to give the following instructions, which were refused by the court:

1. The provision in the contract read in evidence, providing for the payment in good current money of this State, cannot be satisfied by tender of bank bills of other States than of this State, and the plaintiff was not bound, under the provisions of

said contract, to receive in payment the bank bills of banks located in Indiana, Ohio, Kentucky or Pennsylvania.

2. Under the contract read in evidence, providing for the payment in good current money of this State, unless the jury believe that the defendant tendered the amount of money required by the contract in bank bills of solvent banks in this State, or in specie, on the day required by the contract, they will consider and determine that no tender was made under said contract, and that a tender of bank bills of other States than of this State is not a performance of said contract.

But the court instructed the jury as follows in defendant's instructions No. 2: That the contract aforesaid does not bind the defendant to pay for said cattle in gold or silver; and if the jury believe, from the evidence, that the plaintiff's offer to deliver the cattle was accompanied with a demand for gold and silver, or either, in payment for the same, and that the offer to deliver was made only upon condition that the defendant would pay for the same in gold or silver, this would be no offer to perform on his part, as required by the contract, and a refusal to pay such money by Morris would be no breach of the contract on his part, and that if, in this respect, Moore did not perform, or offer to perform, his part of the contract, he cannot recover.

3. If the jury believe, from the evidence, that when defendant tendered the plaintiff the paper money for the cattle, that Moore (plaintiff) said he wanted other money, or such money as the contract called for, he thereby meant and intended to be understood as demanding gold or silver money, and that the defendant did so understand him, that such demand, even if accompanied with an offer to deliver the cattle, was a breach of the contract on the part of plaintiff, and no breach of contract on part of defendant to refuse to pay such money for said cattle.

4. That the phrase, "good current money of this State," means that kind of good paper money of specie paying banks which, at the time it was to be paid, was passing current in and constituted a portion of the currency of this State.

To the refusing of which instructions, asked by plaintiff, and to the instructions as given, the plaintiff excepted.

The jury brought in a verdict for the defendant.

These instructions, asked on the part of the plaintiff, and refused, should have been given, and those on the other side refused.

There is nothing, in legal contemplation, "good current money" but the coin of the constitution, or foreign coins, made current by act of Congress, unless there is evidence giving to those terms a *local* signification.

The plaintiff, however, having accepted the first payment in current bank notes, and his declaration at the time, "that he wanted money that he could pay his debts with, and if all the money was as good, he would be satisfied," authorized the purchaser to come with such notes, with which to make the final payment, and, at least, entitled him to time, in case they were refused, to convert them into coin, and the case should have been put to the jury in this aspect.

The judgment is reversed and the cause remanded.

Judgment reversed.

Jacob Curran, who sues by his next friend, Plaintiff in Error, *v.* William W. Beach, Defendant in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where the ground presented for a change of venue relates to the Judge of the Cook Circuit Court, the venue may be changed to the Common Pleas Court of that county.

All the material facts of this case are stated in the opinion of Mr. Justice Walker.

J. J. McGilvra, for Plaintiff in Error.

J. A. Jameson, and C. B. Waite, for Defendant in Error.

Walker, J. This was an action on the case, commenced in the Cook Circuit Court, at the October term, 1856, by Jacob W. Curran, who sues by his next friend, George J. Harris, against William W. Beach. A summons was returned not found, and an alias issued and returned served, January 17th, 1857. The case was continued from term to term, until the November term, 1857, when defendant entered a motion for a change of venue. The motion was allowed, and the venue was changed to the Cook County Court of Common Pleas. At the February term of the last named court, defendant entered a motion to dismiss the suit, which the court overruled, but struck the cause from the docket; to which decision of the court, in striking the case from the docket, plaintiff excepted; and, to reverse this judgment, prosecutes this writ of error.

The only question presented by this record is, whether the venue was properly changed from the Cook Circuit Court to the

Cook County Court of Common Pleas. The second section of the practice act, R. S. p. 413, provides, that it shall not be lawful for any plaintiff to sue a defendant, out of the county where the latter resides or may be found, except in specified cases. The chapter entitled Venue, R. S. 527, provides, that when either party in a civil suit may fear that he will be unable to have a fair trial in the court in which the action is pending, on account that the judge is interested or prejudiced, or shall have been of counsel for either party, or that the adverse party has an undue influence over the minds of the inhabitants of the county, or that the inhabitants of such county are prejudiced against the applicant, so that he cannot expect a fair trial, such party may apply to the Circuit Court in term time, or to the judge in vacation, by petition, verified by affidavit, setting forth the cause for a change of venue, and, if sufficient, that the court or judge shall award a change of venue to some county where the causes do not exist. This cause was argued by the counsel in the case, upon the assumption, that the cause for the change of the venue related to the Judge of the Circuit Court, and not to the inhabitants of the county, and we shall so consider the question. From the provisions of the practice act referred to, it is obvious, that it was the intention of the legislature to require all suits to be brought and tried in the county of the defendant, where the trial could be fair and impartial. But the act regulating changes of venue, for the purpose of securing to the parties an impartial trial, provides that where causes existed which would prevent such a trial where the suit is brought, then the case should be sent to some county where the causes complained of do not exist. In this case, the objections to a fair trial related to the Judge of the Circuit Court, and not to the inhabitants of the county; and no reason is perceived why the parties should be sent for trial to a distant county, when a fair and impartial one could be had where the suit rightfully originated. The Common Pleas is a court of concurrent jurisdiction with the Circuit Court within the limits of Cook county, and the suit might, if desired, have been instituted in that court. Then, to change the venue from the Circuit Court to the Common Pleas, when the causes did not exist in the latter court, would, clearly, better effectuate the legislative intent, as expressed in the second section of the practice act, than to change the venue to another county. And this does not violate the object of the law regulating changes of venue, but is equally promotive of the object of that act. This court, in the case of *Searles* v. *Munson*, held that the venue was well changed from the Lake County Court to the Lake Circuit Court, under the chapter entitled Venue. In the act establishing the Lake County Court, there was no pro-

vision in regard to change of venue. The court placed it upon the grounds, that it falls within the reason and spirit of the general law on the subject. 17 Ill. R. 561. That case is decisive of this, as every reason which applied in that, applies with equal force to this case.

The venue was well changed from the Cook Circuit Court to the Cook County Court of Common Pleas, which had jurisdiction to try the cause, and erred in striking it from the docket; and the judgment of the court below must therefore be reversed, and the cause remanded.

Judgment reversed.

Josiah S. Patty, Plaintiff in Error, *v.* Stephen Winchester, impleaded with Levi Gladfelter, Defendant in Error.

ERROR TO PEORIA COUNTY COURT.

On an appeal from a trial before a justice of the peace, as to the right of property, the appellant may amend his appeal bond in the appellate court, if he has in good faith attempted to execute a valid bond.

This was a proceeding commenced before a justice of the peace for the trial of the right of property, in which the plaintiff in error was claimant, and Winchester and Gladfelter were plaintiffs in the executions under which the property had been levied.

On the trial before the justice, the jury found the property did not belong to the plaintiff in error, and the justice rendered judgment against him for costs. The plaintiff in error, on the rendition of the verdict, gave notice that he should appeal to the County Court of Peoria county, and on the same day executed an appeal bond, with Smith as surety. The appeal bond was filed with the justice, and approved by him the same day. The papers were filed by the justice in the County Court, and summons issued to appellees, and returned served as to Winchester.

At the February term, A. D. 1858, of the Peoria County Court, Winchester entered a motion to dismiss the suit, for want of a sufficient appeal bond.

The plaintiff entered a motion for leave to amend the appeal bond forthwith. The court overruled the motion, and refused to allow the plaintiff in error to amend the bond.

The court then dismissed the suit.

The plaintiff now assigns the following errors on the record:

The court below erred in refusing to allow the plaintiff in error to amend the appeal bond.

The court below erred in dismissing the cause.

H. GROVE, for plaintiff in error.

C. C. BONNEY, for defendant in error.

BREESE, J. This was a trial of the right of property before a justice of the peace in Peoria county, and a jury, the plaintiff in error being the claimant, and the defendants in error plaintiffs in execution.

The jury found against the claimant, and the justice rendered a judgment against him for the costs.

The claimant gave notice, on the coming in of the verdict, that he would appeal to the County Court, and on the same day executed an appeal bond, with security, which was filed with the justice and approved by him.

The papers were filed in the County Court, and the usual summons issued, which was served on Winchester only.

At the February term, 1858, of the County Court, the appellee entered his motion to dismiss the suit for want of a sufficient appeal bond, and appellant, at the same time, entered a cross-motion to amend the bond, which motion was denied, and the motion to dismiss allowed, and judgment for costs against the appellant, to all which he excepted.

The error assigned is, in refusing to allow the bond to be amended, and dismissing the suit.

The bond shown is a writing signed by the appellant and a surety, and is formal in all respects, save that it has no seal. Technically, this is no bond, yet it was approved by the magistrate as a bond, and returned by him to the Circuit Court with the other papers in the cause, and there filed.

This point has been already decided by this court in the case of *Hunter* v. *Ladd*, 1 Scam. R. 551, and the decision involves the principle in this case.

There, the parties to the bond had neglected, as in this case, to put seals to their signatures, and on being discovered, a motion being made to dismiss the cause for want of seals to the signatures, a cross motion was interposed by Hunter, the principal, to amend the bond by attaching a seal or scrawl to it. This was refused, and very properly, by the court, for the reason, that the court could not confer on Hunter the power to make or attach a seal to the signature of the surety to the bond. Such a seal would not be the seal of the co-obligor,

although so far as it regards Hunter, it might have been granted. Yet the court say, "if amended, it would not render the bond valid, because of the want of a seal to the signature of the co-obligor. As the application did not extend to the perfecting the bond in relation to the signature and seal of the co-obligor, the Municipal Court could not do otherwise than dismiss the suit."

Had the application extended to both the obligors, that they should have leave to amend, by placing their seals to the paper, it would have been allowed, and that is this case. The party here does not make the specific motion to add the seals, but to amend the bond, and this includes the power to both the obligors to put their respective seals to the paper filed as a bond, or to execute an entirely new bond.

But the point has been, if possible, more distinctly decided in the case of *Lea* v. *Vail*, 2 Scam. R. 473.

This was an attachment case, and the bond had no scrawls or seals, and on that account, although a motion was made to amend the bond, the suit was dismissed.

The court say, after reciting the act authorizing the amendment of the affidavit or bond in attachment cases, and which is the same, substantially, in relation to appeal bonds—"Under this statute, the amendment of the plaintiff's bond ought to have been allowed. The court erred in not permitting it."

So we say in this case. The party had executed a paper, which the magistrate accepted and filed as a bond; he made the attempt, in good faith, to execute a valid bond. As it was technically defective, his motion to amend should have been allowed.

In the case of *Waldo* v. *Averett*, 1 Scam. R. 487, the court say: "If it is admitted that the bond *was ever so defective*, the court, nevertheless, erred in dismissing the appeal; it ought to have allowed the motion of the appellants to file a good bond."

See also the case of *Bragg* v. *Fessenden*, 11 Ill. R. 544; *Boorman* v. *Freeman*, 12 Ill. R. 165; *The Trustees of Schools, etc.*, v. *Starbird*, 13 Ill. R. 49.

These cases all show that in an honest attempt to give a bond, and a paper is signed which the officer accepts as a bond, the party shall not be prejudiced by a defective execution.

There can be no objection that the bond was taken by the justice, and not approved by the clerk of the Circuit Court within five days after its execution. The tenth section of chap. 91, R. S., 476, provides, "and in case of an appeal, the justice of the peace shall take the bond and transmit the same, with the other papers, to the clerk as aforesaid."

The twelfth section provides, "that all appeals from the judgments on the trial of the right of property, shall be demanded on the day of such trial, and bond entered into before the clerk of the Circuit Court within five days from such trial."

There is no necessary conflict in these laws. As in ordinary cases, so in these, the bond may be filed and approved by the justice of the peace, or by the clerk of the Circuit Court, or of the County Court to which the proceeding was removed by appeal under the 4th section of the act extending the jurisdiction of the County Court of Peoria county, (Laws of 1855, p. 194,) the provisions of our practice act extending to the County Court by this act.

But if there be a discrepancy, it is all reconciled by the act to amend chap. 91, approved Feb. 18, 1847, (Laws of 1847, p. 84,) which is as follows:

"Upon the trial before the Circuit Court of any appeal from the trial of the right of property, if the bond required to be given shall be adjudged informal, or otherwise insufficient, on account of its having been taken or approved by an unauthorized person, or otherwise, the party who shall have executed such bond shall be in no wise prejudiced by reason of such informality or insufficiency: *Provided*, he will, in a reasonable time, to be fixed by the court, execute and file a good and sufficient bond."

The appellant's motion to amend the bond entitled him to the full benefit of this act also.

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

Judgment reversed.

David Burns, Appellant, *v.* Adam Henderson, Appellee.

APPEAL FROM PEORIA.

The constitution confers upon the Circuit Courts jurisdiction in all cases of appeals from all inferior courts; and the legislature cannot take away this jurisdiction, although it may give other courts concurrent jurisdiction in that regard.

The word "shall," in the fourth section of the act extending the jurisdiction of the Peoria County Court, is construed to mean "may," so as to make that act harmonize with the constitution.

Henderson sued Burns before a justice, and recovered judgment. Burns appealed to the Circuit Court, and filed bond with the justice.

At the May term, 1857, the court called the cause for trial, to which the defendant objected, for the following reasons: The court has no jurisdiction to try the cause; the plaintiff has no right to prosecute said cause in this court; this court has no jurisdiction of the parties.

The court overruled the objections and called a jury.

The plaintiff below offered a note in evidence, and the defendant below excepted. Verdict and judgment for plaintiff below, and Burns appealed to this court.

The plaintiff here assigns the following errors upon this record:

1. The court below erred in overruling the objections of the defendant below.
2. The court below had no jurisdiction to try the cause.
3. The plaintiff had no right to prosecute his suit in the court below.
4. The court below should have dismissed the appeal.
5. The Circuit Court had no jurisdiction to try appeals.

The only point relied on by the plaintiff in error is, that the that the court below had no jurisdiction to try the appeal.

By the 4th section of the act approved February 9th, 1855, entitled, "An Act to extend the jurisdiction of the County Court of Peoria county," it is provided that "all appeals from the decisions of police magistrates and justices of the peace, made or rendered in said county, shall be taken to the County Court."

The 8th section of article five, constitution of 1848, provides that "said courts (Circuit) shall have jurisdiction in all cases at law and equity, and in all cases of appeals from all inferior courts."

The 18th section of the constitution declares "that the jurisdiction of the County Court shall extend to all probate and such other jurisdiction as the General Assembly may confer in civil cases."

H. Grove, for Appellant.

E. G. Johnson, for Appellee.

Caton, C. J. The word *shall*, in the fourth section of the act of the 9th February, 1855, extending the jurisdiction of the County Court of Peoria county, must be construed to mean *may*. That section reads: "All appeals from the decisions of police magistrates and justices of the peace, made or rendered in said county, shall be taken to said County Court." To hold this to be imperative, would bring it in conflict with the eighth section of the fifth article of the constitution. That is as fol-

lows: "There shall be two or more terms of the Circuit Court held in each county of this State, at such times as shall be provided by law, and said courts shall have jurisdiction in all cases at law and in equity, and in all cases of appeals from all inferior courts." This confers jurisdiction, in all appeals from all inferior courts, upon the Circuit Courts, independently of any legislative enactment on the subject, and we cannot presume that the legislature intended to take away that jurisdiction, but only to give the County Court concurrent jurisdiction, although, but for this constitutional provision, we should construe the word as imperative, and as conferring upon the County Court exclusive jurisdiction of the appeals mentioned. Wherever it is possible, we must so construe the statutes as to make them harmonize with the constitution, and in order to do this, we must construe the word *shall*, in the statute quoted, as permissive, and not mandatory.

The judgment is affirmed.

Judgment affirmed.

Worcester A. Dickerman *et al.*, Appellants, *v.* William T. Burgess *et al.*, Defendants.

APPEAL FROM WINNEBAGO.

In equity, a party to a suit, as also his attorney, if he purchases property sold under an execution, is chargeable with notice of all irregularities attending the sale.

A party cannot claim a benefit, or the aid of a court of equity, who has been guilty of *laches* in protecting his rights, unless such *laches* may be imputable to the party claiming against him.

If a sheriff makes a sale of real estate by merely indorsing it on the execution, and making out a certificate of sale, without going to the court-house door, without any outcry or bidders, or any circumstance to arrest public attention, or to indicate that a sale was going on, and returned the execution, satisfied by a sale, to the plaintiff's attorney, who was the assignee of the judgment, but sent a certificate of sale to a person indicated by said attorney, the attorney will be held to be the purchaser, although the sheriff should subsequently have amended his return, so as not to have it appear that the attorney became the purchaser.

In such a case, where the holder of the certificate of sale, who disclaimed all knowledge of or interest in the transaction, assigned it to a brother of the attorney, and he to a cousin, under such suspicious circumstances as showed a design to conceal a wrong, they will all be held as acting in trust for the benefit of the attorney, and all the proceedings will be set aside for the irregularities and fraud connected with them.

Gross inadequacy of price, under such circumstances, should be considered in the conclusion to be arrived at.

There should be entire uniformity in the return to the execution, the certificate of sale, and the deed where real estate is sold, or they will be invalid.

A certificate of sale by a sheriff to another person than the purchaser, shown by his return to the execution, is a void act.

A bid by letter may be recognized by the sheriff, if it is announced by him; and if there is no advance upon that bid, he may sell upon it.

The decree in the Circuit Court of Winnebago was pronounced by SHELDON, Judge, at February term, 1858. The proceedings and proofs are fully stated in the opinion of the court.

J. MARSH, and G. GOODRICH, for Appellants.

W. T. BURGESS, for Appellees.

BREESE, J. The bill in this case, originally filed by Alden Thomas in his lifetime, and revived by the complainants, who are his legal representatives, alleges dealings between him and one of the defendants, H. O. Stone, for several years, a suit by Stone against him, and a judgment in March, 1850, in favor of Stone, for forty-five dollars. That William T. Burgess, another defendant, was the attorney of Stone, to whom Thomas paid the amount due, except fifteen dollars which Burgess claimed as his fees for collection, and which, by an arrangement between him and Burgess, was to be the only question of controversy on the trial of the suit; that Burgess was the principal witness on the trial, and on his testimony Stone obtained a judgment for thirty dollars more than he had claimed; that Burgess admitted he had been mistaken in his testimony, and agreed to have the matter fairly arranged; that execution was issued on the judgment in June, 1850, on which Thomas paid thirty-one dollars and the costs, which Burgess, Nov. 13, 1850, received. Complainant remonstrated to Burgess against having to pay more, and complainant and the sheriff, who had the execution, both understood that Burgess accepted that amount in full satisfaction of the judgment. That complainant then had property, and agreed with the sheriff to pay the balance at any time, if required. The execution was returned by order of Burgess, and complainant heard nothing more of the matter until January, 1854, when an execution was issued for the balance; that he then told the sheriff the facts of the case, and arranged with him to wait until complainant could write to Burgess, and if he found Burgess insisted on the payment, then he would pay it at once. He alleges he did write, but receiving no answer and hearing nothing more of it, either from Burgess or the sheriff, he supposed Burgess had given up pressing the matter and forgot all about it until informed that his property had been sold, and a deed executed by the sheriff. The property sold by the sheriff, was a lot and building in Rockford, worth about five thousand dollars, and at the same time complainant had other real estate and personal property unincumbered in Rockford, out of which the execution might have been satisfied. That

complainant had no knowledge of any step having been taken by the sheriff until he learned, in September, 1855, that the lot had been sold on the execution and the sheriff's deed executed and recorded; that sheriff pretended to sell the lot on the 10th June, 1854, but had not advertised it for sale, as required by law. He did not offer it at public auction, nor cry it for sale; no person was present or knew of the sale; no bid whatever was made; and alleging that the sheriff did no act of making the sale except to make this indorsement on the execution: "Made the amount of the within execution by sale of property described in levy hereon to William T. Burgess, plaintiff's attorney, as per his receipt attached hereto; received my fees, and paid clerk his fees. K. H. Milliken, sheriff." Complainant charges that this indorsement, though bearing date June 10th, 1854, was not made until some time afterwards, when another indorsement was made as follows: "Received thirty-eight dollars $\frac{33}{100}$ from sale of land within described. H. O. Stone, by W. T. Burgess, assignee." Charges that the "said" indorsement was made by the sheriff by the express directions of Burgess, without any reference to any sale having been made of the premises at any time or place, and that no money was paid, etc.; that Burgess was acting both as the attorney and assignee, but insists that the whole proceeding had been carried on without the knowledge of Stone for the sole profit of Burgess. Charges that about the 17th June, 1854, Burgess induced the sheriff to execute a certificate of sale to one J. F. Farnsworth, his law partner; that Farnsworth resided at Chicago and had no knowledge of the matter and no interest in it, nor consented to have his name so used, and that Burgess' sole object in using Farnsworth's name was the more effectually to conceal his own fraud; that Farnsworth assigned the certificate July 10, 1854, to John S. Burgess, without any consideration; that on Sept. 12th, 1855, the then sheriff Taylor executed a deed to J. S. Burgess, a brother of defendant; that J. S. Burgess paid no consideration for Farnsworth's assignment, and that it is in defendant's handwriting, nor had he any agency in procuring the deed to himself or knowledge of it; that he had no pecuniary means; that as soon as complainant found out the condition of things, he went to Chicago and offered to pay defendant, W. T. Burgess, fifty dollars if he would arrange it, but that Burgess refused to give him any satisfaction, and alleging that the title was in his brother, J. S. Burgess, and was beyond his control, and that his brother was absent in California, which complainant alleges was not true, but was at the time in Chicago. That on the 13th Sept., 1855, J. S. executed a quit claim deed to his cousin, Samuel P. Burgess, defendant, for the consideration of $3,000,

but that in fact he paid nothing for the conveyance; that he is a young man without means, a relation of W. T. Burgess, and that it was a scheme of W. T. further to conceal the true condition of his own interest and connection with the property, and that no person claims any interest in it except W. T. Burgess, and that these persons are used as means to carry out his fraudulent designs; that W. T. Burgess has caused notice to be served on the tenants of the property to quit, for the purpose of commencing an action of ejectment; that complainant has, ever since the judgment and sale, had the open and notorious possession of the premises; that, not admitting any obligation to pay anything, he has offered W. T. Burgess one hundred dollars to compromise the matter and relinquish his claim, but he demands two thousand dollars therefor. Charges combination and confederacy to defraud complainant; calls upon defendants to answer not under oath, and prays that the sheriff's sale be set aside as fraudulent, and the several conveyances from the sheriff to John S. Burgess, from him to Samuel P. Burgess, be set aside and cancelled, and decreed to convey to complainant, and that W. T. Burgess be decreed to restore complainant in all things in respect to the title of said premises to as good condition as at the time of said sheriff's sale, and that defendants' and agents' attorneys, etc., be restrained from selling or incumbering the property, or disturbing complainant in the possession of it, and from proceeding in the ejectment suit, and from commencing or instituting any suit at law to recover the possession of the premises, and for general relief.

This bill is sworn to before the clerk of the Circuit Court of Winnebago county, and an injunction awarded by the Circuit judge, December 18, 1855.

William T. Burgess, in his answer, admits there was considerable misunderstanding as to the amount due from complainant to Stone, growing out of their dealings existing prior to the commencement of the suit of Stone against Thomas, and to procure a settlement and adjustment, the suit was commenced and prosecuted by defendant, with one Fuller for Stone; denies all knowledge of the true merits of the controversy between them; denies any promise or obligation to make any discount on the judgment; admits purchase of judgment from Stone, issuing execution, levy and sale, and claims they were all regular; charges willful *laches* on complainant, and claims the benefit of lapse of time; denies all fraud and unlawful combination.

The answer of H. O. Stone sets up lapse of time as a bar to any relief—says before the alias *fi. fa.* was issued, he had sold

the judgment to W. T. Burgess, after deducting the payment of thirty-one dollars thereon, and disclaims all interest, and denies all fraud, etc.

S. P. Burgess sets up in his answer lapse of time and *laches* of complainant; claims to be a *bona fide* purchaser for a valuble consideration, without notice of any irregularities in sale by sheriff, and denies that any exist, and as to the rest and residue of the bill, says that he denies all the facts set up in it to be true, except such as appear of record in the judicial proceedings, and the sale under them, and the different mesne conveyances from Farnsworth to him; relies on the certificate of purchase as the best evidence of what there occurred, "made so by statute," and denies all fraud, etc. The name of W. T. Burgess is signed as of counsel.

At the February term, 1856, a general replication was put in to these answers. At October term, 1856, the death of complainant was suggested, and the present complainants, his heirs at law, admitted to prosecute the suit.

At the October term, 1857, the cause was heard on the bill, answers, and the following evidence:

John S. Burgess, sworn, testified that he was a brother of William T. Burgess, and resided in Chicago, September 30, 1855; was the person who executed the deed shown (a deed executed by witness to S. P. Burgess). Acquired the title through him. Don't know from whom he got the title. Never had a deed of the premises in his possession. Paid a consideration, by a note, for $250; gave the note to William T. Burgess. Don't know what has become of it. It was paid by selling the premises to William T. Burgess. Was given up by him in September, 1855. He held it a year, and gave it up when the premises were conveyed to him, in September, 1855. Owed him some borrowed money besides—some $40 or $50. Never had any dealings with any one but William T. Burgess about the land, and conveyed it at his request. Samuel P. Burgess is cousin of William T. Burgess, and was residing in Morris, Grundy county, in September, 1856. Does not know, and never took any interest to know, the value of the property. Does not know whether S. P. Burgess was worth any property or not in September, 1855.

On cross-examination, the witness stated that he went into business in 1854, and William T. Burgess let him have $250, and took his note, which is the note testified about. This note was given up at the time the deed was executed. At the same time, S. P. Burgess gave one note for $2,000, and one for $1,000, which were indorsed and left with Wm. T. Burgess.

Being shown the deed, the witness stated that his impression, when first examined, was that he gave the deed to William T. Burgess; was told by William T. Burgess that he had sold the premises to S. P. Burgess, and he wanted witness to convey. It was the understanding that the account between himself and William T. Burgess would be squared by his conveying to S. P. Burgess.

On re-examination by complainant, witness stated that he saw S. P. Burgess in Chicago about the time, but did not remember seeing him the day the deed was made.

Complainants gave, in evidence, the execution and alias executions, and indorsements in the case of H. O. Stone *v.* Alden Thomas.

King H. Milliken testified that he was sheriff of this county at date of execution; has seen this execution; remembers the transaction referred to by the execution and its indorsements. The property described in the levy on the execution is on the east side of the river, south side of State street.

The complainants propose to the witness this question: What was the value of the property in September, 1855?

To which the defendants object, but the court allows the same to be put and answered.

Thinks the buildings were on at that time; was then worth three thousand dollars, with the buildings on. Front width, twenty-two feet; and in June, 1854, the property was worth fifty dollars per foot, front.

The property was advertised under this execution; it was adjourned several times—don't know how often—for want of bidders. Wrote to W. T. Burgess, and received a line from him. Wrote, in the first place, the day to which I had adjourned sale, and received a line from him—if he was not there, to strike it off in the name of John F. Farnsworth. On the day of sale, the property was sold as he directed. He wished witness, in his line to him, to send him a certificate of sale to Farnsworth, and did so. Recollection not distinct about it, nor whether there was any person present or not. A gentleman by the name of Leavitt, an attorney, had an office in witness' office; if he was not there, does not know of any one that was. No one was present to make any bids. It is his impression that it was not cried off; impression not very distinct. The place of sale was at the court-house door. Office was in the east wing of the court-house. Has not now any recollection of going any nearer than his office.

On his cross-examination, he says his recollection is not distinct as to offering the land for sale; cannot state from recollection that it was not offered for sale; recollects making out and

sending a certificate of sale to W. T. Burgess, but has no recollection whether he went to the court-house door and cried the premises for sale or not; will not swear positively that he did not go to the door of the court-house and cry the land for sale; his attention was first called to the sale at the time the sheriffs' deed of the same was executed; his attention had not been called to it from the time of the sale up to the making of the sheriffs' deed of the same. Called on Alden Thomas, the defendant in the execution, for property on the execution, and asked him to turn out property on the execution; asked him several times. He did not turn out any property on the execution; examined the record to find property to levy on, and found a farm and this lot. Knew his duty as sheriff required him to cry the property for sale at the place advertised therefor, and when he made out the certificate of sale to Farnsworth, supposed he had complied with the law in that respect.

The defendants here introduced and read the certificates of sale, which, with their indorsements, are as follows:

STATE OF ILLINOIS, } *ss.*
WINNEBAGO COUNTY. }

I, King H. Milliken, sheriff of the county and State aforesaid, do hereby certify that by virtue of an execution and fee bill to me directed, dated the 28th day of December, A. D. 1853, and delivered in favor of Horatio O. Stone and against Alden Thomas, I did, in pursuance of the statute in such case made and provided, on the 10th day of June, 1854, between the hours of ten o'clock, A. M., and five o'clock, P. M., offer at public sale the following described property, to wit: (here follows description of lands,) and John F. Farnsworth, having bid the sum of 38 33-100 dollars, he being the highest and best bidder at sale, became the purchaser. Now, if the aforesaid property shall not be redeemed within fifteen months from this date, according to law, then the said John F. Farnsworth will be entitled to a deed therefor.

Witness my hand and seal at Rockford, this 10th day of June, A. D. 1854.

K. H. MILLIKEN, [SEAL.]
Sheriff of Winnebago County.

September 12, 1855. Deed executed on the within to John S. Burgess, September 12, 1855.

An assignment from Farnsworth to John S. Burgess.

Another certificate of the same tenor, and indorsed, recorded June 17, 1854.

The witness further said these certificates of sale were executed by him as sheriff of Winnebago county.

The defendants here moved the court to exclude the testimony of said Milliken given in the trial of this cause, tending in any wise to conflict with said certificates, or the facts therein stated.

The court refused to exclude the same, and the defendants excepted.

The defendants then showed the witness a paper writing, purporting to be a copy of a letter written by the witness, and witness says he thinks the copy of the letter now shown him is a copy of a letter he wrote and sent to W. T. Burgess; don't recollect comparing it with the original with Orren Miller.

For the purpose of introducing said copy, the defendants here produced Orren Miller, who was sworn, and says he got the original, of which the one produced (the one above alluded to) is a copy, from W. T. Burgess; he had the original in the court room during one of the terms since this suit was pending. Milliken, witness, and Burgess, looked over original, and Burgess and witness compared it with this, and this is a true copy of the original. The original was in the handwriting of said Milliken; witness wanted to use the original in another suit; took the original away with him; has searched for it during this term of the court; had it in his office, but is unable to find it; it is lost.

The cross examination of K. H. Milliken was then continued by the defendants.

Wrote a letter of the purport of this to W. T. Burgess at the time he sent him the certificate of sale to John F. Farnsworth. Witness reads the copy through, and then says it contains in substance a statement of what he wrote Wm. T. Burgess in regard to the sale of said land.

The said copy is here read to the court by the defendants, as follows:

ROCKFORD, June 10, 1854.

MR. BURGESS: SIR: I this day struck off to John F. Farnsworth, Esq., a part of a city lot belonging to A. Thomas, on the execution in favor of H. O. Stone, for the amount of damages and costs, $38 33, as per order from you. The costs (clerk and sheriff,) are $15 95; you can remit the same, and I will forward you the certificate of sale, also a receipt to attach to the writ.

Yours, respectfully, K. H. MILLIKEN,

Sheriff Winnebago County, Ill.

Re-examined by complainant. Witness' attention called to the return on the execution, says: That is the return made at the time, according to the best of his recollection, the transaction being some time ago, and has not given the matter much thought. All the sale was the indorsement on the execution, and the certificates of sale, but is not positive. Thinks the indorsement of payment of fees was made a few days after; the other indorsement was made at the time of sale. Recollects W. T. Burgess calling his attention to the return, and saying he wanted him to alter it, that the sale was made to Farnsworth. But as the matter was in court he preferred not to do it.

Cross-examined by defendants. W. T. Burgess said to him that the sale was made to Farnsworth, and he ought to alter it. Agreed with him that it was made to Farnsworth, but said he would not correct it. Then told W. T. Burgess that the sale was regular so far as he knew. Thinks he has so told Mr. Burgess several times.

Re-examined by complainants. The sale was made to Farnsworth by the direction of W. T. Burgess, by his letter. Considered the sale made to Farnsworth; his reasons for it were the directions that he had from W. T. Burgess. Thinks no bidders were there at the sale.

V. A. Marsh testified that he resided in Chicago in 1855, and had an opportunity of knowing the pecuniary circumstances of Samuel P. Burgess; he had no means except his salary; about that time he stated that he had no means, and wanted a situation as clerk.

Jason Marsh testified he was acquainted with Alden Thomas, and had been since he can remember; has known W. T. Burgess since 1841; was the attorney for A. Thomas in the suit of H. O. Stone against him, in which the execution in this cause was issued. Previous to the trial of this cause, W. T. Burgess and witness, or Mr. Fuller, or both, or which is not positive, talked about the question that was to be tried.

The defendants here object to any evidence being given either as to what occurred at the trial of said cause, or going behind or *dehors* the record of the judgment therein; but the court overruled the objections severally, and allowed the evidence to be proceeded with touching the said trial as hereinafter given.

The understanding was that the only thing in controversy was the amount of fees to Burgess, as attorney, which he claimed Thomas had to pay him. That was understood to be the question in controversy. At the trial, Mr. Burgess was the only witness sworn. Mr. B. Shaw was also sworn as to the state of the account, both by the defendant, Thomas. At the trial a certain charge came up that Thomas claimed had been settled; but on the testimony of W. T. Burgess, can't say how it came up, but that item was made a part of the judgment. His recollection is not now very distinct as to what did occur on the trial.

Sometime after judgment, execution being out, talked with W. T. Burgess in relation to it; talked considerable. W. T. Burgess admitted that he was mistaken in his testimony, and held out the idea that he or Mr. Stone, or that he would get Mr. Stone, to relinquish that portion of the judgment. Thinks the amount was from eighteen to thirty dollars; don't recollect anything about the amount, but thinks it would range somewhere

along there. Communicated the fact to Thomas that Burgess would communicate with Stone to procure him to reduce the amount of the judgment.

On cross-examination. The money that was paid and indorsed on the execution, was paid after the conversation referred to by witness with Burgess about the reduction of the payment. Thinks Burgess said that he would try to get Stone to make a deduction on the judgment. After the trial was over, Thomas explained to witness how the mistake had occurred, and witness explained it to W. T. Burgess, and he said he would consult Stone, and try to have Stone deduct the same from the judgment. Is a brother-in-law of A. Thomas, deceased.

Burgess also admitted that Farnsworth had no interest in the matter, and that no consideration passed between them — was a mere matter of accommodation to Burgess. Thomas had possession of the premises until his death; since then his heirs have had possession.

William Brown testified that the premises were worth in September, 1855, $4,000. The lot was worth in 1854, $60 per foot.

Complainants read in evidence the sheriff's deed.

Complainants here closed, and defendants offered as evidence, deed of the premises from John S. Burgess and wife to Samuel P. Burgess, dated September, 13, 1855, acknowledged September 29, 1855; Record of the suit of *H. O. Stone* v. *Alden Thomas;* execution in said suit, with the sheriff's return; alias execution and sheriff's return; sheriff's certificate of sale to J. F. Farnsworth; assignment of certificate by Farnsworth to J. S. Burgess; and deed from J. S. Burgess to Samuel P. Burgess.

At February term, 1858, a final decree was rendered, dismissing the bill. The complainants have brought this case here by appeal, and have assigned this as error.

This case appeals strongly to the best feelings of the court, as some of the complainants are infants, contending with an astute and practiced lawyer, who having, as he contends, a legal advantage, is determined to avail himself of it, without regard to any equities supposed by the complainants to exist in their favor. Though it be such a case, and one of great hardship perhaps, this court is not permitted to violate any rule of law or equity in the effort to afford relief, neither in this or in any other case. We can only apply those rules to the facts and the circumstances of each case that may be presented.

As is said by Fonblanque in his excellent treatise on Equity, book 1, chap. 1, sec. 3: "In chancery, every particular case stands upon its own particular circumstances; but if the law has determined a matter, with all its circumstances, equity can-

not intermeddle; and for the chancery to relieve against the express provisions of an act of parliament, would be the same as to repeal it. Equity, therefore, will not interpose in such cases, notwithstanding accident or unavoidable necessity; so that infants had been bound by the statute of limitations, if there had been no exception in the act. And although in matters of apparent equity, as fraud or breach of trust, precedents are not necessary, it is dangerous to extend the authority of the court further than the practice of former times."

The discretion given to courts of equity is not by any means an arbitrary discretion in any case, but it is to be governed by rules both of law and equity, which are not to oppose, but each in its turn to be subservient to the others; this discretion, in some cases, follows the law implicitly; in others, assists it and advances the remedy; in others again, it relieves against the abuse or allays the rigor of it; but in no case does it contradict or overturn the grounds or privileges thereof, as has been sometimes ignorantly imputed to this court. *Cowper* v. *Cowper*, 2 Peere Williams, 753, by Sir Joseph Jekyl, master of the rolls.

In *Bond* v. *Hopkins*, 1 Schoole and Sepoy, 428, Lord REDESDALE said, "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity in this respect have no more discretionary power than courts of law."

And Blackstone, in 3 Com. 432, says, "The system of our courts of equity is a labored connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may be liable to objection."

The rules of evidence, also, are the same in equity as at law. No case, therefore, can be determined in equity, on any other than fixed rules and principles applied to the particular case. And the chancellor, like a jury, can draw his inferences from the testimony, and, like them, weigh it, and as it preponderates, so decree.

It is a rule in equity, that a party to a suit, purchasing property sold under an execution, is chargeable with notice of all irregularities attending the sale; and so is his attorney, who conducts the proceedings.

It is also a rule, that a party shall not claim a benefit, or the aid of such a court, who has been guilty of *laches* in protecting his rights, unless that *laches* may be imputable to the party claiming against him.

The bill in this cause avers, in positive terms, that complainant had no knowledge of the sale of the property in question, until he was told that it had been sold by the sheriff, and the deed actually executed and recorded. The sheriff testifies, that when he had the execution against him, he called on him to settle, and complainant told him he must take property. The complainant endeavors to account for his apparent negligence, and states these facts: That in the suit by H. O. Stone against him, the only matter of real difference between them was, a small sum of fifteen dollars, being the fee of one of the defendants, as attorney for Stone; that he had paid on the demand thirty-one dollars; and that on the trial, Burgess was sworn as a witness, and by his testimony, the amount of the recovery against him was much greater—some forty-five dollars. Burgess admitted, —so Jason Marsh testifies,—there was a mistake in his testimony, and said he would see Stone about it, and have it rectified. This is not denied by Burgess. The complainant states, when execution was issued on the judgment, in June, 1850, he paid on it $31 and the costs, which Burgess received, and remonstrated against paying more; that the execution was returned by order of Burgess, and that he heard nothing more of it until January, 1854, when a *fi. fa.* was issued for the balance; that on telling the sheriff the facts of the case, he consented to wait until complainant could write to Burgess; that he did write to Burgess about it, and receiving no reply to his letter, he supposed the matter was all adjusted, and gave himself no further concern about it, and was only awakened from his delusion by being told of the actual sale of his property and a deed made and recorded for it. Supposing he was dealing with an honorable man, in the person of Mr. Burgess, of high standing at the bar, whose professional robe indicated the higher virtues, he might well consider he was secure in relying on his promise,—for such it was,—to have the mistake, which he had produced by his own testimony, corrected. Instead of that, however, without communicating with the complainant in any way, he becomes the purchaser of the judgment, and enforced the collection of the whole of it, by the sale of valuable property, worth at that time some twelve or thirteen hundred dollars, for the trifling sum of thirty-eight dollars and thirty-three cents, and at the time of the hearing of this cause, worth some four or five thousand dollars. We do not hold this promise of Burgess to see Stone, and have the mistake rectified, was of binding legal obligation,—not at all; but, when coming from a member of an honorable profession, in whom no improper designs can be presumed to lurk, the complainant was well justified in supposing that he had done as he said he would do, that

the whole matter was adjusted, and it should trouble him no more. It was a reasonable inference from Burgess' silence.

But be this as it may, assuming it to be true that the complainant knew of the levy and sale, was the sale conducted in the manner prescribed by law, and is the defendant chargeable with knowledge of any irregularities, or serious departure from the requirements of the law in sales by sheriffs?

It must be confessed, the witness on the first point as to the regularity of the sale, the sheriff himself, is not so positive in his statements as he might be; but this fact distinctly appears from what he does say—that, in truth and in fact, there was no public sale of the property whatever. Our statute, R. L. 1845, chap. 57, sec. 11, provides that "no lands or tenements shall be sold by virtue of any execution aforesaid, unless such sale be at public vendue, and between the hours of nine in the morning and the setting of the sun of the same day." Provision is then made for public notices of the sale, and a penalty against the sheriff of fifty dollars if he sells otherwise, with this proviso: "Provided, however, that no such offense, nor shall any irregularity on the part of the sheriff, or other officers having the execution, be deemed to affect the validity of any sale made under it, unless it shall be made to appear that the purchaser had notice of such irregularity."

The sheriff states that all the sale he made of this property was, by sitting in his office, in the east wing of the court-house, and there indorsing it on the execution, and making out a certificate of sale; that he did not go to the door of the court-house; that there was no public vendue, no bidders, no outcry, nothing transpiring there to arrest the attention of the public, or any indication that a sale of valuable property by the sheriff was going on. The fact may be, that at the very moment, whilst the sheriff, privately in his office, was making this indorsement, the owner of the property, the complainant, may have been at the door of the court-house.

One reason why such sales are directed to be at public vendue is, that by the very publicity of it, not only bidders may be attracted, but that the defendant himself may be present to see and know that every thing is fair; it is a great protection to unfortunate debtors. Had the sale in this case been public, if the debtor did not know of it himself, some friend might have known it, and so communicated the fact. But the sheriff obeyed not the law, but the direction of the plaintiff's attorney, who, it is very evident, had matured his plans to possess himself of this property, for the little trifle due on the execution, and which he had induced the complainant to believe no longer existed as a balance against him.

A stranger to these proceedings would not, and justly, too, be affected by them; for effect must, from motives of public policy, if for no other cause, be given to sales of this character, and he has a right to repose upon the presumption that the officer has done his whole duty in the premises.

It is not so with the plaintiff in this suit, and in this aspect W. T. Burgess is viewed by the court, because he says, before the issuing of the alias execution, he had become the purchaser of the judgment from Stone, and had been and was the attorney of the plaintiff, Stone.

In such case the rule is, that where the plaintiff in the judgment becomes the purchaser, he is responsible for and is supposed to be cognizant of all the irregularities and errors, both in the judgment and in the proceedings under the execution. *McLagen* v. *Brown et al.*, 11 Ill. R. 523, 524.

That W. T. Burgess was the purchaser, distinctly appears by the sheriff's return on the execution, and his return must be conclusive; it cannot be explained away by parol, or by the production of Burgess' letter to him to strike it off to Farnsworth; nor would he be any less the purchaser, under the facts as they are proved here, if the sheriff's return actually showed that Farnsworth was the purchaser, for he disclaimed all knowledge of it, or having any interest in it. He would be the trustee, only, of Burgess, holding the title for him. So with John S., his brother, and with his co-defendant, Samuel P. Burgess, his cousin. They were but trustees for the benefit of William T. Burgess.

Look at John S. Burgess' testimony. It is enough to satisfy any mind that he was used—under the influence of an older brother as cunning as one well taught in the chicanery of his profession could well be, it was no difficult matter to make him an instrument for his purposes. His testimony is quite sufficient to show he was a mere instrument. "He does not even know from whom he got the title." Had given his brother a note for $250, and paid it by selling the premises, worth $4,000, to his brother—conveyed the land to Samuel at William's request; never had any contract with Samuel to convey him the land; never took any interest in the property. He says, moreover, that William T. Burgess told him that he had sold the premises to S. P. Burgess, and he wanted him to convey it to him. This shows he was a mere trustee.

So with S. P. Burgess. The proof shows that he never was in a condition to buy such property, and the inference is irresistible, as J. S. Burgess conveyed the land to him without his knowledge, and at the request of W. T., he also is but a trustee for W. T. Burgess. They are all "art and part" in a fraud-

ulent transaction. It would be a just reproach upon a court of equity, if W. T. Burgess could be permitted to interpose either of these persons between him and the censure of this court. It was one of the many artifices Burgess resorted to to cover up his fraud and escape detection, and have it in his power to allege that neither the plaintiff in the execution nor his attorney was the purchaser. But such shallow devices and fraudulent practices cannot avail him. He, in the eye of justice and of the law, concocted this scheme—he was the moving spring of the sheriff's illegal action; he pressed into his service Farnsworth, his brother John, and his cousin Samuel, a co-defendant with him, drew up his answer, and taught him upon what to insist. They were all animated by his soul, and in that, there brooded a wicked design.

The direction to the sheriff, "if there are no bidders, strike it off to Farnsworth," was a sufficient intimation to a very obliging sheriff that it would be perfectly agreeable to him, that there should be no bidders, so that he might, at a future day, by the train he had laid, become the owner without being chargeable with any irregularities in the sale. Irregularities is a term too mild by which to characterize these proceedings — they were gross abuses in the face of justice, and would be condemned every where. It is an old maxim that it is the very essence of fraud to attempt to cover up fraud.

If he had not some design of this character, if he was conscious every thing was fair, just and honest, why did he not appear in all the papers—in the certificate and sheriffs' deed, as he did appear in the sheriff's return the real purchaser, as he was, of the property. When the sheriff made his return, that he was the purchaser, he saw at once, and knew he would be affected by the abuses committed, and he endeavored to induce the sheriff to amend the return. But in such a case as this is, we will hold the sheriff to it, and consider the fact as true, that Burgess was the purchaser, as shown by his return.

Being so, issuing the certificate to Farnsworth was a void act, for it could only issue to Burgess himself, who appears on the return as the purchaser. Chap. 57, sec. 12, R. S. 1845.

We hold that there must be entire conformity in all these proceedings in the return, the certificate and the deed, and if they do not possess it, they will be invalid. *Davis* v. *McVickers*, 11 Ill. R. 329.

But there is another ground on which the complainants might well seek the interposition of this court, and that is, the gross inadequacy of price.

We do not mean to be understood as intimating, that at a judicial sale at public vendue or sale by auction, conducted

fairly, and in conformity with the statute, that inadequacy of price could be urged as ground for setting aside a sale. *Ayres* v. *Baumgarten*, 15 Ill. R. 444. There would be no necessity, under our system of laws, to contend very strenuously for such a principle, because, having a right to redeem, no permanent injury need be worked by it, or valuable estates sacrificed. But where, as in this case, the requirements of the statute were spurned—where there was no public vendue, no bidders, and no outcry—gross inadequacy of price, such as is here exhibited, ought to have a most decided influence, and be in fact, a controlling element.

Nor do we mean to be understood as objecting to receiving a bid by letter—but the officer must cry the bid, and if there be no advance on it, he would be justified in selling at the bid. The debtor has a right to insist upon all the forms.

We did design to bring out in stronger relief the acts of the principal defendant in this cause, who has exercised a power his position gives him, for such a bad purpose. We did intend to administer to him a well merited rebuke, as pointed as it is true, but have thought we would leave him to reflect how much sweeter and more consoling would be to him the whispers of his conscience, if he had endeavored, by the exercise of his talents and sagacity, to save this estate to those entitled to it, rather than by his cunning and craft to deprive them of it.

The decree is reversed, and a decree entered in this court, that on payment to William T. Burgess, by the said complainants, of the amount for which the lot and land in question was sold, and all the costs, with interest thereon from the day of sale, the said William T. Burgess and Samuel P. Burgess, do make a quit-claim deed, in due form of law and properly acknowledged, to the said complainants, for the lot and land in controversy, releasing to the heirs at law of said Alden Thomas, all their right, title and claim of, in and to said lot of ground and premises and appurtenances, and that the complainants recover their costs herein. And on failure to execute said deed by said defendants, within thirty days from and after the payment of the money aforesaid, then the Master in Chancery of Winnebago county, do make, execute, acknowledge and deliver such deed.

Decree reversed.

James H. Rees, Administrator, etc., *et al.*, Plaintiffs in Error, *v.* James H. Eames *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where a sheriff, entrusted with an execution, called on the defendants for payment, which was promised, but afterwards refused; which execution was lost, so that it could not be returned by the sheriff, and he paid the amount he was commanded to make; the law will imply a promise on the part of the defendants in execution to refund to the sheriff the amount which he has paid.

The remedy by a sheriff against parties for whom he has paid money by virtue of his office, will depend upon the good or bad faith of his conduct.

The declaration in this case was as follows:

For that, whereas, the said James Andrew, in his lifetime, in the year 1855, was sheriff in and for the county of Cook, in the State of Illinois, and so being such sheriff, and while such sheriff, there came into his hands as such sheriff, to be executed, a certain *fieri facias* or execution, wherein one Thomas J. Hunt was plaintiff and the said James H. Eames and John A. Patmor, impleaded with William Carroll, were defendants, and which said writ was duly issued out of the clerk's office of the Circuit Court of the county of Kane, and State of Illinois, under the seal of the said court, and in and by which said writ, the said James Andrew, sheriff of Cook county, as aforesaid, was commanded of the goods and chattels, lands and tenements of the said James H. Eames and John A. Patmor, defendants, to make the sum of five hundred and twenty-six dollars and twenty-five cents damages, and twelve dollars and seventy-five cents costs of suit, and which said writ so delivered as aforesaid, to the said James Andrew, sheriff as aforesaid, and while in the hands of the said sheriff, James Andrew, and before the same or any part thereof had been paid and collected, and before the said goods and chattels, lands and tenements of the said defendants, or either of them, had been levied upon and seized upon, under and by virtue of the said writ, and long before the expiration of the said writ, the said writ was lost while so being in the possession of the said James Andrew, sheriff as aforesaid, and the said James Andrew so being sheriff as aforesaid, was unable to find the said writ, and was unable to proceed thereon and collect the same in the lifetime of the said writ, and then and there the time for the collection of the said money, under and by virtue of said writ of and from the said defendants expired, and the said James Andrew, so being such sheriff as aforesaid, then and there became and was, by reason thereof, liable to pay the said Thomas J. Hunt, the plaintiff in said execution, the amount of the said execution against the said defendants, and so

being liable, to relieve himself from liability and save himself from damages, afterwards, and after the expiration of said writ, to wit, on the 27th day of September, A. D. 1855, at Chicago, in the county of Cook aforesaid, while such sheriff as aforesaid, paid, laid out and expended the sum of five hundred and twenty-six dollars and twenty-seven cents to the said Thomas J. Hunt, plaintiff as aforesaid, in said execution, in full, for the amount, principal, interest and costs then due and owing said Thomas J. Hunt for and upon account of said execution and for the said defendants.

And the said plaintiffs further aver that the said James Andrew in his lifetime, and while the said execution was in his hands to execute, as such sheriff, and before the loss thereof, as hereinbefore averred, the said James Andrew, so being such sheriff as aforesaid, demanded of the said defendants the amount of said execution, and which said amount the said defendants promised to pay, and the said plaintiffs also aver that the said James Andrew, so being such sheriff as aforesaid, and in his lifetime, after the loss of said execution and before the payment of said sum of money as hereinbefore stated, to the said plaintiff in said execution, again demanded of said defendants the payment of the amount of said execution.

Whereby the said defendants became liable to pay the said sum of money so paid as aforesaid, by the said James Andrew, sheriff as aforesaid, to the said James Andrew in his lifetime.

Yet the said defendants, not regarding their said duty, promise and undertaking, have not as yet paid the said sum of money, or any part thereof, to the said James Andrew in his lifetime or to the said plaintiffs, administrators as aforesaid, since the death of the said James Andrew (although often requested so to do), but they so to do have hitherto wholly refused, and still refuse, to pay the same, or any part thereof, to the said plaintiffs, administrators as aforesaid, to the damage of the said plaintiffs, as such administrators as aforesaid, of one thousand dollars, and therefore they bring their suit, etc.

And the said plaintiffs bring into court here the letters of administration of all and singular the goods, chattels and credits whereof the said James Andrew, at the time of his death, granted to the said plaintiffs by the County Court of Cook county, which give sufficient evidence to the said court here of the grant of administration to the said plaintiffs as aforesaid.

To which said declaration the said defendants demurred, and which demurrer was sustained by the court, J. M. Wilson, Judge, presiding. The plaintiffs below then appealed.

Arnold, Larned & Lay, for Plaintiffs in Error.

W. T. Burgess, for Defendants in Error.

CATON, C. J. The declaration in this case shows that, by accident, the execution was lost while in the sheriff's hands, and before the return day; that, before the return day, he called on the defendants in execution and demanded payment, which they promised but refused to make; that, in consequence of the loss of the execution, he was unable to return it, according to the exigency of the writ, and hence became liable to pay, and did pay, the amount of the judgment; that, after the return day of the execution, and before he paid the amount, he again demanded payment of the defendants, who again promised to pay it, but never did. On this state of facts, the law will imply a promise on the part of the defendants to refund to the sheriff the amount which he has thus paid to satisfy this debt. The sheriff was not bound to wait till he was sued for not returning the execution. It is sufficient that he was liable for the amount, and then he had a right to pay it, and save costs. It is like a surety who voluntarily pays the debt after his liability is fixed. There the law will imply a request on the part of the principal.

The cases where the sheriff has, and where he has not, a remedy against the party whose debt he pays in consequence of omission of some official duty, are very distinguishable, and there can be rarely any difficulty in applying the rule. Wherever he acts *male fide* he is without remedy. If he acts in good faith—if he intends to do his duty, and supposes he is doing it—and through inadvertence or accident, he becomes liable, he has his remedy over. If a sheriff suffer a voluntary escape, he has no remedy against the debtor, for he knew he was neglecting his duty when he suffered the debtor to go at large; but, in case of an involuntary escape, although he might have guarded the prisoner closer, and was even guilty of negligence or want of proper prudence in not doing so, he has his remedy against the execution debtor, if he thought he was safe.

Here the declaration shows that the sheriff was guilty of no willful misconduct, but that the execution was lost by accident, whereby he was unable to return it. The defense here insisted upon is an ungracious one, and ought not to be listened to, except where the policy of the law requires that the sheriff should be punished for his misconduct. Then it is admitted, not for any intrinsic merit in the defense itself, or the party making it, but as an example, and as a punishment, for the misconduct of the officer. The demurrer to the declaration should have been overruled.

The judgment must be reversed and the cause remanded.

Judgment reversed.

David Nichols, Appellant, *v.* A. Guibor, Appellee.

APPEAL FROM BUREAU.

An agent is, on general principles, a competent witness for all purposes.
The purchaser of an article, not warranted as to quality, must take the hazard of his bargain. If he was not to keep the article purchased, unless it pleased him, he should return it, if it displeased him, at the earliest practicable moment.

This was an action brought against the defendant by the plaintiff, before a justice of the peace, to recover pay for a plow, which plaintiff alleges he sold to defendant. Judgment for plaintiff below. Case appealed to Bureau Circuit Court at April term, 1857. Judgment in that court for plaintiff. The defendant shows the following points in which the court erred:

In permitting Linton, who was the agent of plaintiff, to testify in chief, by his signing his release, as set forth in bill, which only releases Guibor from recovering damages from Linton, but did not release Linton from the damages which Guibor could recover for his negligence in permitting this plow to become worthless while in his hands as agent.

In refusing to grant a new trial on motion of defendant.

The cause was tried before Ballou, Judge, and a jury, at April term, 1857, of the Bureau Circuit Court.

John M. Grimes, for Plaintiff in Error.

Glover & Cook, for Defendant in Error.

Breese, J. All the points raised in this cause must be decided against the appellant.

The agent, Linton, was a competent witness on general principles for all purposes. His interest in this particular case, if he had any, was released on trial, and all objection removed.

To make the party liable under this proof, the seller was under no necessity of demanding a return of the article. It was the business of the purchaser to return it so soon as he discovered it did not suit his purposes. There was no warranty of quality, and, therefore, it was not competent for the purchaser to prove the article was worthless; "his eyes were his chap;" he was his own judge of the article, without any warranty, express or implied. The express agreement to return it if it did not suit, excludes any implied warranty.

The case does not show the property was damaged while in the possession of the agent, Linton, so as to make him responsi-

ble in an action. No release, therefore, was necessary on this account; but the case did not depend on Linton's testimony. William Phillips testifies that Nichols told him he was not obliged to keep the plow, if he did not like it, but was to return the plow if it did not suit him.

He should have returned it at the earliest practicable moment. Not having done so, he is justly chargeable with the price.

Judgment affirmed.

The City of Chicago, Appellant, *v.* The Rock Island Railroad Company, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Special authority delegated by legislative enactment to particular persons, or summary proceedings without personal service, to take away a man's property and estate against his consent, must be strictly pursued, and this must be shown on the face of the proceedings.

Since the act of February, 1857, amendatory of the charter of the city of Chicago, there is but one collector and his assistants, and that collector must apply to some court of general jurisdiction for an order of sale of lands, etc., to satisfy assessments. Special collectors cannot make this application.

Where a command issued to a special collector to levy of the goods and chattels, had he made a levy, he could have completed the execution, even after the passage of the amendatory act. Had the warrant been issued against lands, the special collector could not have sold, as he had only been commanded by the common council, and not by some court of the city, having competent jurisdiction.

The Common Council of the City of Chicago made a special assessment for extending La Salle street from its present terminus (Madison street) to Jackson street, which was confirmed June 9, 1856. A warrant in due form was issued to George W. Colby, special collector of the south division of Chicago, dated June 17, 1856, by which he was directed to collect said assessment out of the goods and chattels of the respective owners of the real estate assessed, and to make return in what manner he should execute his writ, within thirty days from the date thereof.

Colby, the special collector, never made any return of his warrant; but, on the 31st day of December, 1857, he published, in the corporation newspaper, a notice, stating that he had in his hands for collection "Warrant 207, S, opening La Salle street from Madison street to Jackson street," with other warrants, and requested all persons who had not paid their assessments to pay the same.

On the 15th day of January, 1858, Colby, the special collector, published, in the corporation newspaper, a notice, stating

that he should, on the 27th day of January, 1858, apply to the Cook County Court of Common Pleas, at a special term thereof to be held on that day at the court-house in Chicago, for judgment against all blocks, lots, sub-lots, pieces and parcels of land, together with the improvements, if any, situated thereon, for all taxes, assessments, interests and costs due thereon, and remaining unpaid, as appears from the following described warrants then in his hands for collection, to wit: "No. 207, S, 17th June, 1856, special warrant, opening La Salle street from its present terminus, at Madison street, south to Jackson street."

On the 27th day of January, 1858, Colby presented to said court his report of the delinquent lands, lots, etc., and asked for judgment against the same; to which objections were made, and the court refused to render the judgment asked, and dismissed said application at the costs of the city. Colby, the special collector, in the name of the city, brings the case to this court for a revision of the judgment of the court below.

Prior to the amendment of the city charter, approved Feb. 14, 1858, the people elected one collector, who collected the general revenue of the city, and the common council appointed special collectors for the several divisions of the city, who collected the warrants for special assessments in the respective divisions for which they were appointed. These special collectors were elected in the month of March, in each year, and held their offices for one year. They were required to conform, in the execution of their duty, to the provisions of the charter and the ordinances of the common council, regulating and prescribing the duties of collectors. At the time the several warrants mentioned in the record in this case were delivered to George W. Colby, he was the special collector of south division of the city, and his term of office was to expire in March, 1857. The amendment to the city charter, approved February 14, 1857, and in force from its passage, provided that from and after the passage of that act, there should be no special collectors of the city revenue or assessments appointed by the common council, and since that time no special collectors have been appointed. The ordinance prescribing the duties of collectors, required them, whenever an assessment was paid, to mark the word "paid" on the face of the warrant, opposite the real estate charged therewith. All warrants were required, by ordinance, to have a return day therein named, which the common council might, from time to time, extend by resolution. On the return day of the warrant, the collector was required to make return thereof to the common council, according to a form prescribed by the ordinance. The return designated the assessments collected as those marked paid upon the face of the warrant, and all others

as uncollected. Upon the return of any warrant unsatisfied, in whole or in part, an order was to be made by the common council for the sale of the real estate on which the assessments so remained unpaid. The power of the common council to pass an order of sale was materially modified by the act of March 1st, 1854; the duties of the collector, however, remained the same after the passage of that act as before, and the proceedings which the common council were authorized to take could only be taken after the warrant was returned, in the manner above mentioned, unsatisfied in whole or in part. It is under these circumstances that Colby refuses to return his warrants, and claims that, although out of office, he has full power and authority to proceed in some way to collect the assessments mentioned in the warrants in his hands.

The process of the collector in the present case was a several one against each land owner whose lands were assessed; and as to the persons whose assessments now remain unpaid, it appears that the collector never attempted to execute it in any manner whatever, until long after his term of office expired.

Scates, McAllister, Jewett & Peabody, for Appellant.

Beckwith & Merrick, and N. B. Judd, for Appellee.

Walker, J. This was an application by a special collector of the city of Chicago, to the Cook County Court of Common Pleas, at the January term, 1858, for an order of sale of certain lots, upon which assessments had been levied, for the extension of La Salle street. The record shows that the common council confirmed this assessment on the 9th of June, 1856, and issued a warrant to George W. Colby, special collector for the south division of Chicago, for its collection, dated the 17th day of June, 1856, returnable in thirty days from its date. The warrant commanded him to collect the several amounts of the goods and chattels of the respective owners of the real estate on which the assessments had been made. Colby never returned this warrant. On the 31st day of December, 1857, he gave notice, in the corporation newspaper, that the warrant was in his hands for collection, and requiring the owners to make immediate payment. He, as special collector, gave a further notice, in the same paper, that he should, on the 27th day of January, 1858, apply to the Cook County Court of Common Pleas, on that date, for an order of sale of the lots, sub-lots, blocks, pieces and parcels of land, together with the improvements, if any, situated thereon, to satisfy all taxes, assessments and costs due thereon and unpaid, as appeared by this warrant, which was described.

That on the 27th day of January, 1858, he returned to the court a list of the delinquent lands, lots, etc., in the assessment, and applied for an order for their sale, to satisfy the amounts remaining unpaid. This application was resisted by the defendants, and the proceeding was dismissed by the court, on their motion. And the plaintiff brings the cause to this court to reverse the judgment of the court below.

The act to amend the charter of the city of Chicago (Private Laws 1851, p. 134,) provides, that at the annual election of officers, there shall be elected a collector. The same act provides, that there shall be one or more collectors. The city, by ordinance of the 17th July, 1856, provided that, in addition to the collector elected by the people, there should be, thereafter, three other city collectors, who should be appointed by the common council, on the second Tuesday of March in each year. They were required by the ordinance to collect all warrants for special assessments, for opening any street, alley, etc. The 8th section of chap. 8, p. 159, Private Laws 1851, provides that, in case of the non-payment of taxes or assessments, the premises may be sold at any time within two years; but before any sale shall be made, an order shall be entered by the common council on the records, directing the collector to sell, particularly describing the delinquent premises and assessment for which the sale is to be made. The amended charter of the city of Chicago, approved the 14th February, 1857, (Private Laws, 892, sec. 27,) provides, that from and after its passage, there should be no special collectors of the city revenue or assessments appointed by the common council, other than assistants to the city collector, who shall in all cases be the principal in the collector's bureau of the treasury department. Private Laws 1857, p. 899. By the 40th section of this act, p. 902, it is provided, that "if, from any cause, the taxes and assessments charged in said assessment warrants are not collected or paid, on lands or lots described in such warrants, on or before the first Tuesday in January ensuing the date of said warrants, it shall be the duty of the collector to prepare and make report thereof to some court of general jurisdiction, to be held in Chicago, at any special, vacation, or general term thereof, for judgment against the lands, lots and parcels of land, for the amount of taxes, assessments, interest and costs respectively due thereon; and he shall give ten days' notice of his intended application, before the first day of the said term of the said court, briefly specifying the nature of the respective warrants upon which such application is to be made, and requesting all persons interested therein to attend at such term; and the advertisement so published shall be deemed and taken to be sufficient and legal notice, both of the aforesaid intended

application by the collector to said court for judgment, and a refusal and demand to pay the said taxes and assessments." The act then provides for the rendition of judgment, the process under which the sale shall be made, and the notice of sale. The 87th section, p. 911, repeals all parts of the act of which it is amendatory, and the several acts amending the same, as are inconsistent with or repugnant to the provisions of this act, but leaves all acts and parts of acts not inconsistent therewith in full force.

These seem to be the only legislative enactments necessary to be considered in the determination of the questions presented by this record. Since the determination of the case of *Rex* v. *Croke*, 1 Cowper, 30, the rule has been recognized and uniformly adhered to, that a special authority delegated by legislative enactment to particular persons, or summary proceedings without personal service, to take away a man's property and estate against his consent, must be strictly pursued, and it must so appear on the face of the proceedings. This court has adopted and acted upon this rule, and it is believed every State in the Union has done the same in sale of lands for taxes, and in appropriating private property for public uses. This rule is so uniform and familiar, that it would be useless to quote authorities in its support. To give the court jurisdiction the authority must be strictly pursued, and a failure to do so renders the whole proceeding void. The statute alone confers the authority, and the mode it prescribes can alone be adopted. Then, did the statute authorize this proceeding? The amendatory act of the city charter of 1857 was in force when the assessment was made and confirmed, and when the warrant was issued, and for several months after its return day. Colby, under that act, had the undoubted right to return this warrant and procure an order of sale from the common council at any time before the passage of the act of February, 1857. That act provided that there should, after its passage, be but one collector and his assistants, and that he should apply to any court of general jurisdiction in the city for an order of sale of lands, etc., for the payment of taxes and assessments that remained due and unpaid on the first Tuesday in January. By this act, no power was conferred on special collectors to make the application. This act had also repealed all former acts which were inconsistent with its provisions. The application by any other person than the collector, or an order made by any authority other than a court of general jurisdiction, was inconsistent with its provisions. This was an assessment which was due on the first Tuesday in January and was clearly embraced in its provisions, and the collector alone had the right to apply to the Cook

County Court of Common Pleas for an order of sale. No such power had been conferred on this special collector, nor is there in the act any clause which saves this assessment from its provisions, and the proceedings for their collection out of the real estate upon which they are assessed must be the same as in other cases.

It was urged that the passage of the act of February, 1857, did not affect the collection of this assessment, because the officer had commenced execution. As a general proposition, it is true that when an officer commences to execute a *fi. fa.* by a levy, he may complete it, notwithstanding the writ may have died or his office have expired before its completion. But in this case the writ only commanded him to levy goods and chattels. Had he, under it, while it was alive, levied upon goods and chattels, he could have completed the execution by their sale, even after the death of his writ or the expiration of his office. But this writ did not authorize him to levy or sell these lands, and if it had, the command would have been void for want of such power in the common council. There was no judgment against the lands—no order of sale, and he could do no act affecting them without an order from the common council, made after the return of the first warrant issued. The levy and confirmation of the assessment became a lien on these lands, but nothing more. It might as well be insisted that the sheriff, who receives a *fi. fa.* and fails to levy before the return day, and while he is in office, has commenced execution, and has a right to complete it after the return day, and after his office has expired. His power to act ceased with the repeal of the law under which he obtained his warrant. The other questions involved in this case have been discussed in the case of the *City of Ottawa* v. *Macy et al.*, at the present term of this court, and it is deemed unnecessary to again discuss them here. Upon this record we are unable to discover any error, and the judgment of the court below should be affirmed.

Judgment affirmed.

Truman B. Gorton, Plaintiff in Error, *v.* William Frizzell, Defendant in Error.

ERROR TO ROCK ISLAND.

An affidavit to hold to bail must show that the defendant has refused to surrender his estate, or has been guilty of fraud.

An affidavit before a justice of the peace, which states that a defendant "withholds his money or secretes his property from the officer so that the debt cannot be levied," is insufficient to authorize the arrest of the debtor.

Gorton *v.* Frizzell.

When a capias recites such an affidavit as its foundation, an officer who executes it will be a trespasser; he cannot justify under a void writ.

In an action against a sheriff for the escape of a party arrested under such a process, the court should instruct the jury that it is void, or should exclude it from the jury altogether.

THIS is an action of debt for an escape, commenced by the defendant in error against the plaintiff in error, in the Rock Island Circuit Court.

The summons and declaration claim $102 debt, and $200 damages.

The declaration avers that the plaintiff, on the 10th of July, 1855, before E. R. Bean, J. P. of Rock Island county, recovered a judgment against James Bowie, for $102 and the plaintiff's costs; that on the 20th of July, 1855, the plaintiff sued out a *capias ad satisfaciendum* upon the judgment, which was delivered to a constable, by virtue of which writ he arrested James Bowie and conveyed him to the common jail, where he delivered Bowie to the defendant, Gorton, who was sheriff of the county; that the defendant received and detained Bowie by virtue of the writ; and afterwards, without the leave and license and against the will of the plaintiff, the said Bowie escaped and was permitted to go at large by the defendant, the said judgment, interest and costs being wholly unpaid.

The second count is the same, except that it avers that the *ca. sa.* was delivered by the justice of the peace, to the defendant, Gorton, for execution, and that he arrested Bowie.

The defendant filed his pleas. First, *nil debet;* second, that the *ca. sa.* was null and void, and not sufficient to justify the defendant in detaining Bowie.

On these pleas issue was joined.

At the June term of the Rock Island Circuit Court, A. D. 1856, DRURY, Judge, presiding, the cause was tried before a jury.

The plaintiff offered a paper in evidence, which reads as follows, to wit:

STATE OF ILLINOIS, } *ss.*
ROCK ISLAND CO. }

I do solemnly swear that I do verily believe James Bowie to be able to pay $101.66, the amount of a judgment, costs and interest recovered by me on the 10th day of July, 1855, before E. R. Bean, J. P., and that he withholds his money or secretes his property from the officer, so that the debt cannot be levied.

WM. FRIZZELL.

Subscribed and sworn to before me, this 20th day of July, 1855. E. R. BEAN, *J. P.*

STATE OF ILLINOIS, } *ss.*
ROCK ISLAND CO. }

The People of the State of Illinois to any Constable of said County, Greeting:

Whereas, Wm. Frizzell recovered a judgment against James Bowie, before E.

R. Bean, a justice of the peace, on the 10th day of July, 1855, which judgment, cost and interest, amounts to $101.66, and whereas has this day made oath before me, E. R. Bean, a justice of the peace for said Rock Island county, as follows, to wit: That he does verily believe James Bowie to be able to pay $101.66, the amount of a judgment, costs and interest recovered by Wm. Frizzell on the 10th day of July, 1855, before E. R. Bean, a justice of the peace, and that he withholds his money or secretes his property from the officer, so that the debt cannot be levied. You are therefore hereby commanded to arrest the said James Bowie, and him convey to the common jail of said county, and the sheriff or jailor is commanded to receive and safely keep him in said jail till he pay the debt or be discharged by due course of law.

Given under my hand and seal this day of July, A. D. 1855.

E. R. BEAN, *J. P.* [SEAL.]

To the introduction of this paper the defendant objected, because the same was invalid and void as a writ of *ca. sa.*

The court gave, on behalf of the plaintiff, the following instructions, to which the defendant excepted:

1. If the jury believe, from the evidence, that the judgment was obtained by the plaintiff against James Bowie, and a *capias ad satisfaciendum* was issued thereon as alleged in the declaration in this cause, that he was arrested on such *capias*, and committed to the custody of the jailor of Rock Island county, who was then and there the jailor and deputy of the defendant, and that afterwards said jailor and deputy voluntarily permitted said Bowie to go at large, then the plaintiff is entitled to recover against the defendant in this cause, and the measure of damages is, etc.

2. The permitting a person who is committed to jail to go out of jail, and at large, is an escape within the meaning of the law in such a case as the one under consideration.

The defendant asked the court to give the following instructions, which were refused, and the defendant excepted.

3. If the jury believe, from the evidence, that the said James Bowie was committed to Ezra M. Beardsly, the jailor of Rock Island county, and was permitted by the said Beardsly to escape and go at large, without the knowledge or consent of the defendant, and that the act of Beardsly was not confirmed afterwards by the defendant, and that the defendant had no other or further connection with said escape, then they will find for the defendant.

4. If the jury believe, from the evidence, that the *ca. sa.* by which Bowie was arrested and committed to jail was void, then they will find for the defendant, and they are further instructed that the *ca. sa.* offered in evidence in this case, is void.

The jury returned a verdict for the plaintiff of the sum of

one hundred and two dollars and ninety-one cents, debt, and five dollars and sixty-six cents, damages.

The defendant moved for a new trial, which motion was overruled.

The defendant also moved in arrest of judgment, because there is no sufficient cause of action shown by the declaration, but it discloses the fact that the pretended judgment on which the *ca. sa.* issued was void for want of jurisdiction in the justice of the peace, and because the verdict finds more for the plaintiff than he can have judgment for. Which motion was overruled.

The court entered judgment for the plaintiff below.

The case was brought by the defendant below to this court by writ of error.

Wilkinson & Pleasants, and Goudy & Judd, for Plaintiff in Error.

N. H. Purple, for Defendant in Error.

Breese, J. This was an action of debt, brought by the defendant in error against the plaintiff in error, sheriff of Rock Island county, for an escape.

The declaration contains two counts; the first avers that the plaintiff, on the tenth of July, 1855, before a justice of the peace of Rock Island county, recovered a judgment against one James Bowie, for one hundred and two dollars and costs; and that on the 20th July, he sued out a *capias ad satisfaciendum* upon the judgment, which was delivered to a constable of that county, on which he arrested Bowie and conveyed him to the common jail, and delivered him to Gorton, who was sheriff of the county; that the defendant received and detained Bowie by virtue of the writ, and afterwards, without the leave or license and against the will of the plaintiff, Bowie escaped and was permitted to go at large by the defendant, the judgment, interest and costs being wholly unpaid.

The second count is substantially the same, averring that the *ca. sa.* was delivered by the justice of the peace to Gorton for execution, and that he arrested Bowie.

The defendant pleaded *nil debet*, and that the *ca. sa.* was null and void and not sufficient to justify the defendant in detaining Bowie, and issues were joined. A *fi. fa.* had been issued and returned *nulla bona*.

The controversy grows out of this second plea, though other pleas were filed, not necessary to be noticed.

It was upon this affidavit the *ca. sa.* issued: "State of Illinois, Rock Island county, ss: I do solemly swear that I do verily believe James Bowie to be able to pay $101.66, the amount of a judgment, costs and interest, recovered by me on the tenth day of July, 1855, before E. R. Bean, Esq., J. P., and that he withholds his money or secretes his property from the officers, so that the debt cannot be levied. Wm. Frizzell."

And this was the capias which issued on this affidavit:

"State of Illinois, Rock Island Co. The people of the State of Illinois to any constable of said county, greeting:

"Whereas William Frizzell recovered a judgment against James Bowie before E. R. Bean, a justice of the peace, on the 10th day of July, 1855, which judgment, cost and interest, amounts to $101.66; and whereas has this day made oath before me, E. R. Bean, a justice of the peace for said Rock Island county, as follows, to wit: That he does verily believe James Bowie to be able to pay $101.66, the amount of a judgment, costs and interest, recovered by Wm. Frizzell, on the tenth day of July, 1855, before E. R. Bean, a justice of the peace, and that he withholds his money or secretes his property from the officer, so that the debt cannot be levied.

"You are therefore commanded to arrest the said James Bowie, and him convey to the common jail of said county, and the sheriff or jailor is commanded to receive and safely keep him in said jail till he pay the debt or be discharged by due course of law. Given under my hand," etc.

The defendant objected to the introduction of this writ, but the court overruled the objection, and the defendant excepted.

The fourth instruction asked by the defendant, based upon the writ, was this:

"If the jury believe, from the evidence, that the *ca. sa.*, by which Bowie was arrested and committed to jail, was void, then they will find for the defendant, and they are further instructed that the *ca. sa.* offered in evidence in this case, is void."

In conformity with the decision by this court, *ex parte* Jesse N. Smith, 18 Ill. R. 347, this instruction should have been given, or rather the last branch of it, the jury having no right to pass upon the legality of the process. The court, in the first place, when objection was made to its going to the jury, should have excluded it, and when requested, should have told the jury that it was a void process.

Being void, the defendant could not have justified under it in an action against him for false imprisonment. The sheriff had notice by the recital of the affidavit set out in the writ, that the justice of the peace had no jurisdiction or power to issue it, and that he could not execute it without being a trespasser. An

officer cannot justify under a void writ. *Brother and January* v. *Cannon*, 1 Scam. R. 200; *McDonald* v. *Wilkie*, 13 Ill. R. 22; *Barnes* v. *Barber*, 1 Gilm. R. 401.

The case *ex parte* Smith determines that an affidavit to hold to bail must show, by facts stated and circumstances detailed, what the constitution requires, that is, either that the defendant has refused to surrender his estate for the benefit of his creditors as required by law, or he must, by the facts stated, raise a strong presumption that the defendant has been guilty of a fraud. Neither of which is shown by the affidavit and *ca. sa.* in this case.

There is no averment in the affidavit that the defendant had money which could be appropriated to this debt. It may have been held to be appropriated to another debt. Nor is there any averment that the defendant had any property, or that such as he may have had, was not exempt from execution. And besides, the affidavit is in the alternative, and does not set forth the circumstances on which the presumption of fraud can be raised.

The judgment is reversed and the cause remanded.

Judgment reversed.

The Town of South Ottawa, Plaintiff in Error, *v.* Amasa Foster, use, etc., Defendant in Error.

ERROR TO LA SALLE COUNTY COURT.

A court on overruling a demurrer, if the party pleading it does not ask to plead over, may give judgment against the defendant and call a jury to assess the damages.

On an inquest of damages, a defendant is not permitted to introduce a substantive defense. He may cross-examine a witness of the plaintiff to overthrow a direct examination, but nothing further. He may also introduce witnesses to reduce the amount of the recovery. If the inquest is taken in open court, he may ask for instructions.

This was an action on the case, brought in the County Court of La Salle county, by Foster, for the use of Whipple, against the town of South Ottawa, to recover damages for a team and wagon having fallen off of an embankment at the end of the Coval Creek bridge, in said town. The declaration is in the usual form in an action on the case, alleging that it was the duty of the town to keep the embankment in repair, and that, by reason of a neglect of that duty, the team and wagon were precipitated down the embankment and injured, and $300 dam-

ages were claimed. The declaration was filed to the September term of the court, 1857.

The town filed a demurrer to the declaration, which, after argument, was overruled by the court, and the town abided by the demurrer.

On the inquest of damages, the defendant (the town) offered proof tending to affect the credibility of a witness introduced by Foster, and also tending to defeat the plaintiff's cause of action, and in that connection, the court instructed the jury, "that they could not consider the evidence thus offered as tending to defeat the plaintiff's cause of action, but that they might consider it in any point of view in which they might think it tended to induce the jury to place more or less reliance on the witness' credibility." The defendant objected to the giving of said instruction, and the court overruled the objection.

The plaintiff offered evidence tending to prove that the plaintiff was the owner of a pair of horses and wagon, worth from $200 to $300, which were being driven down the hill on to the bridge embankment, after dark, with a heavy load, the hill was icy, and one of the horses fell, and thereupon the team and wagon were precipitated over the embankment, and one horse killed, and the other so badly injured that he was worthless, and the wagon and harness were also injured, and that the damage was from $200 to $300.

The defendant introduced a witness and asked him, "whether or not, in his opinion, it was prudent for any person, at that time after dark, to go down that hill with a loaded wagon without having both hind wheels locked." The plaintiff objected to the question, and the court sustained the objection.

The defendant then called another witness and asked him, "whether or not Foster (the plaintiff) had stated to him (the witness) that the cause of the accident was the breaking of the lock-chain." The plaintiff objected, and the court sustained the objection.

At the instance of the plaintiff, the court instructed the jury, that, "It is conceded for the purposes of this case that the plaintiff is entitled to recover, and the only question before the jury is, how much damage the plaintiff has sustained by the injury to his team, wagon and harness, by reason of the same being precipitated down the hill, and the true measure of damages is the actual amount said team, wagon and harness were reduced in value thereby, not exceeding $300." Defendant excepted to the giving of this instruction.

Defendant asked the court to instruct the jury, "that if they believed, from the evidence, that the negligence of the plaintiff, or his servant, contributed to the loss sustained, then the jury

should find only nominal damages for the plaintiff." The court refused so to instruct.

The jury rendered a verdict for $230. The defendant moved the court to set aside the inquest; the court overruled the motion, and defendant excepted.

The following errors are assigned:

1st. The court erred in overruling defendant's demurrer to the declaration.

2nd. The court erred in excluding proper testimony offered by defendant.

3rd. The court erred in giving the instructions that were given.

4th. The court erred in refusing instructions asked by the defendant.

5th. The court erred in refusing to set aside the inquest of damages.

GRAY & WALLACE, for Plaintiff in Error.

GLOVER & COOK, and LELAND & LELAND, for Defendant in Error.

BREESE, J. The demurrer filed in this cause was properly overruled, for the declaration stated a good cause of action, and in plain and perspicuous language.

The court, on giving judgment against the demurrer, if the party pleading it did not ask to withdraw it, and plead to issue, could, as it did, give judgment against the defendant for the damages, and cause a jury to be empanneled to assess those damages.

What consequences flow from this? By not pleading further, the demurrer being to the merits and in bar, admitted the cause of action as stated in the declaration—it admitted all the facts therein set out, and they could not be controverted on the inquest.

The right of a defendant on an inquest of damages does not extend so far as to allow him to introduce a substantive defense. He may overthrow, by a cross-examination, what has been testified to by the witness on his direct examination, but he cannot, by the witnesses called by the plaintiff, establish a substantive defense. He may also introduce witnesses to reduce the amount of the recovery, and when taken in open court, ask for instructions to the jury, and this is the extent and meaning of the rule laid down in the *Chicago and Rock Island Railroad Co.* v. *Ward*, 16 Ill. R. 522.

Under this view, the testimony of the witness who was asked if, in his opinion, it was prudent for any person, at that time, after dark, to go down that hill with a loaded wagon without having both hind wheels locked, was properly rejected, as it introduced a substantive defense; and so of the testimony of the other witness—that pointed to the same object. If there was any defense, it should have been raised by plea.

The instructions given on behalf of plaintiff were correct. That asked by the defendant was properly refused, because the plaintiff's negligence was not a matter of inquiry on the inquest.

The points presented by the demurrrer are disposed of by reference to the 22nd, 23rd and 24th sections of the law providing for township organization. There the duty is imposed. and means provided to discharge the duty.

There being no such errors as are assigned, the judgment of the court below is affirmed.

Judgment affirmed.

Henry Frazer, Appellant, *v.* Richard Gregg *et al.*, Appellees.

APPEAL FROM PEORIA.

In an action of assumpsit for work and labor as a distiller, the plaintiff is entitled to recover the price fixed by contract, if there was one; if not, then what his services were reasonably worth. If the plaintiff was to employ an assistant for the service of his employers, without a contract on his part to pay such assistant, then whatever sum is paid said assistant is not to be deducted from the plaintiff. Whatever understanding may have existed between the plaintiff and his assistant, as between themselves, would not affect the employers.

The facts of this case are sufficiently presented in the opinion of the court. There was a verdict and judgment for the plaintiff in the Circuit Court.

Grove & McCoy, for Appellant.

N. H. Purple, for Appellees.

Caton, C. J. This action was brought to recover compensation for services rendered as a distiller. As it does not appear, from the bill of exceptions, that it contains all the evidence given upon the trial, we have only to pass upon the correctness of the instructions given and refused.

For the plaintiff the court instructed the jury:

"1. That if the jury believe, from the evidence, that the plaintiff wrought for the defendants as a distiller, and performed his labor in the same manner as ordinarily practical distillers do, that he is entitled to recover whatever the defendants agreed to pay him; or if there was no specific contract, what his services were reasonably worth.

"2. That if there was no specific contract that plaintiff was to pay his assistant, and the jury believe, from the evidence, that there was an established custom that the assistant should be paid by the owners of distilleries, then no deduction is to be made on account of payments to the assistant.

"3. That unless the defendants have proved that the plaintiff agreed to pay the assistant distiller, he is not liable for his wages, and payments to him should not be deducted from the plaintiff's claim."

These instructions assert principles of law so familiar, that we hardly know how to discuss them. The plaintiff was certainly entitled to recover compensation for his services according to the terms stipulated in the express contract, if one was made; or, if there was none, then what his services were reasonably worth. As to the two last instructions quoted, if there was no contract, either expressed or implied, that the plaintiff should pay the assistant, it would be strange indeed if the plaintiff should be charged with money paid to the assistant by the defendants for services rendered to them. The instructions were right.

The defendants asked the court to instruct the jury: "If the jury believe, from the evidence, that the defendants made payments to Freeman, by consent or at the direction of the plaintiff, the jury should allow the defendants the amount of such payments," which the court gave, adding the words, "*made on account of the plaintiff.*" The defendants excepted to this addition. If the payments were not made on account of the plaintiff, it is difficult to conceive why he should be charged with such payments. The assistant worked for the defendants, under the plaintiff as principal or head distiller, and it may have been very properly his place to direct payments to be made to him, as his subordinate in the service of the defendants. The whole question depended on the inquiry, whether by the contract, expressed or implied, between the parties, the plaintiff was to employ the assistant and pay him for his services, and then charge the defendants with the services of the assistant, or whether the defendants were to pay the assistant themselves. The principle involved in this question is so manifest to the

most common comprehension that we cannot doubt that the jury fully understood it. The only real question was one of fact.

The court also refused to give, for the defendants, the following:

"If the jury believe, from the evidence, that Freeman and plaintiff were to share their profits while they were working for the defendants, this would constitute the plaintiff and Freeman partners, and, in that case, the plaintiff cannot recover any amount against the defendants in this action.

"There is no legal evidence before the jury of plaintiff selling or delivering malt to the defendants."

To understand the first of these instructions, we must remember the evidence to which it was intended it should apply. This evidence tended to prove that the plaintiff had agreed to run the defendants' distillery at so much per bushel, and was to pay his own assistant, and that he employed Freeman as such assistant, and, as a compensation for his services, was to give him one half he made by running the distillery. This is the most that any of the evidence tended to prove towards a partnership between the plaintiff and Freeman. Whatever this might be, as between themselves, it was nothing as to the defendants. They could not be prejudiced by any such arrangement, nor could they take advantage of it. As to the defendants, at least, there was no partnership; and the instruction was properly refused. We do not know what the whole of the evidence before the jury was, so that it is unnecessary for us now to inquire whether the bill of exceptions contains any evidence of the sale of malt, or not. In no event are we authorized to say that the last instruction was improperly refused.

The judgment must be affirmed.

Judgment affirmed.

John Shirk, Appellant, *v.* Oliver Trainer, Appellee.

APPEAL FROM JO DAVIESS.

Where a suit is pending before a justice of the peace, arbitrators may be chosen, and a judgment rendered upon their award; but unless a suit is pending, a justice cannot acquire jurisdiction. Because a justice of the peace prepares a submission to arbitrators, the Circuit Court does not thereby get jurisdiction of the controversy by an appeal.

Shirk *v.* Trainer.

This was an appeal from the Jo Daviess Circuit Court. The cause was tried before Sheldon, Judge, and a jury, at December term, 1857, of the said court.

Leland & Leland, for Appellant.

W. H. L. Wallace, for Appellee.

Walker, J. It appears from the record in this case, that the parties went before a justice of the peace of Jo Daviess county, and selected three arbitrators, and the justice drew for them the agreement of submission, swore the arbitrators and witnesses, at their request. The arbitrators heard the evidence, and awarded that there was due from Shirk to Trainer the sum of fifty-five dollars, and that Shirk pay the same. That Shirk prayed an appeal to the Circuit Court, which was granted. It also appears that when the arbitrators were selected, no suit was pending between the parties before the justice. The cause was tried on the award in the Jo Daviess Circuit Court, by the court and a jury, at the March term, 1857, which resulted in a verdict in favor of Trainer for fifty-five dollars. Shirk entered a motion for a new trial, and also in arrest of judgment, which were overruled, and a judgment rendered on the verdict, from which defendant appealed to this court.

The only question which we deem necessary to determine is, whether the Circuit Court had jurisdiction to try this cause and render the judgment.

The 43rd sec., 59th chap. R. S. 1845, p. 321, provides: "That, in all cases, the parties to a suit before a justice of the peace shall have the privilege of referring the difference between them to arbitrators, mutually chosen by them, who shall examine the matter in controversy, and make out their award thereon in writing, and deliver the same to the justice, who shall enter the said award on his docket, and give judgment according thereto." It will be perceived from this provision of the statute, that to authorize the selection of arbitrators, and the rendition of a judgment on their award, there should be a suit pending before the justice. The justice of the peace could acquire jurisdiction to render a judgment on an award in no other way. In this case, there was no such suit pending, nor was there any judgment rendered on the award by the justice of the peace. The statute allowing appeals from justices of the peace to the Circuit Court only authorizes them to be prosecuted from judgments. There is no authority given to appeal from the award of arbitrators; and the Circuit Court can only derive jurisdiction to review a decision of an inferior court by appeal

or certiorari, and has no power to review the decision of arbitrators by either of these modes. The Circuit Court acquired no jurisdiction of the subject matter by the service of its process, as in case of an appeal. The only mode by which it could do so was by an original proceeding, by an appropriate action on the award or submission, or by the parties voluntarily entering their appearance, and consenting that the court should try the cause. The Circuit Court did not acquire jurisdiction in either of these modes. It was the duty of the court, on discovering that the justice of the peace had no jurisdiction of the subject matter at any stage of the proceeding, to have dismissed the case. *Allen* v. *Belcher*, 3 Gilm. R. 596.

If the party has any remedy in this case, it is by action on the submission or the award of the arbitrators, and he must be left to seek it in that mode.

The Circuit Court erred in rendering the judgment in this case, and it must be reversed.

Judgment reversed.

Isaac Brokaw *et al.*, Appellants, *v.* Charles L. Kelsey, Appellee.

APPEAL FROM BUREAU.

A plea which avers payment of a note by means of a deed of trust given to secure its payment, is bad.

A plea which avers that the defendant is only the security in the note, and that he received no consideration for his suretyship, is bad.

The opinion of the court gives a statement of this case.

J. S. Eckels, for Appellants.

M. T. Peters, for Appellee.

Breese, J. This is an action of assumpsit, on a promissory note made by the defendants to one A. A. Webber, and by him assigned to the plaintiff. The declaration is in the usual form, and contains two special counts on the note, and the common money counts. A demurrer by defendants was overruled, whereupon they filed five special pleas, to which several demurrers were sustained, and judgment on the demurrer for the plaintiff for his damages, and an appeal taken to this court.

The questions arise on the sufficiency of these pleas, each and all of them.

The first and second pleas, it will be seen, besides being inartificially drawn, and containing much argumentative matter, seek to establish payment of the note by the execution of a deed of trust to Webber by Isaac Brokaw, to secure its payment.

It is very plain this is not a payment in fact or in law. It is the usual security on a loan of money; it is not satisfaction of a debt due, but security merely.

The third plea is liable to the same objections, and to the additional one, that it sets up a contract void by the statute of Frauds, and is argumentative, unintelligible, and not good in form or substance.

The fourth plea sets up that A. S. Brokaw is only the security in the note, and that he received no consideration for his suretyship. This is immaterial. None need be shown.

The last plea does not show in what the fraud and misrepresentation consisted, and is as defective as the others, and they are all liable to the objections pointed out.

The judgment is affirmed.

Judgment affirmed.

Matthias Stone *et al.*, Appellants, *v.* David R. Gardner, *et al.*, Appellees.

APPEAL FROM BOONE COUNTY COURT.

The clerk of the Circuit Court is not the proper person with whom to deposit money for the redemption of land sold under execution.

A judgment creditor intending to redeem land sold under execution against his debtor, should at the same time deliver the sheriff an execution on his judgment.

A court of equity has not power to dispense with the plain requirements of a statute.

Money to redeem land sold under execution may be paid to a deputy sheriff, or to the administrator of a sheriff who is dead, or it may be paid to the purchaser of the land.

David R. Gardner, on the 5th of May, 1857, filed his bill of complaint against the appellants and Orville S. Stevens, charging, that on the 26th of July, 1855, the Stones recovered judgment against him before a justice of the peace, on a note due May 1st, 1855, for $95.50 and costs, from which he appealed to the Boone County Court, on which, at December term, 1855, a judgment was rendered for $107.18 and costs. December 19, 1855, execution issued to Boone county, and levied by the

sheriff, H. R. Wilson, on W. hf. S. E. qr. Sec. 26, T. 44, R. 3 E., on 2nd of February, 1856, returned satisfied by sale of land to M. and M. Stone. That a sheriffs' certificate filed, showing a sale of said land to said Stones on the 26th of January, 1856, for $122.19. That on 26th of January, 1857, at 10 A. M., Gardner deposited with Whitney $134.40, for the redemption of said land from said sale, for the said M. and M. Stone. That they were then non-residents of the State; that Daniel T. Olney then was or claimed to be their agent, and was notified by said Whitney that the money had so been deposited, but that he, Olney, acting as such agent, refused to receive it; that upon this he applied to R. D. Stanton, an attorney, to pursue some method by which he could pay up amount due and obtain release of land, and by his advice confessed a judgment in that court in favor of Martin Y. Gilbert, on the 21st of February, 1857; that Stanton was taken ill, and he, in ignorance of the proper mode, as the agent of Gilbert, on the 26th of April, 1857, deposited with Tisdell, the sheriff of Boone county, $140 for redemption, of which Olney was notified; that Olney refused to receive it, saying no execution was in the hands of the sheriff prior to the expiration of fifteen months from sale; that he afterwards called on Olney and offered to pay him considerably more than the redemption money ($50 more), but he refused to accept it; that he had conveyed the premises by warranty deed to Orville S. Stevens, June 9, 1856; lands worth $1,600; offers to pay the amount due when and where the court may order; that said certificate is in the hands of M. and M. Stone, but he is fearful they will assign it and procure a deed from sheriff.

Answer under oath waived. Prays a preliminary injunction to restrain the assignment of certificate, and the sheriff from making a deed; that upon payment of amount due M. and M. Stone, either on the 26th of January, 1857, or 24th of April, 1857, they or their assigns might be ordered to satisfy said certificate of sale for the benefit of complainant, or of Stevens, or of Gilbert, and if they should refuse, that the judgment and all subsequent proceedings might be set aside. Bill sworn to and injunction allowed by the judge.

May 5, 1856. Summons issued against M. and M. Stone, Olney, Tisdell, Gilbert and Stevens. No return to the summons.

Injunction, containing a summons, issued against M. and M. Stone and Olney. Served on Olney alone.

June 1, 1857. Olney's answer filed. Sets up that the sale of said land was in the mode and manner authorized by law; that the same has not been redeemed; that the title by virtue thereof has become divested out of said Gardner and his grantee, and

vested in the purchasers at the sale, or their assignees, and they are entitled to a deed. Denies all fraud, etc.

June 1, 1857. M. and M. Stone answer. Admit the recovery of judgment as charged in bill, being for note, interest, and ten per cent. damages for delay; that the defendant was called upon in person by the sheriff for payment of the execution, and though able to pay, he took advantage of the law's delay, and turned out to the sheriff the said land for him to levy upon and sell; that he knew the time and place of sale and allowed his land to be sold, and that if he has failed to redeem according to law, it is his own laches; that they resided in Milwaukee, within eight hours' ride by railroad from Belvidere, the county seat of Boone county, and such, their residence, well known to the complainant, and no reason exists why he did not come to them and pay the money; that Olney resided in Belvidere, and deny conferring any authority upon him to waive their rights; deny that the lands were ever redeemed according to law; deny that they did any act depriving him of his rights, and if Gardner has lost his title, it is by his own gross *laches* and disposition to take advantage of the law's delay; deny that there was any consideration for Gilbert's judgment, and it was intended to defraud them; deny that Gilbert ever paid any money to redeem the land, other than the money of Gardner; insist that Gilbert's rights are adverse to the complainant, and he should institute proceedings to enforce them and not complainant, and demur to all that part of the bill; insist that the money, if ever paid into the hands of Whitney, was afterwards voluntarily withdrawn by Gardner, and he elected to treat that as a nullity, and to redeem the same under cover of a judgment creditor, and having so elected, he is now stopped from setting up or insisting upon any rights thereunder, and insist upon this as a bar to relief.

It was admitted by the parties that Wilson, the sheriff who made the sale, died the 20th of July, 1856; and letters of administration were granted on his estate the 8th of August, 1856, to Olive A. Wilson and R. A. Blanchard.

After the cause, the case was argued and submitted to the court, and taken under advisement.

The complainant's counsel having verbally notified the defendants' counsel, since the cause was submitted, that he intended to file amendments to the bill, now produced an amendment, and offered to file the same under leave of the court, to which defendants objected; court, after argument, allowed amendment to be filed, which is as follows:

"And your orators further show unto your honor that said

sale of said land, made by the said H. R. Wilson, sheriff, under said execution, was invalid in these particulars, because the said land so sold by him, was, at the time of sale, of the value of sixteen hundred dollars, largely exceeding the amount of the said execution, and was susceptible of division to advantage, but, in fact, was not offered by said sheriff, at said sale, in smaller parcels, nor was any bid asked for or permitted for a less amount than the entire eighty acres, but the whole undivided eighty acres was offered at said sale at first, and bid in by the plaintiffs in execution."

Answer to amendments, filed same day, denies that the sale was invalid for reason alleged, that the land is described in complainant's deed as one entire lot of eighty acres — is used as a farm — was not susceptible of division to advantage, and neither admits nor denies that the lands are worth sixteen hundred dollars, or whether the whole eighty acres were, in the first instance, set up and offered for sale.

General replication to answers to bill and amended bill.

The decree of the court concludes as follows:

" And it further appearing by said bill of complaint, that said complainants are ready and willing, and therein and thereby tender to the said Matthias and Marvin Stone, such sum of money as may be due upon said sale, and the certificate thereof, on file in the recorder's office of said county, when and where this court may order and direct. It is therefore considered, adjudged and decreed, that the said complainants do, on or before the 14th day of October next ensuing, tender to the said Matthias and Marvin Stone, or their agent, Daniel T. Olney, or solicitor, Lewis W. Pray, the full sum of one hundred and twenty-two dollars nineteen cents, with interest thereon at ten per cent. per annum, from the 26th day of January, 1856, until the day of the date of such tender. And in case the said Matthias and Marvin Stone shall accept said sum so tendered, then that they, said Matthias and Marvin Stone, shall release, and discharge, and acknowledge payment, of the sum expressed in said sheriff's certificate, now on file and recorded in book number two of sheriff's certificates, page 174, in the recorder's office of Boone county, and the said sheriff's certificates, and all rights thereunder, shall be deemed null and void. And in case the said Matthias and Marvin Stone shall refuse to accept said sum of money, so tendered within said time, that then and in that case, the sale so as aforesaid made by said Hanson R. Wilson, on said 26th day of January, A. D. 1856, and all claims and rights thereunder, be set aside and held for naught. And that Fayette B. Hamblin, master of this court, be, and is hereby,

directed to indorse upon said record of the certificate of said sale in said book number two, page 174: 'This sale and certificate set aside and canceled by decree of the County Court of Boone county.' And that the same order as to said sale be entered by the clerk of this court upon his judgment docket. And that said complainants, before such entry by said master and clerk, be made, and before the first day of March next, pay in to the clerk of this court, for the use of said Matthias and Marvin Stone, or their assigns, the said sum of money so tendered as aforesaid, to be paid out to them when the same shall be demanded. And it is further ordered that the complainants pay the costs of this suit."

The decree in this case was ordered by FULLER, Judge of the County Court of Boone county.

L. W. PRAY, and W. T. BURGESS, for Plaintiffs in Error.

S. A. HURLBUT, for Defendants in Error.

BREESE, J. This case presents a series of blunders, of which the defendant here, Gardner, must be the victim.

The sacrifice of a large estate for a small sum of money, is always to be regretted; but justice requires that a party shall suffer for his own *laches* when without excuse.

Had the defendant here, Gardner, applied at the proper time, at the earliest practicable moment, to the court whence the execution issued, to set aside the sale on the ground that the whole tract was sold when it was susceptible of a just division,—if the fact was so,—and made proper proof of the fact, the court might have set it aside, and directed a new execution to issue. But he did not do so; he made no effort at relief in this direction, and turned out the whole tract himself to the sheriff, to sell.

Again, he knew of the sale by the sheriff, and of the amount necessary to redeem, and the day on which his right to redeem expired. Yet he does nothing but fold his arms in unconcern, and suffers the day to elapse, and not until January 26th, 1857, some three weeks or more after the time had expired, does he consider it necessary to move in the matter.

On that day, he deposits with the clerk of the Circuit Court an amount large enough to redeem the land; but the day of grace had passed, and the clerk had, at no time, any right to receive the money; so he can take nothing by that motion.

This money being refused by the purchasers, or their agent, Olney, on the 24th of February following, Gardner received it back, he having, on the 21st of February, confessed a judgment

in favor of one Gilbert, for $404.66, to make him a judgment creditor, so that he might redeem. On the 24th April, Gilbert paid to the then sheriff, Tisdell, (the sheriff Wilson, who made the sale, having died,) the amount of the judgment, interest and costs for which the land was sold, and on the 5th of May following, received it back again. On paying this amount to the sheriff, to redeem, he did not, as the statute requires, deliver at the same time to the sheriff an execution on his judgment (R. L. 1845, chap. 57, sec. 14), and of course gained nothing by that proceeding. On that day, Gardner filed his bill of complaint and obtained a decree in his favor, to the effect that, on paying the purchase money, with ten per cent. and costs, the purchasers should re-convey to him.

We are at a loss to find a single hook on which to hang this case. We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute; it has been always disclaimed, and the real or supposed hardship of no case can justify a court in so doing. When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it. Fonblanque Eq., book 1, chap. 1, sec. 3.

If the sheriff who sold the land was dead, what did it matter to the judgment debtor? He knew, or should have known, he could pay the money to his administrator, or, as has been held in the case of *Mc Clusky* v. *Mc Neely*, 3 Gilm. R. 579, to his deputy, and certainly to the purchaser. R. L. 1845, chap. 57, sec. 13. He did not choose to do either, but was content to deposit the amount, in currency, with the clerk, whose right to receive it was no better than that of the town constable. This right to redeem is a statutory privilege, and its behests must be obeyed.

From beginning to end, the complainant seems to have been doomed to blunders, until, from their repetition, he has lost a valuable property.

Whilst our law allowing redemptions remains as it is, it may be expected that frequent cases of this kind may occur, the party, by reason of the smallness of the amount of the judgment, not being impelled to any great activity. In a country where money is worth vastly more than the rate allowed a purchaser on redemption, it is not at all probable that any person other than the judgment creditor will be a bidder at such sales, and he only as the last chance to get security for his debt. Were there no redemption, and these sales open to fair and free competition, not below a certain valuation, it is quite probable such cases of

great hardship would rarely occur, and men's property would be sold for its real value, or nearly so.

On full consideration of all the allegations and proofs in this cause, we are of opinion that the bill contains no equity upon which to base the relief decreed, and that the decree is unwarranted by the facts, and unsupported on correct equitable principles. The decree is therefore reversed and the bill dismissed.

Decree reversed.

Henry Scott, Plaintiff in Error, *v.* William Whitlow, Defendant in Error.

ERROR TO PEORIA.

A sold a lot of railroad ties to B, who again sold them to C, who confused them with other ties laid upon a road bed. A notified C that the ties belonged to him, and C thereupon refused to pay B for them. B then sued C, and obtained a judgment against him for the value of the ties. A then filed his bill, alleging fraud, etc., in B, and obtained a perpetual injunction against C, restraining him from paying the judgment in favor of B, and commanding the sheriff to collect it for the benefit of A: *Held*, That C should have made this defense at law in the action brought by B, and that it was not a proper exercise of chancery powers to interfere with the collection of a judgment, fairly obtained as between the parties to it.

A court of equity is not always bound to act, even where it has authority.

The defendant below, on the 6th day of April, 1857, filed his bill for injunction in the clerk's office of the Circuit Court of Peoria county, alleging that, about the month of August, 1856, he was the owner of about five thousand railroad ties, which were lying on the bank of the Illinois river, in Schuyler county; that he had previously purchased the same of the rightful owners, and same had been delivered to him at the place aforesaid.

That three writs of attachment were sued out from before a justice of the peace, of Schuyler county, against one William Pound, and levied upon said ties, upon which attachments some of the ties were subsequently sold, to satisfy the judgments obtained in the attachment suits; that the ties were purchased by William Gregory, one of the plaintiffs in one of the attachment suits; that said Gregory soon after sold the ties to plaintiff, who took the ties to Peoria, and sold them to William H. Cruger, Charles A. Secor and James Hurry; that Cruger, Secor & Hurry put them with other ties, and they could not then be identified; that defendant notified Cruger, Secor & Hurry not

to pay plaintiff for the ties; that plaintiff brought suit against Cruger, Secor & Hurry, and recovered judgment for $385.50 and costs, in the County Court of Peoria county, and that execution was issued upon this judgment against Cruger, Secor & Hurry, to make the amount of the judgment.

The bill alleges that the judgments before the justice of the peace were void for want of sufficient affidavit bond and writ; that Gregory knew, at the time of the sale, that the ties were defendant's, and that Scott knew, at the time he purchased the same of Gregory, that the ties were defendant's; that Scott has left the State of Illinois, and that complainant does not know of any property belonging to plaintiff to make the amount of the value of the ties. The bill also charges that the plaintiff was guilty of fraud in purchasing and selling the ties, and that the constable who made the sale is irresponsible.

The bill prays for injunction against plaintiff, to prevent his collecting his judgment, and also against Cruger, Secor & Hurry, to prevent their paying the judgment, and against the sheriff of Peoria county, enjoining him from collecting the judgment.

An injunction was granted, as prayed for in the bill, and the cause was heard before POWELL, Judge.

The plaintiff demurred to the bill, and the cause was heard in vacation, and a decree rendered, perpetually enjoining the plaintiff from collecting the judgment, and decreeing that the sheriff proceed to collect the same from Cruger, Secor & Hurry, and pay over the same to the defendant Whitlow, and that thereupon the said Cruger, Secor & Hurry be discharged from said judgment.

WEAD & WILLIAMSON, for Plaintiff in Error.

H. B. HOPKINS, for Defendant in Error.

CATON, C. J. The railroad ties in controversy were seized by virtue of certain writs of attachment against Pound, and as his property, were sold to Gregory, one of the plaintiffs in attachment, who sold them to Scott, and he transported them to Peoria, and sold them to Cruger, Secor & Co., who mixed them with other ties, and laid them on their road. Whitlow notified Cruger, Secor & Co. that the ties belonged to him, and they thereupon refused to pay Scott for them. Scott then sued them for the price of the ties, and obtained a judgment against them. Then Whitlow filed his bill, alleging these facts, and that the ties were all this time his, and that Scott well knew this when he bought them of Gregory; that the whole proceed-

ing was fraudulent from beginning to end, and that Scott is irresponsible, and prays an injunction, etc. On the final hearing, the court perpetually enjoined Scott from collecting his judgment, but directed the sheriff to collect it, and pay the money over to the complainant.

We think this was carrying the principles of equitable relief quite too far. Whitlow has really nothing to do with that judgment of Scott against Cruger, Secor & Co. He discharged his duty when he notified them that the ties were his, and not Scott's, and put them in a position to defend themselves against Scott's action for the price of the ties. That they either neglected to do, or got beaten in the controversy, if they attempted it. As between the parties to that action, the question is forever settled that the sale was *bona fide* and conferred a good title. That is now *res adjudicata*. The amount of that judgment certainly belongs to Scott, both in law and equity, if the defendants then knew of the defense, and failed to make it, or attempted to make it, and were beaten. Whatever defense there was to that action, was strictly of a legal character, and then was the time to insist upon it. It does not concern Whitlow whether or not Cruger, Secor & Co. pay this judgment to Scott. The payment of the judgment to Scott would, in no degree, impair their liability to Whitlow, if any has existed. This is manifestly a bill got up for the benefit of Cruger, Secor & Co., to give them the benefit of another trial upon the questions which were and should have been tried in that action. The bill abounds in allegations of fraud, but, after all, there is no allegation that the judgment was obtained by fraud. While fraud is one of the broadest grounds of equity jurisdiction, it by no means follows that it will take cognizance of and inquire into every allegation of fraud. We have before remarked, in another case, that a court of equity is not always bound to act where it has authority to act; that although its decrees might not be void for want of jurisdiction, yet it is not always bound to exercise its jurisdiction when its aid is invoked. In this case, although the court had power to make the decree it did, we do not think it a proper exercise of its chancery powers to interfere with the collection of a judgment, fairly obtained as between the parties to it.

The decree must be reversed and the bill dismissed.

Decree reversed.

Thomas D. Robertson *et al.*, Appellants, *v.* William P. Dennis, Appellee.

APPEAL FROM WINNEBAGO.

A party may redeem from sheriffs' sale any one of a number of lots, sold at one time and separately, to the same purchaser.

The party redeeming, can, at his option, pay either to the officer who sold the land, or, if he is out of office, to his successor.

The appellants recovered a judgment against the appellee, at September term, 1854, of the Winnebago Circuit Court. In October following, an execution was issued on this judgment, which was returned satisfied, on the fourteenth day of February, 1855, by the sale of two pieces of land.

At February term, 1857, of the court, a motion was made for a rule upon the sheriff, requiring him to convey to T. D. Robertson, one of the plaintiffs, by sheriffs' deed, the two tracts of land sold under the execution. This motion was denied as to one tract, and allowed as to the other. The bill of exceptions shows that defendant appeared by counsel to oppose it as to one tract of land, and did not oppose it as to the other. That the plaintiffs read, in support of the motion, an affidavit of Thomas D. Robertson, one of the plaintiffs, an affidavit of James M. Wight, plaintiffs' attorney, the entry of the judgment in this cause, the execution issued on said judgment, the certificate of levy, and return thereon indorsed, and a certificate of the sheriff, K. H. Milliken, who made the sale to Robertson.

Robertson's affidavit shows that he was one of the plaintiffs, the recovery of the above judgment, the time and amount of such recovery, and the issue of the above described execution. That February 14th, 1855, $400 remained due on said execution, and to make that sum the sheriff of said county levied on the north-west quarter section 27, township 26, in range 10 east of fourth principal meridian; and that part of the north-west fractional quarter of section 26, in township 44, range 1 east of third principal meridian, which lies west of Rock river and north of Kent's creek, all in Winnebago county.

That the tracts were sold by said sheriff separately, on said 14th day of February, 1855, and both bought in by deponent for the joint benefit of all the plaintiffs, the first tract for $150, and the other tract for $250, he being the highest bidder for said lands.

The duplicate certificates of said sale were immediately made out by the sheriff, delivered and filed, pursuant to law.

That the whole amount of the purchase price bid for the two parcels of land, and interest thereon at the rate of ten per cent. per annum, had not been paid to the deponent, the plaintiffs or sheriff of said county within one year from the day of sale.

And that said lands had not been redeemed by any owner or judgment creditor, in pursuance of law; and insists that the lands had not been redeemed by any person authorized to redeem them; and that deponent was entitled to a sheriffs' deed of both parcels.

That the defendant, pretending to be entitled to redeem one tract of the land sold without redeeming the other, on the 14th or 15th day of February, 1856, deposited with John F. Taylor, then sheriff of Winnebago county, the sum of $250, and interest thereon at the rate of ten per cent. per annum, which money was received by sheriff, and was deposited for the purpose of redeeming the tract of land last above described, defendant claiming the right to redeem that parcel without redeeming the other sold at the same time on the same judgment and execution.

That in consequence of such pretended redemption, deponent was unable to obtain a deed from the sheriff of both parcels of land, as he was entitled to, and insists that defendant had no right to redeem one tract without redeeming the other, and that such pretended redemption was of no force or validity, and that deponent was entitled to a sheriffs' deed of both parcels.

That the title of the land first above mentioned (being the land not redeemed,) was doubtful and uncertain, and that the attempt of the defendant to redeem one tract without redeeming the other would subject the plaintiffs to great wrong and injustice, and asks for a rule on the sheriff to convey both parcels.

Wight's affidavit shows that prior to the rendition of judgment in this cause, that the first tract of land above described had been sold and conveyed by defendant to one Hicks, which land is described as the north-west quarter of section 27, township 26, range 10 east fourth principal meridian.

That at the time of said sheriffs' sale, said conveyance to said Hicks had not been recorded, and that defendant at the said time had in fact no title to the said parcel of land.

J. M. Wight, for Appellants.

J. Marsh, for Appellee.

Breese, J. The thirteenth section of the act relative to judgments and executions, R. L. 1845, chap. 57, is remedial in

its character, and must be liberally construed so as to advance the remedy.

It would be a prodigious hard case, that a debtor who could raise money enough to redeem a lot with a humble cabin on it, should not have the privilege of doing so, because, with the cabin lot, there was sold at the same time, to the same purchaser, and included in the same certificate, a lot with a fine mansion upon it.

The true construction of the act will permit a party to redeem any one of a number of lots, sold at one time and separately, to the same purchaser; if not, the law would fail of its manifest object.

The other objection, that the redemption money was paid to the sheriff *in being*, who was not the sheriff who sold the land, is not tenable. The true meaning of the statute is correctly given by this court in the case of *Elkin* v. *The People*, 3 Scam. R. 209. The party redeeming can pay the money to the sheriff, or to the officer who sold the land, even if out of office. He has his choice to pay to either.

This view is fortified by a consideration of the 14th section. When a judgment creditor offers to redeem, he must "sue out an execution upon his judgment, and place it in the hands of the proper officer, to execute it." This officer is the acting sheriff, or if he be dead, his deputy, or the coroner. There can be no other.

It may be that the purchaser under an execution may be left with a tract on hand, to which the debtor had no good title. This would be his misfortune, but it was in his power to look into the title before he purchased. In such cases, the maxim, *caveat emptor*, well applies.

We see no ground for the objections taken, and accordingly affirm the judgment.

Judgment affirmed.

Mary Moody, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO RECORDER'S COURT, CHICAGO.

In an indictment for kidnapping, an affidavit for a continuance should show the particular fact or facts which can be proven by the absent witness, and in what way those facts are material.

In such a case, it is not necessary that physical force be used; it will be sufficient to show that the mind was operated upon, by falsely exciting the fears, by the use of threats, or other undue influence, amounting substantially to a coercion of the will, as a substitute for violence.

In coming to a conclusion in such a case, the jury should take into consideration the condition of the person kidnapped, her age, education and condition of mind, and all the circumstances connected with the transaction, as detailed by the proof.

The judgment for costs is an incident of the judgment. Several defendants, when convicted, are severally liable for all the costs made by the people in the trial of their several causes, but not for such costs as are made to procure the conviction of a co-criminal in the same indictment.

THIS cause was heard before R. S. WILSON, Recorder, and a jury, at November term, 1857, of the Recorder's Court.

The facts of the case are fully stated in the opinion.

EDMUNDS & SKINNER, for Plaintiff in Error.

C. HAVEN, District Attorney, for The People.

WALKER, J. This was an indictment for kidnapping, in the Recorder's Court of Chicago, at the November term, 1857. The indictment contained two counts. The first count charges that Mary Moody, William Bush, Michael Joy and William H. Reed, on the 13th day of October, 1857, at the city of Chicago, etc., "unlawfully, fraudulently and wickedly, without having established a claim, according to the laws of the United States, forcibly did steal, take and arrest one Christiana Davis," etc., "a minor child of one Davis, of said county, city and State," "and her, the said Christiana Davis, did carry, transport and convey out of the State of Illinois into another State, to wit, into the State of Indiana, without the consent of the said Christiana Davis, and against her will, and without the consent of the said Davis, the father of the said Christiana Davis."

The second count alleges that Mary Moody, with the other defendants, on the same day and year, at the same place, "unlawfully, without having established a claim, according to the laws of the United States, forcibly did take and arrest one Christiana Davis, a free white minor child, and her, the said Christiana Davis, forcibly did carry out of the State of Illinois into another country, to wit, the province of Canada, without her consent, and against her will."

The defendant, Moody, filed her affidavit for a continuance, which is as follows:

"Mary Moody, one of the defendants in the above indictment, being duly sworn, doth depose and say that she has a good and substantial defense on the merits of this cause; that —— Soper and —— Soper, his wife, of London, in the District of Canada

West, are material witnesses for this deponent on the trial of this cause, without whose testimony she cannot safely proceed to trial thereof; that she expects to prove by said Soper and wife (said witnesses) that this deponent is not guilty either of kidnapping, or aiding or assisting in the kidnapping, the said Christiana Davis, and by said indictment said to be kidnapped; that said Christiana Davis was aged about fourteen years in December, 1856; and the said Christiana Davis left the city of Chicago, county of Cook, and also the State of Illinois, and went through the State of Indiana and Michigan, to London aforesaid, of her own free will and accord, and that she was not taken or carried out of this State against her will, or without her consent, and that the said voluntary trip of said Christiana Davis is the same charged in said indictment, and supposed to constitute the crime of kidnapping; that she knows of no person by whom she can prove the same facts who are not indicted with her in this case, or the said Christiana Davis, who, on the examination before the committing court, denied the facts; that this indictment was found at this term of this court, since which time she has been unable to obtain the testimony of said witnesses, or their attendance in court; that the given names of said witnesses are unknown to deponent; that she expects to be able to obtain the testimony of said witnesses in this cause at the next term of this court. And this application is not made for delay, but that justice may be done."

The court overruled the motion, and the defendants were tried seven days after the indictment was found, by the court and a jury, which trial resulted in a verdict of guilty. This defendant entered a motion for a new trial, which was overruled by the court, and judgment was rendered on the verdict, to reverse which this defendant prosecutes this writ of error.

The first question which we propose to consider, is, whether the affidavit was sufficient to entitle the defendant to a continuance. When we divest it of its form, and look alone to its substance, we see that the affiant nowhere states a single fact which would tend in the slightest degree to establish her innocence. It only states that, by the absent witnesses, she can prove that she is not guilty, and that the prosecuting witness left the State voluntarily. Whether the witnesses, of their own knowledge, can so state, or, from information, can state material circumstances, is not stated. It is believed that, in our practice, the affidavit has always specifically stated the particular fact or facts which can be proven, and in what way they are material, and that, failing to do so, an affidavit was never held to be sufficient. Anything short of that degree of certainty would leave it to the affiant to determine what constitutes a defense,

and not to the court, as it certainly should. This affidavit was therefore insufficient.

It was likewise urged that the evidence against defendant Moody was insufficient to authorize the finding of the jury. After a careful examination of the evidence in the record, we are satisfied that it does show, beyond a reasonable doubt, that she aided and abetted the other defendants in the abduction, and, by so aiding, she became equally guilty of crime with the others, who were the active parties in its perpetration, and we see no reason for disturbing the verdict on that account.

The correctness of the second and third instructions given for the People is questioned by the assignment of errors; the second of which is, that "to constitute the forcible abduction or stealing of a person within the meaning of the statute, it is not necessary that virtual physical force or violence be used upon the person kidnapped. But it will be sufficient, if, to accomplish the removal, the mind of the person was operated upon by the defendants, by falsely exciting the fears, by threats, fraud or other unlawful or undue influence, amounting substantially to a coercion of the will, so that, if such means had not been resorted to or employed, it would have required force to effect the removal." The statute defines kidnapping to be the forcible abduction or stealing away of a man, woman or child from his or her own country, and sending or taking him or her into another. While the letter of the statute requires the employment of force to complete this crime, it will undoubtedly be admitted by all that physical force and violence is not necessary to its completion. Such a literal construction would render this statutory provision entirely useless. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence. If the crime may be committed without actual violence, by menaces, it would seem that any threats, fraud, or appeal to the fears of the individual, which subjects the will of the person abducted, and places such person as fully under the control of the other, as if actual force were employed, would make the offense as complete as by the use of force and violence. And this is what this instruction asserts, and nothing more. We are fortified in this construction by the construction which has been given to the British statute defining the crime of rape. That statute requires, to make the crime complete, that the act shall be forcible, and against the will of the woman violated; and yet it has been held that when the woman was stupefied to insensibility by the use of drugs, and the act then committed, that it was a rape. *Rex* v. *Camplin*, 1 Car. & K. 746. Or when the offense was committed where the woman yielded her consent by fear of

death or duress. 1 Hawk. P. C., cap. 41. Or where a physician, by falsely pretending that the act done was necessary in a case of medical treatment. 1 Bishop's Crim. Law, 344; Wheat. Crim. Law, 442. We are not able to perceive any reason for distinguishing in the construction of these two statutes.

The third instruction on the part of the People was, that "in determining the guilt or innocence of the defendants in this indictment, the jury should take into consideration the condition of the girl, Christiana Davis—her age, education, and state of mind at the time, the representations and conduct of the several defendants towards her, the effect of those representations and that conduct upon her, the object of the defendants in effecting her removal from the State, and all the circumstances surrounding the case, as detailed in evidence." This instruction called the attention of the jury, very properly, we think, to the age and condition of the prosecuting witness, her intelligence, the representations of defendants to her, and their conduct and object in her removal, and left them, from these and all the other circumstances in the case, to determine the guilt or innocence of the defendants. We are unable to perceive any error in this instruction.

The only remaining question which we propose to consider, is, whether the court erred in rendering the judgment which it did, for the costs of the suit, against this defendant. In an indictment against two or more, it is generally true that the charge is several as well as joint; so that if one is found guilty, judgment may be rendered against him, although one or more may be acquitted. And where several persons are jointly indicted and convicted, they should be sentenced severally, and the imposition of a joint fine, is erroneous. *The State* v. *Gay*, 10 Miss. R. 440. It would therefore seem to follow, that as the judgment for costs is an incident following the judgment in the cause, it would be erroneous to render a joint judgment against all the defendants indicted, unless the trial resulted in a conviction that was joint. The defendants, when convicted, are severally liable for all the costs made by the People in procuring their several convictions; but not for the costs of each other, or for separate costs made by the People against their co-defendants. The judgment for costs, in this case, was against the defendant for all the costs of this proceeding. A proper construction of this judgment only authorizes the clerk, we think, to tax the People's costs made in her conviction, and not any separate costs made by the People in procuring the conviction of her co-defendants. The case is entitled, *The People* v. *Mary Moody*, *impleaded*, *etc.*, which

seems to indicate that the judgment was intended to be several and against her for only the costs for which she was legally liable, and we are of the opinion that such is the proper construction of the order. After having carefully examined this record, we do not feel disposed to disturb the judgment of the court below, and are of opinion that it should be affirmed.

Judgment affirmed.

Breese, J. I do not concur in this opinion. The continuance should have been allowed on the affidavit, for it states, substantially, that the defendant could prove by the non-resident witnesses, that the girl went voluntarily to Canada. If such was the fact, and we are to take the affidavit as true, the jury could not have convicted. The trial took place immediately on finding the indictment, and the defendant should have had a reasonable time within which to prepare her defense. Speedy justice is desirable, but not such speed as deprives a party of all chance to make a defense.

Nor does there appear to me sufficient evidence to connect her with the real culprits by any overt act, or by advising the crime.

Stephen F. Gale, Appellant, *v.* Philip Dean, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Where a party agreed, without any time being specified, to procure a deed to a piece of land from another person, and failed to perform, the measure of damages will be the value of the land at the time the person for whom the title was to be obtained, was notified that it could not be procured.

Where interviews were had by a third person, with the contracting parties, in relation to procuring said deed, the statements made to such third party and by him communicated to those in interest, may be considered as having been made directly to them.

On the 7th day of August, 1857, the appellee commenced an action of assumpsit against the appellant, in the Cook County Court of Common Pleas. The declaration contained two counts. The first count set forth in *hæc verba*, the following contract, to wit:

Chicago, May 17, 1851.

Received of Philip Dean, the sum of seven hundred and fifty dollars, as follows: James H. Rees' judgment note, payable in thirty days from May 12, 1851, to the order of said Dean, and indorsed by him for six hundred dollars, and in cash one hundred and fifty dollars, being in full for sale of tax certificate on sub-lot 9, of lots 2, 3 and 4, of block 84, in school section addition to Chicago, the undersigned

agreeing to obtain a deed by quit-claim or otherwise, for one-half of said sub-lot 9, of H. L. Tuller, or such other party as may have the title to the half part of said lot, formerly conveyed to the said H. L. Tuller. STEPHEN F. GALE.

And alleged a demand on the 10th day of April, 1857, upon the appellant for the deed mentioned in the contract, a readiness on the part of the appellee to receive the same, and a neglect on the part of the appellant to make or obtain such deed.

The second count sets out the above contract according to its legal effect, averring that the appellant was thereby bound to procure such deed within a reasonable time, which he had neglected to do. To this declaration the plea of the general issue was interposed and a trial was had by jury, before J. M. WILSON, Judge.

On the trial it appeared in evidence that the contract set forth in the declaration, and another agreement between the parties of the same date, were executed at the same time, both of which were offered in evidence. The latter agreement was as follows:

MEMORANDUM OF AGREEMENT, entered into this seventeenth day of May, A. D. 1851, between Stephen F. Gale, party of the first part, and Philip Dean, party of the second part, both of the city of Chicago, and State of Illinois. Whereas, the party of the first part, did, on the 1st day of May, A. D. 1840, purchase at the city tax sale, sub-lot nine, of lots 2, 3 and 4, in block 84, in the school addition to Chicago, and whereas, from an examination of the records, and from other information obtained, the fee title appears to be held by H. L. Tuller and Amos C. Hamilton. And whereas, the party of the first part, has this day sold to the party of the second part, his tax certificate on said lot 9, upon the following conditions, viz.: that the said Amos C. Hamilton or his heirs may have the privilege of redeeming, or receiving an assignment from the said Dean, or by quit-claim deed, one-half part of said sub-lot 9, upon condition that the said Amos C. Hamilton, or his heirs, pay unto the said Dean, one hundred dollars within six months from this date. STEPHEN GALE.
PHILIP DEAN.

The appellee moved to strike out the evidence, on the ground of a variance between the declaration and the proof offered in support of it, which motion was overruled.

It not only appeared in evidence, but was admitted, that the appellant, in making the contract, acted in good faith, and did not act in bad faith in his failure to perform the same, but that the failure to perform the contract on his part arose from his inability to procure the title.

It appeared in evidence that the appellee demanded a performance of the contract in the winter or spring of 1857, and that the appellant had never performed the same.

The appellant introduced in evidence a letter from Tuller to

him, dated May 15, 1851, in which Tuller says he is in hopes soon to have the title papers of the half lot, and that as soon as he got them he would bring or send them to Chicago, and would then settle the matter to the appellant's satisfaction.

It also appeared in evidence that the value of one-half of said sub-lot 9, was, in May, 1851, $650; in the fall of 1851, $800 to $900; in January or February, 1852, $1,000; and in the fall of 1856, and winter and spring of 1857, $7,500. That the property was improved in May, 1851, at which time the appellee entered into possession, and that he had remained in possession ever since. That said sub-lot was conveyed by tax deed to appellee in 1851, that the tax title at the time of the sale was considered worth about $200.

It further appeared in evidence that James H. Rees was present when the contract was made, and having a desire to see it carried out, frequently saw the appellant after that time about procuring a deed from Tuller. That the appellee knew that Rees frequently talked with appellant about getting such deed, and that Rees was accustomed to tell the appellee what the appellant said at these interviews, although Rees had no particular authority to act for the appellee, and could not say that he acted at his instance. At one of these interviews, shortly after the contract was made, and within six months from that time, the appellant told Rees that he could not procure the deed from Tuller; that Tuller refused to give a deed; which conversation Rees shortly after communicated to the appellee.

The appellant asked the court to instruct the jury that the measure of damages should, under the circumstances, be the consideration money and interest.

Or, if the court was of opinion that such was not the true rule of damages, then that the contract was to be performed within a reasonable time from making it, and the measure of damages should be the value of the premises after the lapse of such reasonable time, and interest thereon.

Or if the court was of opinion that neither of these rules were correct, then that the measure of damages should be the value of the premises when the appellee had notice that the appellant could not perform his contract, with interest thereon. But the court refused to instruct the jury as requested, and instructed them that the measure of damages should be the value of the property when the demand was made in 1857. The jury found a verdict for the appellee for $7,500.

Hoyne, Miller & Lewis, and Beckwith & Merrick, for Appellant.

Scates, McAllister & Jewett, for Appellee.

CATON, C. J. The court properly decided that there was no variance between the contract declared on and the one offered in evidence.

The measure of damages, in this case, was not the value of the land when the contract was made, but its value at the time of the breach of that contract. Here no time was specified when the title from Tuller should be obtained. That portion of the contract on which the breach is assigned, is in these words: "the undersigned agreeing to obtain a deed by quit-claim, or otherwise, for one-half of said sub-lot 9, of H. L. Tuller, or such other party as may have the title to the half part of said lot formerly conveyed to said H. L. Tuller." The party did not claim to have the title himself, nor was he to make the conveyance. He agreed to procure the title from another, and without any specification of time within which it should be done. This gave to Gale a reasonable time within which to procure the conveyance. On the one side it was insisted, that the contract was broken after the expiration of a reasonable time, though both parties remained passive; while on the part of Dean it was insisted, that there could be no breach until he had requested Gale to perform and he had thereupon failed or refused to do so. We think neither of these positions is correct. We do not think that Gale, when he found he could not perform, was absolutely at the mercy of Dean, for the determination of the time when his liability should be fixed, and the measure of that liability determined. We think, after the expiration of a reasonable time, and after making all reasonable efforts to procure the conveyance from Tuller, without avail, that it was the right of Gale to notify Dean that he could not perform the contract, and thus, by his own affirmative act, create a breach and determine the time when the value of the land should be estimated, to establish the measure of damages which he was bound to pay, for the breach of the agreement. Until such notice was given, Dean had a right to believe that the contract would be performed, and to make improvements and enjoy the premises, in view of that supposition; but when he was notified that Gale could not perform the contract, by procuring the title, he was no longer at liberty to act as if it was to be performed, and if he made further improvements, or did other acts, on the assumption that it would be performed, he did them in his own wrong, and could not use them to enhance his damages. This is in accordance with those principles of reason and justice which characterize the common law. We should never so construe a contract as to give one party an unfair or an unreasonable advantage over another, unless such was the manifest intention of the parties at the time it was made. We cannot presume here that it was the intention

of either party, at the time the contract was made, in case Gale should be unable to procure the conveyance from Tuller, that it should be left entirely to Dean's discretion to postpone the time at which the value of the property should be taken for the purpose of fixing the measure of his damages, and that Gale should be obliged to stand by, dumb and powerless to act, and see the property rising in value, till it had arisen, as in this case, more than one thousand per cent., and then be obliged to respond in damages to the full enhanced value of the property. When the contract was made, both parties knew that it was uncertain whether it would be possible for Gale to perform or not, and it is not reasonable to suppose that Gale thought he was receiving, or that Dean believed he was paying, a consideration adequate to such a contingent liability, in case it should be impossible for Gale to perform. It is one of the cherished objects of the law to maintain a reciprocity between the parties to contracts, wherever that can be done without doing violence to the language used. It is just as unreasonable, and there is just as great a want of reciprocity, in allowing Dean to hold on indefinitely, before fixing the time for declaring the breach, in case he saw the property appreciating in value, as there would be in allowing Gale to do the same thing in case he saw the value of the property depreciating. A just sense of reciprocity must require that either of the parties, after the lapse of a reasonable time, might declare a breach of the contract, if not performed; the one party by demanding performance and declaring it broken if it is not performed, and the other party by giving notice that he could not perform.

There was evidence tending to show such a determination and breach of the agreement by Gale, after the lapse of a reasonable time to perform, if that had been possible; and it was admitted on the trial that Gale had acted in good faith throughout, and it should have been left to the jury to say whether there had been such determination and breach by Gale. With a view to this, his counsel asked the court to instruct the jury as follows: "If the jury shall believe, from the evidence, that the witness, James H. Rees, had interviews with the defendant, at the instance of the plaintiff, in relation to the procuring of the quit-claim deed referred to in the contract given in evidence, then the statements made by the defendant to said Rees, at these interviews, and by him communicated to the plaintiff, are to be considered by the jury as having been made by the defendant to the plaintiff; and if the jury shall believe that the defendant did not act in bad faith, either in making the contract or in failing to perform the same, and that the plaintiff, in the manner above stated, was informed of defendant's inability to procure said quit-claim deed, then the measure of damages in this case will not exceed the

value of the premises to be conveyed by said deed, at the time when such communication was made to the defendant, with interest thereon at six per cent. per annum, to the present time." This instruction the court refused to give, but, on the contrary, instructed that the measure of damages was the value of the land at the time Dean demanded the performance and Gale's non-compliance with such demand; to which rulings exceptions were taken. In this we think the court erred. The judgment must be reversed and the cause remanded.

Judgment reversed.

James W. Sheahan *et al.*, Appellants, *v.* John Collins, Appellee.

APPEAL FROM COOK.

In an action for libel, the defendants being publishers of a newspaper, cannot show that a similar publication to that complained of had shortly previous appeared in another newspaper.

The general character of the plaintiff may be shown, but witnesses should not be permitted to give in detail all the reports in circulation to his prejudice.

The plea of the general issue, admits that the plaintiff was innocent of the charges against him, of which he complains.

A defendant in such a case may show, in mitigation of damages, the general bad character of the plaintiff, and may show any fact which tends to disprove malice.

The truth of the libel can only be shown under a plea of justification.

This was an action of libel, commenced by defendant against the plaintiffs in error, in the Cook County Circuit, was tried at the November term thereof, 1857, before Manierre, Judge of said court, presiding, and a jury.

The libel complained of, was an article published in the Chicago Daily Times newspaper, of Dec. 24th, 1856, and is as follows, to wit:

A Robber at Large.—The hack driver, John Collins, who, as we stated the other day, was arrested for robbing a countryman named Blanchard, instead of being held for trial was set at liberty, and is again ready to entrap and rob the first stranger who is green enough for his purposes.

This scoundrel is one of the most adroit thieves and robbers in Chicago. He has been frequently arrested for crimes, of the commission of which there is no more doubt that he was guilty, than there is that they were committed; yet in every instance he has managed to escape justice, generally through the agency of false swearing. Not long ago, when Collins was brought up for stealing a large number of trunks, although no one entertained a doubt of his guilt, he was set at

liberty, in consequence of the testimony of a number of witnesses (hackmen) who swore positively in his favor. Afterwards the same witnesses had the boldness to admit publicly that they received $50 each for swearing Collins clear. Why they were not indicted for perjury is more than we can account for.

We do not doubt that the same instrumentality was made use of by Collins in the present case. He was discharged upon the testimony of hackmen, (whose names we have not at hand,) who perjured themselves for his benefit. However astonishing it may appear, this is no uncommon practice among hackmen. With rare exceptions they are leagued together for purposes of rascality, and scruple not to resort to any means to screen each other from detection and punishment. The best advice we can give to strangers, is, have nothing to do with them.

We are not apprised whether Collins still retains his hackman's license.

The defendants below plead the general issue.

Upon the trial of the case below, it was admitted that the plaintiffs in error, Sheahan and Cameron, were the publishers and proprietors of the paper in question, and that all of the defendants were connected with the publication of the alleged libel.

Upon the trial, one *Martin White* being called as a witness for plaintiff below, testified: "I saw the article in the Times in regard to Collins; called his attention to it on a Sunday, in the Rock Island House. He asked me to go with him to the Times office to see the editors about it. I went there with Collins; saw Mr. Cameron; no other person was there. Collins asked Cameron if that was his paper, to which the reply was, yes. He then showed *the article* and asked him to *retract it*, as it was wrong and injurious to him, his business and his family. Mr. Cameron said that Mr. Matteson wrote the article, and if it was wrong, he would have Mr. Matteson correct it," etc.

Upon the examination of *William M. Douglass* a witness for the defense, the following questions were put to said witness:

Ques. Were there any reports current prior to December 24th, 1856, in regard to his being generally suspected of theft and robbery?

Ans. There were.

Ques. What were those reports?

Objected to by counsel for plaintiff, and the court sustained the objection. To which decision of the court, counsel for the defense excepted.

The same question, with the same objection and ruling of the court, occur in relation to the testimony of Joseph Kellogg, and other witnesses.

Upon the examination of *C. P. Bradley*, a witness for the defense, the question was asked of him: Do you know of any reports current in the neighborhood of defendants' residence in

regard to plaintiff having got himself discharged from the accusation to which you have referred, by the subornation of witnesses?

Objection raised by plaintiff's counsel. Court sustained the objection, to which decision of the court the defendants objected.

Defendants below, after the introduction of a large number of witnesses, showing the bad character of the plaintiff in mitigation of damages, further offered in evidence an article published in another newspaper printed in Chicago, on the day before the publication of the libel in this suit, that is to say, an article published in the Chicago Journal, on the 23rd December, 1856, containing substantially the same facts and charges as published in said libel of the Times, and further offered to show in connection with said article, that the said charges had become matter of general suspicion and public rumor against the plaintiff, this testimony being offered in mitigation of damages, and not to establish the truth of the charges contained in the libel.

Plaintiff's counsel objecting, the court ruled out the testimony, to which ruling of the court the defendants excepted.

The court gave to the jury the following instructions for the plaintiff below, to the giving of which the defendants excepted:

1. If the jury believe, from the evidence, that the defendants published the libel as charged in the declaration, then the plaintiff is entitled to recover.

2. The evidence offered by the defendants in regard to plaintiff's general character, is evidence not in justification of the alleged libel, but excuse or extenuation, and for the purpose of diminishing the amount that the plaintiff is entitled to recover. If the plaintiff has proved the publication of the libel as alleged, then he is entitled to a verdict, and the amount of that verdict is to be determined by all the evidence in the case.

3. In this case, the defendants, by their plea of not guilty, admit that the *plaintiff is not guilty of the charge alleged* in the libel, as charged in the declaration; all the evidence admitted to the plaintiff's general character, and the existence of general reports and rumors, was received, not for the purpose of showing the plaintiff's guilt, *his innocence being admitted*, but this evidence was received in excuse and in diminution of the amount of damages, and for no other purpose.

4. If the jury believe, from the evidence, that the libel was published, as charged, then the plaintiff is entitled to recover. The amount of the recovery is to be determined by all the evidence and circumstances proved in the case; and in determining such amount, the jury will consider the character of the charge, the general reputation of the plaintiff at the time of the publi-

cation complained of, whether the defendants *had an opportunity to retract the charge*, whether maliciously made and persisted in, and whether made as public journalists, and for laudable purposes, and without malice, and also the plaintiff's general character, and all the facts proved in the case having a reference to this subject.

The jury returned a verdict for plaintiff of $358.

The errors assigned upon the record are —

The refusal of the court to grant a new trial.

The refusal of the court to permit the testimony of Bradley and other witnesses, as to the character of the reports in general circulation affecting the plaintiff's character, in mitigation of damages.

The refusal of the court to permit the defense to show other newspaper publications to the same purport as the libel, in mitigation of damages.

The instructions of the court that by the plea of the general issue we *admitted the innocence of the plaintiff, and that he was not guilty of the charge contained in the article*, when the only issue raised upon the pleadings was our own innocence or guilt in the publication charged against us.

The court erred in assuming the fact by the 4th instruction of said plaintiff, that an *opportunity to retract* the charge contained in the libel had been offered defense by a demand to do so, when the fact as shown, was, that the demand to retract had been made of another and different article than the one proven as the libel before the jury.

Thos. Hoyne, and J. Lyle King, for Appellants.

C. S. Cameron, for Appellee.

Walker, J. It was insisted that the court below erred in refusing to permit defendants below, to show in evidence, that a similar publication to the one made by them had appeared in another newspaper in the city shortly before that published by them. It seems to be the doctrine that a defendant in an action for slander or libel may mitigate damages in two ways. First, by showing the general bad character of the plaintiff, and second, by proving any facts which tend to disprove malice, but which do not tend to prove the truth of the charge. *Reginer* v. *Cabot*, 2 Gilm. R. 140. Its truth can only be shown under a plea of justification, and hence any evidence tending to show its truth, would be in violation of the rule. Anything which tends to show that the plaintiff sustains a general bad character, is

proper evidence in mitigation, because there can be less injury inflicted on the man who has a general bad character, than on one whose general character is good. But it is a general rule, that the character of either a witness or party cannot be impeached by special acts, for no man is supposed at all times to be prepared with the proof to meet every individual act, but is presumed at all times to be prepared to support his general character. Witnesses under the rule can only testify to the general reputation amongst the party's associates, and not of particular acts, and what particular individuals may have charged. The republication of a libellous article from another paper is substantially the same thing as repeating what an individual may have said of the defendant. It seems, therefore, to follow, that it could not be admitted to show his general bad character. Evidence that the plaintiff was suspected by his neighbors of the act charged, is not admissible in mitigation of damages, under the general issue. *Young* v. *Burnett*, 4 Scam. R. 43. And if it were offered as tending to establish the truth of the charge, it was under the rule, equally inadmissible. If admitted, its effect would tend to produce that impression on the minds of the jury, and would be to permit the defendant to do that indirectly which he has no right to do directly.

It was urged that the court erred in not permitting the witness to testify in detail, what people generally said in regard to plaintiff being guilty of theft. The witness had already testified, that prior to the publication of this article, there were reports in circulation that plaintiff below was generally suspected of theft and robbery. And we are at a loss to perceive upon what grounds the defendants had a right to have these reports detailed to the jury. It would lead to endless investigation and collateral issues as to what these reports were, who circulated them, and would tend to consume time, increase expense and produce confusion, by burthening the case with immaterial circumstances, where no beneficial result would be attained. Where it was proven to the jury that the plaintiff was generally suspected of being a thief, the evidence was as complete as it could be by giving the particulars of what each person said who circulated the rumor. What they said would not tend to give it additional weight. And both in reason and from practice it was not properly admissible.

It was urged that the court erred by instructing the jury that when defendants plead the general issue they admitted the plaintiff was innocent of the charge. While this is not the language of the plea, it is undoubtedly the effect of such a plea. *Reginer* v. *Cabot*, 2 Gilm. R. 39. That plea denies the act charged in the declaration only, and the truth or falsehood of

the charge cannot be inquired into under that issue. Its falsehood stands admitted by the parties; and the instruction as given could not have misled the jury, and was not erroneous.

Upon the whole record no error is perceived for which the judgment should be reversed, and it must therefore be affirmed.

Judgment affirmed.

William H. W. Cushman, Plaintiff in Error, *v.* John Savage, Defendant in Error.

ERROR TO LA SALLE.

After a demurrer to a plea in abatement is overruled, it is not regular to grant leave to reply; the proper judgment on such a plea is, that the writ be quashed.

All that is necessary to an understanding of this case will be found stated in the opinion of the court.

A. W. Cavarly, for Plaintiff in Error.

T. L. Dickey, for Defendant in Error.

Breese, J. In this case there was a plea in abatement of the jurisdiction of the court, the plaintiff residing in La Salle, and the defendant in the county of Cass. To the plea the plaintiff demurred, and it was overruled, and the court granted plaintiff leave to reply.

This was erroneous. After a demurrer to a plea in abatement has been overruled, it is not regular for the court to grant leave to reply; for a judgment for the defendant, on such a plea, whether it be on an issue of fact or of law, is, that the writ be quashed. Tidd's Practice, 642; 1 Ch. Pl. 501; *Motherell* v. *Beavers*, 2 Gilm. R. 69; *McKinney* v. *Pennoyer et al.*, 1 Scam. R. 319; *Eddy et al.* v. *Brady*, 16 Ill. R. 396.

The case will be remanded to the Circuit Court of La Salle, with instructions to abate the writ.

Judgment reversed.

J. M. Hildreth, Plaintiff in Error, *v.* Rosell M. Hough *et al.*, Defendants in Error.

ERROR TO COOK.

A summons issued in October, returnable on the first day of the next term, which is on the fourth Monday of October next, is a nullity; the word "next" refers to the month, and not to Monday; and there being more than one term intervening between the issuing of the writ and the return day, makes it void.

This case is stated at length in the opinion of Mr. Justice Breese.

Scammon & Fuller, for Plaintiff in Error.

C. B. Hosmer, for Defendants in Error.

Breese, J. This action was commenced by issuing a summons against the defendant, October 11th, 1855, returnable to the fourth Monday of October thereafter, which summons is as follows:

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

The People of the State of Illinois to Sheriff of said County, Greeting:

We command you that you summon J. M. Hildreth, if he shall be found in your county, personally to be and appear before the Circuit Court of Cook county, on the first day of the next term thereof, to be holden at the court-house, in the city of Chicago, in said county, on the fourth Monday of October next, to answer unto Rosell M. Hough, Oramel S. Hough and Charles H. Seaverns, in a plea of trespass on the case, upon promises, to the damage of the plaintiff, as is said, in the sum of five hundred dollars. And have you then and there this writ, with an indorsement thereon, in what manner you shall have executed the same.

Witness, Louis D. Hoard, clerk of our said court, and the seal thereof, [seal.] at the city of Chicago aforesaid, this eleventh day of October, A. D. 1855. L. D. HOARD, *Clerk.*

And afterwards, on the 3d day of November, A. D. 1855, the plaintiffs filed their declaration in assumpsit for cattle sold and delivered, and common counts. Damages, $500.

And upon the 21st day of November, A. D. 1855, no plea having been filed, the default of the said defendant was then and there entered, and an order for a writ of inquiry. And upon the 31st day of March, 1856, damages were assessed by the court at five hundred dollars.

The plaintiff in error assigns for error, the rendering of the judgment in said case, in that the summons issued in said case, and upon which the action is founded, was dated October 11th,

1855, and therein made returnable to the fourth Monday of October *next*, in which case the summons was, by its own provision, made returnable to the fourth Monday of October, 1856, and thereby, more than one year would intervene between the teste and return of the writ.

The error is well assigned. "Next," in its connection, refers to month, and not to Monday; and there is, therefore, more than one term intervening the issuing the writ and the sitting of the court. The writ is, consequently, a nullity, and the default taken irregular. *Calhoun* v. *Webster & Hickor*, 2 Scam. R. 221.

The judgment is reversed.

Judgment reversed.

JOHN F. DOGGETT *et al.*, Plaintiffs in Error, *v.* HIRAM NORTON *et al.*, Defendants in Error.

ERROR TO WILL.

Where, in an action of covenant upon a lease, the parties lessors being some of them *femmes covert*, the lease is set out in *hæc verba*, the peculiar interest of the *femmes covert* is exhibited by the lease, without any special averment; and the lessees having admitted a special interest in these parties by taking the lease, are estopped from denying it.

THIS was an action of covenant on a lease. The declaration contains but one count, and is as follows in substance: It first avers the identity of the plaintiffs with the parties who executed the lease, some of whom signed by their initials, and one of whom afterwards intermarried with Rollin G. Parks, who is made a party to the suit. It then sets forth the lease *in hæc verba*, with the usual profert. The demised premises was a certain flouring mill in the village of Lockport, Will county. Term, for one year, ending 1st August, 1853. Rent, $900, payable quarterly. The lease contains the usual covenants as to surrendering up the demised premises in good condition on the expiration of the term. It also contains an agreement on the part of lessors to make certain repairs and improvements, as soon as it can be done conveniently. All other ordinary repairs to be done by lessees. The declaration then sets forth the legal effect of said lease, and avers generally the performance by lessors of all covenants by them to be performed; and alleges non-payment of rent; and that lessees removed portions of the fixtures, and left demised premises in bad condition. Damages laid at $1,000.

To this declaration there was a general demurrer, which was sustained. The plaintiffs stood by their declaration, and there was judgment for defendants.

S. W. Randall, and Parks & Elwood, for Plaintiffs in Error.

U. Osgood, for Defendants in error.

Caton, C. J. This was an action of covenant upon a lease. Among the lessors are several *femmes covert*, who are parties to the lease and plaintiffs in the action with their husbands and the other lessors. The lease contains a covenant on the part of the lessors, to make certain specified repairs upon the premises. The declaration sets out the lease *in hæc verba*, and assigns for breaches the non-payment of the rent, and also refusal to deliver up the premises in good order at the expiration of the time. A demurrer was sustained to this declaration, which decision is now assigned for error. The objection taken to the declaration is, that the *femmes covert* are joined as plaintiffs, while the declaration contains no statement showing that they had any peculiar interest in the premises demised, or that in them was the meritorious cause of action. The objection to the declaration is not well taken. The lease is set out in the declaration, and shows upon its face the peculiar interest which the *femmes covert* have in the cause of action. The covenants, for breaches of which the action is brought, are to them, with their husbands and others, and that of itself shows a special interest in them, to justify their joining in the action; and the lessees, by taking a lease from them and others, admitted that they had a special interest in the property, and are now estopped to deny that fact. It is unnecessary to inquire whether the husband alone can demise the wife's separate estate, or whether a lease executed by the wife alone would be void; the law is too well settled to admit of controversy, that a lease made by husband and wife is good. In Chitty's Pleadings, 11th American from the 6th London edition, 30, it is said, "In the case of a bond or note payable to her, or her husband and herself, it would sufficiently appear from the instrument itself, as set out in the declaration, without further averment, that she had a peculiar interest, justifying the use of her name as plaintiff." It is insisted, in the argument for the defendants in error, that this statement is not sustained by the authorities. It is sustained by sound reason and good sense, and comports with the philosophy of legal pleading, and we have been referred to no case holding a contrary doctrine. The declaration shows on its face that the lessees admitted, by taking a lease of them, that the *femmes covert* had a special

interest in the demised premises; and that being thus shown, no other averment of it was necessary. They covenanted to pay the money to them, and thereby admitted that they had a peculiar interest in the cause of action. It is unnecessary now to inquire whether they could be sued with their husbands for a breach of the covenants to repair, contained in this lease. Certain it is, that the lessees may recoup, in this action, any damages which they have sustained, for the breach of the covenants to repair, the same as if the *femmes covert* had not joined in the lease and were not parties to the action. We think the demurrer should have been overruled. The judgment is reversed and the cause remanded.

Judgment reversed.

John L. McCormick, Appellant, *v.* Henry Tate, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

Where a demurrer to a plea to one of the counts of a declaration is overruled, and the plaintiff stands by his demurrer, the order of the court amounts to a judgment in bar of the cause of action in that count, and it is no longer before the court for trial.

Where a party alleges in his pleadings in an action of trespass *quare clausum fregit*, that the damage to plaintiff arose by reason of the removal of a partition fence, of which removal the plaintiff had been notified, the pleading should show that the notice was given in due time, and to a proper person.

An averment in such pleading that plaintiff had reasonable notice, is insufficient.

A partition fence, whether existing by agreement, by acquiescence, or under the statute, cannot be removed until the parties interested in its remaining are properly notified of the intended removal.

The case of *Buckmaster* v. *Coole*, in 12th Ill. R. 76, considered and approved.

This case was tried in the La Salle County Court. The opinion of the court states the pleadings.

W. H. L. Wallace, for Appellant.

Chumasero & Eldredge, for Appellee.

Walker, J. This was an action of trespass, commenced by Tate against McCormick, in the La Salle County Court, for injuries to plaintiff's close. The suit was brought to the March term, 1856, and the declaration contained two counts. The first alleges that defendant, with force and arms, broke plaintiff's close, and broke down and removed the fences on the east side of E. half, S. W. 18, 33 N., 1 E., and W. half S. E. 18, 33 N., 1 E., and trampled and despoiled the grass and corn of plaintiff, and with

cattle, depastured the grass and corn, and damaged the soil, and broke down and destroyed one hundred rods of plaintiff's fence, to his damage one thousand dollars. The second count alleges that the defendant broke other closes of the plaintiff, describing them as the W. half of S. E. qr., and the E. half S. W. qr. 18, 33 N., 1 E., abutting towards the east, on defendant's close, and broke down one hundred rods of fence between the plaintiff's and defendant's closes, and with cattle and horses, etc., destroyed the grass and corn of plaintiff, to his damage one thousand dollars.

The defendant filed four pleas. 1st, The general issue to the whole declaration; 2nd, *Liberum tenementum* to the whole declaration; 3rd, That the close of the plaintiff was not surrounded by a good and sufficient fence; 4th, (to the second count), That defendant had built, and then maintained, one-half of said partition fence, which was a good and sufficient fence, and that it was plaintiff's duty to build and maintain the balance of said partition fence, but that he neglected to do so, by means whereof defendant's cattle, running in his own close, escaped through that portion of the fence, which was the same trespass complained of, etc.

Plaintiff filed to the general issue a *similiter*. To the plea of *liberum tenementum*, a replication, denying that the closes were the soil and freehold of defendant, and upon it issue was joined to the country. To defendant's third plea, a special replication, that the closes were surrounded by a fence until just before the trespass complained of, and defendant was in possession of the land adjoining on the east of plaintiff's close, and defendant tore down the partition fence between plaintiff's and defendant's closes, and turned his cattle into his (defendant's) close, and the cattle entered from defendant's close through the broken fence, and committed the trespasses, etc. To defendant's fourth plea, a special replication, that shortly before the trespasses, etc., there was a partition fence between plaintiff's and defendant's closes, which was, shortly before the trespasses, torn down by defendant, and afterwards defendant turned his cattle into his own close, and they entered through the broken fence, and committed the trespasses, etc. The defendant filed a general demurrer to plaintiff's replication to defendant's third and fourth pleas. The plaintiff confessed the demurrer to his replication to defendant's fourth plea, and leave was given to amend. The demurrer was sustained to plaintiff's replication to defendant's third plea, and also to defendant's third plea. Plaintiff filed an amended replication to defendant's fourth plea—that the plaintiff's closes mentioned in the declaration were inclosed by fences, and adjoined on the east to

closes of the defendant, and the partition between the closes was undivided, and plaintiff and defendant were equally bound to maintain the fence; that the fence was not good and sufficient, and defendant tore down a portion of the fence, and put his cattle into his own premises to depasture, whence they escaped through the space in the fence, and committed the trespasses; and concludes to the country. By leave of the court, defendant filed an amended third plea to the first count of the declaration—that he was not guilty of throwing down any fence belonging to plaintiff and situated on plaintiff's close, nor treading down the corn, etc., of the plaintiff in said close, and that the close was not surrounded by a good and sufficient fence, and by reason thereof, the cattle, lawfully running on defendant's adjoining close, without defendant's fault, strayed on plaintiff's close. To this plea plaintiff demurred, which the court overruled, and plaintiff abided by his demurrer. The defendant filed a rejoinder to plaintiff's replication to his fourth plea—that the supposed partition fence was wholly on his own land, and not between the closes of plaintiff and defendant, and the rails of that part of the partition fence removed by plaintiff were not the plaintiff's rails, but were the property of the defendant, and moved by him, as he lawfully might, and the cattle were not turned into defendant's close until after reasonable notice, etc. This rejoinder was filed on the eleventh day of June, 1856, and before a jury was empanneled, and it was on the same day stricken from the files. The defendant had been ruled on the ninth to rejoin by the eleventh.

The cause was tried by the court and a jury, and a verdict was rendered in favor of plaintiff for three hundred dollars damages. Defendant entered a motion for a new trial, which the court overruled, and rendered judgment upon the verdict, from which defendant appeals to this court.

The bill of exceptions in this case having been suppressed at a former term of this court, no questions can arise on the evidence or instructions in the case, and we shall confine ourselves in its consideration to the other questions presented by the record.

The first question presented by the record is, whether the defendant's third plea remained unanswered at the time of the trial. To this plea plaintiff demurred, which was overruled by the court, and plaintiff abided by his demurrer. The court, by overruling the demurrer, held the plea sufficient as a defense to the first count, which it purported to answer, and it was a judgment in bar of the cause of action set forth in that count. That judgment disposed of the first count, with all the issues under it, and it was not before the court for trial.

We shall proceed to determine whether the rejoinder presents

a defense to the second count. By the defendant's fourth plea, by the plaintiff's replication and this rejoinder, it appears that the fence which defendant removed was a partition fence between plaintiff's and defendant's farms. Whether it became so by agreement, by acquiescence, or under the statute, does not appear. But the defendant, in his fourth plea, alleges that it was a partition fence, that he had built and maintained one-half of it, and that it was the duty of the plaintiff to maintain the other half, which he had failed to do. From this, it would seem that it had become a partition fence either by agreement or under the statute; and whether it was under the one or the other, it was the duty of the defendant to give to plaintiff a reasonable notice of the time when he intended to remove it. When a notice is necessary, it ought to appear that the notice was given in due time and to the proper person. 1 Chit. Pl. 329. The allegation of notice in this rejoinder is general, that the plaintiff had reasonable notice, but when it was given or what it contained, is wholly omitted, and the court cannot see that it was sufficient. The rejoinder does not give the circumstances that would authorize the defendant to remove this fence; it alleges that the rails belonged to defendant and were in the fence which stood on his own land. This might be true, and yet if it was a partition fence by agreement, by acquiescence, or under the statute, he had no right to remove it until the plaintiff had received sufficient notice. As it was a partition fence, and plaintiff was bound to maintain one-half and the defendant the other half, the inference that plaintiff had a right to rely on it to protect his crops, must be rebutted, and this rejoinder does not rebut that presumption.

This court, in a case where several persons had raised a crop of corn in a field surrounded by a common fence, and one of them erected an inside fence to protect his crop; the plaintiff, in the month of September, purchased eighteen acres of corn in this field, and defendant's servants, in the month of November, removed a part of the inside fence, by means of which stock entered the field and destroyed plaintiff's corn, held that the plaintiff had a right to recover. And the court also held that it was not error to refuse to permit the defendant to show that it was the duty of plaintiff to repair the outside fence, and the court say, that from aught that appears, the plaintiff had an undoubted right to rely on this fence to protect his property. *Buckmaster* v. *Coole*, 12 Ill. R. 76. This decision seems to be opposed to the case of *Seeley v. Peters*, 5 Gilm. R. 130. In that case the court held that there was no general law in this State prohibiting cattle from running at large in the highway and commons, and in order to maintain an action of trespass of cattle

on one's close, the owner must have it surrounded by a good and sufficient fence, and that the common law requiring the owner of cattle to keep them on his own land has never been in force in Illinois. That was a case where cattle broke into plaintiff's inclosure from the highway, and in the case of *Buckmaster* v. *Coole*, they entered through the space where an inside fence had been removed which had protected the crops. The latter decision limits and qualifies the first to stock running at large in the highways and commons, and leaves the common law in force as to inside fences, unless regulated by the statute regarding partition fences. We do not feel inclined to disturb the decision of *Buckmaster* v. *Coole*. By the common law, every man was bound to keep his cattle on his own land, or respond in damages for their trespasses. And it was one of its rules, that no man is bound to fence his close against an adjoining field, but every man is bound to keep his cattle in his own field at his peril. *Rust* v. *Low*, 6 Mass. R. 91; Bro. Trespass, 345, 359; Fitz, N. B. 128. But this legal obligation might be changed by prescription, and by covenant. And in this State it can be done under the statute regulating partition fences. If parties desire to avoid the common law duty in cases of adjoining fields, they may do so under our stutute by compelling contribution for the erection and maintenance of such a fence. This statute does abridge individual rights, but permits any one to fence his land in his own way, or when a fence has become a division fence, compels both parties to contribute equally to its support, which is eminently just. Upon this record we are unable to perceive any error that should reverse the judgment of the court below, and the same should be affirmed.

Judgment affirmed.

Henry C. Lawrence, Appellant, *v.* John J. Fast, Appellee.

APPEAL FROM WARREN.

A judgment for taxes is fatally defective, if it does not show the amount of tax for which it was rendered. The use of numerals, without some mark indicating for what they stand, is insufficient.

The separate record book of judgments for taxes, should be so kept, as without reference to the general record, it could furnish a full exemplification of a judgment.

This was an action of ejectment, brought by the appellant against the appellee, to recover the N. E. 36, 8 N., 1 W., in the Circuit Court of Warren county.

The cause was tried by a jury before THOMPSON, Judge, at September term, 1857; a verdict was rendered for the defendant; a motion was made by the plaintiff for a new trial, which was overruled by the court, and judgment rendered against the plaintiff for costs. The plaintiff appealed to this court.

On the trial, the plaintiff read in evidence an exemplification of a record of a judgment against delinquent lands for taxes of 1851, rendered at the June term, 1852, by the County Court of Warren county, among which was the tract of land described in the plaintiff's declaration. This exemplification shows the usual convening order, on the 7th day of June, 1852, and a judgment in the form required by the statute of 1849, rendered on the 8th day of the same month.

The plaintiff then read a precept to the jury, and proved that the sheriff and *ex officio* collector received the same from the clerk, and sold the lands on the 15th day of June, 1852, by virtue thereof.

The plaintiff then read in evidence an affidavit of Seth C. Sherman, with the notice required by the constitution, from purchasers at tax sales, and proved that the affidavit and notice was filed in the office of the county clerk of Warren county, and by him recorded in a book kept by him for that purpose, on the 18th day of April, 1855.

The plaintiff then read in evidence a deed from the sheriff to Seth C. Sherman, the purchaser at the tax sale.

The plaintiff then read in evidence deeds connecting himself with Seth C. Sherman, and proved that the defendant was in the possession of the premises at the time of the commencement of the suit.

The witness further stated that he sold the land to defendant, and defendant claimed to own the same, in good faith, by virtue of the sale from the witness.

The defendant produced *Ephraim S. Sevinney*, as a witness, who testified that he was county clerk, and he produced a book containing a record of the sales for taxes in Warren county, and proved that the premises had not been sold since the year 1852.

The witness also produced another book which he testified was the general record of the proceedings of the County Court of Warren county, for county business. And also, another book, which he testified was the record of judgments against delinquent lands in the County Court.

The witness further testified, that he prepared and certified the exemplification read in evidence by the plaintiff, and that in making the same, he copied the convening order from the

book containing the general records, and the rest of the exemplification from the book containing the judgments against delinquent lands.

To the evidence of this witness the plaintiff objected, but the court overruled the objection.

The defendant then offered in evidence the two books last named, to the introduction of which the plaintiff excepted, but the court overruled the objection.

These books proved that the exemplification was a true copy from the two books, except that the general record showed that the court adjourned on the evening of the 8th day of June until the next morning, when the court met, all the judges being present, and finally adjourned on the 11th day of June.

The defendant then moved to exclude all the plaintiff's evidence from the jury, because there was no valid judgment for the sale of the land in controversy. To the allowance of the motion the plaintiff objected, but the court sustained the motion and excluded the evidence.

There being no further evidence, the jury rendered a verdict for the defendant.

The appellant now assigns for error—

That the court erred in overruling the motion for a new trial.

The court erred in rendering judgment for the defendant; and,

The proceedings are otherwise informal and erroneous.

Goudy & Judd, for Appellant.

J. S. Bailey, for Appellee.

Caton, C. J. The first question to be considered in this case, is, whether the judgment for the taxes was sufficient. Waving the question of the sufficiency of the description of the property, we think the judgment fatally defective, in not showing the amount of the tax for which judgment was rendered. The six columns at the right hand of the table in the judgment, are headed respectively, commencing at the left hand, "Valuation," "State Tax," "State Special," "County Tax," "County Sp. Tax," "Total." Opposite the tract in question are the following figures: In the first column mentioned, 240; in the second, 84; in the third, 61; in the fourth, 72; in the fifth, 24; in the sixth, 248. This tract is not at the head of the table. Other figures are at the heads of the columns, opposite the first lot, and there is no mark, sign, or abbreviation, in any way connected with these figures, showing for what they stand. In no part of

the judgment does the word dollar, cent or mill, occur, nor any abbreviation, character or sign, representing either of these words, or any other denomination of money. The tax was 248, and the judgment was for 248, and that is all that can be made of it. You may guess it was for 248 dollars, or cents, or mills, but at last it is but a guess. In some parts of the State the value of one hundred and sixty acres of land, and the rate of taxation might be such, that the tax would be 248 dollars, while in others it might be but 248 mills. And shall we look upon the map and see whether it is in a rural district, or near a great city, to enable us the better to guess what these figures probably meant? I do not think we have sunk to so low a degree of uncertainty, nor have we attained such a perfection of intuitive knowledge, as to justify us in saying we guess what these figures meant, or to enable us to say we know what they meant. Nowhere in any court, we will venture to assume, have mere numbers, without denominations, been held sufficient in a judgment. Would anybody doubt that a judgment in any other sort of proceeding, for "248," would be utterly void and nonsensical? and we know of no reason why such a judgment should not be sustained, if we sustain this. Courts have generally been more strict and technical where land is sold for taxes than in any other cases, but here we are asked to sanction a degree of laxity, which it was never before dreamed could be sustained in the proceedings of the most informal tribunals. It has been said in argument that the statute has given a form for this part of the judgment, and as in that form, the column under the head "Amount of Tax," neither the word "dollar," "cent," or "mill" is given, nor any character representing them, we are therefore to infer that the legislature did not intend that such words or characters should be used to designate the denominations intended to be represented by the figures to be set down in the column. As well might it be argued that because in the form given by the act, the column is left a total blank, it was the intention of the legislature that it should be so left in the judgment. If the form is to be so literally followed in regard to denominations, it may with the same propriety be so followed by omitting the figures also. The figures without denominations are as senseless as would be denominations without figures. Had the figures also been omitted, then had the legislative form been followed in the strictest and most literal sense. We are now asked to sanction as literal an observance of statutory forms as that adopted by the justice of the peace, who administered a statutory oath to the witness, thus: "You do solemnly swear, or affirm, as the case may be," etc. Nay, we are asked to go much further, for *there* was a mere surplusage,

while *here* is an omission of an essential part of the judgment, which the legislature as much intended should be filled into the blank as was that which was filled in. The legislature intended that the blanks left in its form should be filled up with whatever was necessary to show with certainty what was the amount of the tax for which the judgment was rendered. While we are disposed to carry out the manifest design of the legislature, by reasonable intendments in favor of tax proceedings, we cannot go so far beyond what was ever before asked of any court, in favor of any proceedings of any judicial tribunal. Such an omission as this, in any judgment of any court, would be everywhere treated as rendering it a perfect nullity, and so we hold this to be.

Before this judgment could be reversed, there are other difficulties of the gravest character to be surmounted, and which we do not now choose to discuss at length. The statute requires the judgment for taxes to be entered in a separate record, in which no other orders or judgments of the court are to be entered. It is by itself a separate and independent record. This record does not show what is sometimes called the convening order of the court. It does not show by whom the court was held, nor even in what court the judgment was pronounced. It merely shows the entry of the judgment order. There it begins and there it stops. We imagine it would be very difficult to show that such a mere naked order, entered in a separate book, by itself, not showing any of those things which are always required to appear on the face of every record, to give it validity, could be helped out by going to the general record of the court, and copying therefrom the convening and other orders necessary to be shown to make it a judicial record, and attaching them to the judgment for taxes taken from another book, and thus make up, in apparent form, an exemplification of a judgment. But we do not propose to go into a discussion of this question now, for, admitting that the record in which the judgment for taxes was entered had shown upon this subject everything requisite in a court record, still we find that this judgment is utterly void for uncertainty in the amount, or rather because the judgment is for no amount whatever. It has been so often decided by this court that a defendent in ejectment may take this objection to the plaintiff's proof without showing title in himself, that we do not deem it necessary to refer to the cases even, or to say one word in support of the proposition.

The judgment must be affirmed.

Judgment affirmed.

Breese, J. I cannot concur in this opinion. The form pursued by the collector is precisely the form given by the statute,

and so is the entry of the judgment. It is certain to every ordinary intent, that the figures in the proper columns indicated cents, or dollars and cents. The most common man would so understand them, and could not be misled by them. The figures "2 48" must of necessity mean two dollars and forty-eight cents, or two hundred and forty-eight cents, which is the same. Mills are never expressed in that way. Courts of justice must draw the same conclusions from the same facts, which the mass of community would draw from them. Taking the columns with their headings, and the figures in them as they stand, can any reasonable man doubt that dollars and cents, or cents only, were intended? I think not. It is not certainty to every intent in particular that is required in such proceedings, but common certainty.

Patrick R. Morgan, Appellant, *v.* Joseph T. Ryerson, Appellee.

APPEAL FROM COOK.

A verdict will not be set aside where the evidence is conflicting, even though it may be against the weight of evidence.

Where a horse, sold as sound, proves to be otherwise, is returned to the vendor by the purchaser, in an action by the purchaser the measure of damages is the price paid for the horse. If he is not returned, it is the difference between his real value and the price given.

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

The first count of the declaration alleges that on the 11th day of April, 1856, plaintiff, at the request of defendant, purchased of defendant a certain horse for the sum of $225; and that said horse was sound and kind for a family horse; plaintiff avers that said horse was not sound; but on the contrary, said horse was unsound at the time when, etc., whereby said horse became and was of no use or value to plaintiff; and that he, the said plaintiff, had been put to great expense in and about taking care of said horse, whereby plaintiff was deceived, etc.

Second count same in substance as first, alleging the purchase of a horse by plaintiff from defendant, with a warranty of soundness, etc.; and that said horse was unsound at the time when, etc.; and by means whereof there was a breach of the warranty by defendant, whereby plaintiff was damaged, etc.

Common counts in the usual form, etc.

Pleas—1st, general issue; 2nd, set off.

Issue was joined on the pleas.

On the trial, plaintiff gave in evidence the bill of sale from defendant to plaintiff, with warranty of soundness of said horse, in the words and figures following, to wit:

MR. RYERSON,

Bought of P. R. MORGAN,

One bay horse, five years old, warranted sound and kind for a family horse, - - - - - - - - - $225 00

Received payment,

Signed, P. R. MORGAN.

Chicago, April 11th, 1856.

The testimony on the part of the plaintiff below, went to show that the horse, soon after he purchased him, became lame in one of his fore legs, and that this lameness had manifested itself before the purchase by plaintiff, and rendered the horse unfit for use. On the part of the defendant below, the testimony was strong in support of the soundness of the horse, before and at the time of the sale. The horse was returned by Ryerson to Morgan in two or three weeks after the purchase.

The plaintiff requested the court to instruct the jury as follows:

1st. If the jury believe, from the evidence, that the horse sold by the defendant to the plaintiff had any sprain, strain or other injury, amounting to unsoundness in one of his legs at the time of the sale to the plaintiff, and the plaintiff, after discovering such unsoundness, and without unreasonable delay returned the horse to the defendant as unsound, then the plaintiff is entitled to recover the amount paid for the horse.

2nd. If the jury shall believe, from the evidence, that the horse was returned by the plaintiff to the defendant as unsound, and accepted by the defendant, then the plaintiff is entitled to recover back the amount paid the defendant for the horse.

3rd. If the jury believe, from the evidence, that the horse was returned to defendant in June, 1856, as unsound, and was accepted back by the defendant, then the plaintiff is entitled to recover the price paid for the horse, whether he was sound or not at the time of sale.

To the giving of which said instructions the defendant excepted.

The defendant requested the court to instruct the jury as follows:

If the jury shall believe, from the evidence, that at the time of the sale of the horse in question by the defendant to plaintiff, that the said horse had no permanent or incurable injury about him; and that if any unsoundness existed, it was only a temporary and curable injury, and did not injure the horse for

services, then it was no breach of the warranty, and the defendant is entitled to a verdict."

Which said instruction the court then and there gave to the jury, with the following qualification after the word *services:* "and present use while suffering under it." Also, with the following addition after the word *verdict:* "unless the contract of sale was afterwards, by agreement, rescinded by the parties, and the horse returned to defendant."

The defendant then and there further requested the court to give to the jury the following instruction:

"If the jury shall believe, from the evidence, that the horse in question, at the time of the sale to the plaintiff by the defendant, was a sound horse, then the law is for the defendant, and the only question for the jury to try in relation to the soundness or unsoundness of the horse, is the question as to whether the horse was unsound at the time of the sale."

Which said instruction the court gave, with the following qualification after the word *horse:* "and that the contract of sale was not rescinded at the time of his return to defendant, or at any other time."

Also the following:

"If the jury shall believe, from the evidence, that the defend ant kept the horse in question for the plaintiff, after he was hurt and brought back to the stable of the defendant, then the defendant is entitled to recover the value of his keeping and attendance, if the same commenced before this suit was brought, by way of set-off, and the defendant is entitled to such judgment as the keeping and attendance was reasonably worth."

Which said instruction the court gave to the jury, with the following qualification after the word *that:* "the horse was returned to defendant and contract of sale rescinded between the parties, and that".

And also the following:

"If the jury shall believe, from the evidence, that the horse was sound at the time of the sale to the plaintiff, then they should find for the defendant."

Which said instruction the court gave to the jury, with the addition, however, after the word *defendant*, of the following: "unless they shall also find that the horse was returned to the defendant, and the contract of sale rescinded between the parties by mutual agreement."

To the giving of said additions to said instructions the defendant excepted.

The jury found a verdict for the plaintiff, and assessed the damages at $225.

The defendant moved the court for a new trial, which was denied.

S. ASHTON, for Appellant.

E. C. LARNED, for Appellee.

BREESE, J. This was an action of assumpsit, brought upon a warranty given upon the sale of a horse, with a count for money had and received.

Much and conflicting testimony was heard on the trial, which it is the peculiar province of a jury, in such cases, to reconcile; and an instance can scarcely be found in the books where a verdict has been set aside under such circumstances, even if it may appear to the court that the verdict may be against the weight of evidence. *Lowry* v. *Orr*, 1 Gilm. R. 70.

There is proof in the cause that Ryerson returned the horse to Morgan so soon as he discovered the blemish, and the jury had a right to infer, from all the circumstances, that Morgan had accepted him.

The measure of damages in such case is, the price paid for the horse. If he is not returned, the measure of damages is the difference between his real value and the price given. *Caswell* v. *Coare*, 1 Taunton R. 566.

We see no objections to any of the instructions given by the court. The qualifications to the defendant's instructions were all proper.

The judgment is affirmed.

Judgment affirmed.

CHARLES MCDONNELL, Plaintiff in Error, *v.* JOHN MURPHY *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

An affidavit of merits to a plea which states that the defendant has a good defense to a "part" of the amount of damages claimed, is insufficient. Such an affidavit, if it specified the nature of the defense, and what part of the action it extended to, might be good.

THIS was an action of assumpsit, brought by John Murphy, Michael Kelly and John B. Piet, defendants in error, against Charles McDonnell, plaintiff in error, in the Cook County Court of Common Pleas.

There was a motion by plaintiffs that defendant's plea be stricken from the files, for want of a sufficient affidavit of merits. Motion allowed by the court, J. M. WILSON, Judge, presiding, at January term, 1858.

W. R. M. WALLACE, for Plaintiff in Error.

JOHNSON & WILLETTS, for Defendants in Error.

CATON, C. J. The only question in this case is, upon the sufficiency of the affidavit of merits. That states that defendant "believes he has a good defense to a part of the amount of damages claimed and sued for by the said plaintiffs in said action upon the merits." This is not in compliance with the letter or the spirit of the statute. The statute requires the defendant to file "an affidavit setting forth that he believes that he has a good defense to said suit upon the merits." That it may often occur that a defendant has a good defense to a part only of the real cause for which the action is brought, and which, under this law, he should be allowed to litigate, may not be denied, and the court would go very far in the construction of the statute to secure to him this right, without offending his conscience so far as to require him to swear that he has a good defense to the entire cause of action; but in doing this, we must see that it is not resorted to as a subterfuge to procure delay when there is really no defense to the cause of action relied upon by the plaintiff. It is most common, when the only cause of action relied upon is a promissory note, or bill of exchange, in addition to the special count, to insert also the common counts, as a mere matter of safety in case of an accidental variance in the special count. Whenever such is the case, the defendant may safely swear that he has a defense to a part of the plaintiff's cause of action, assuming that such count is in fact upon separate and independent cause of action, knowing perfectly well, all the time, that the only real cause of action relied on is the bill or note specially counted upon. We are inclined to sustain affidavits of merits to a partial defense; but in order to accomplish the manifest objects of the law, we must require such affidavits to specify the nature of the defense, and to what particular portion of the cause of action declared upon, so that the plaintiff may dismiss that portion of his action to which the defense applies, and proceed as to the remainder as if no affidavit of merits had been filed. The judgment must be affirmed.

Judgment affirmed.

William C. Kimball, Appellant, *v.* The People, etc., Appellees.

APPEAL FROM THE COURT OF COMMON PLEAS OF THE CITY OF ELGIN.

It is not necessary, in order to find a defendant guilty of selling spirituous liquors in contravention of a city ordinance, that the liquor was handed to persons who asked for it, and that it was paid for, or charged to some one.

At the June term, A. D. 1857, of the Court of Common Pleas of the city of Elgin, in Kane county, Illinois, an indictment was found therein against the appellant for selling liquor without license within said city. The indictment is in the usual form, and charges a violation of the general law of the State, inflicting a penalty of $10 for selling rum, wine, gin, brandy, whisky, vinous, spirituous and mixed liquors, by a less quantity than one gallon, at and within the limits of said city of Elgin.

At the September special term, A. D. 1857, of said court, the appellant, by his attorney, moved to quash the said indictment, on the ground that the general laws of the State, authorizing the granting of license, and inflicting penalties for selling without license, were not in force within said city limits, but were (by the act entitled, "An Act to amend, alter and revise the manner, name or style and corporate powers of the town of Elgin, approved February 28th, 1854," and the act entitled, "An Act to amend an Act, entitled an Act to amend, alter and revise the name or style and corporate powers of the town of Elgin, approved February 28th, 1854, and to legalize said Act incorporating said town as a city, and all official acts of the Mayor and council by virtue hereof, approved February 15th, 1855," in connection with the ordinances and laws passed by the council of said city, and in force in said city,) repealed as to said city, and that the only law in force upon the subject of selling liquor and inflicting penalties therefor, was the ordinances of the city council of said city, and that the court had no jurisdiction of the case.

It was then agreed between the appellant and appellee, that the questions involved in the reasons assigned for quashing the indictment, should be considered as legally and properly presented and pending for the court to decide.

That a city government was duly organized under the acts of the legislature, in relation thereto; that before and at the time the alleged sales within the city limits of liquor without license are charged to have been made, and to recover penalties under the general laws of the State, this indictment was found, an

ordinance or law of the city was made, and in force within the city limits, upon the subject of liquor.

(By agreement of counsel, a printed copy of the ordinances of the city were attached to the bill of exceptions and to the record, and made a part of the record. These ordinances prohibit entirely the sale of liquor, or having it in charge for sale in the city, refuse to license, and inflict a penalty of $25 for violating the ordinance,) and that all technical objections to manner of presenting the questions should be waived.

This application the court overruled.

The appellant pleaded not guilty to the indictment. A jury was empanneled, and a verdict was found for the people.

S. Wilcox, for Appellant.

W. Bushnell, State's Attorney, for the People.

Walker, J. The plaintiff was indicted, tried and convicted for selling spirituous liquors in a less quantity than one gallon, in the Court of Common Pleas of the city of Elgin. The defendant entered a motion in arrest of judgment and for a new trial, which were overruled by the court, and the plaintiff was fined thirty dollars and costs, from which judgment he appeals to this court. It was agreed, on the trial, that the city of Elgin was incorporated by act of the legislature, which conferred on the corporate authorities of the city, power to license the sale of liquors, and to tax, restrain and prohibit tippling houses and dram shops, and to impose fines and penalties for a breach of any ordinance of the city, and to provide for the recovery and appropriation of such fines; and that the city had, in pursuance of the authority contained in its charter, by ordinance, regulated the sale of spirituous liquors in the city of Elgin. The evidence showed that plaintiff sold the liquor for which he was indicted, in the corporate limits of the city, and he introduced no evidence to show that it was sold pursuant to city ordinance. Upon this state of facts, it is urged that the court had no jurisdiction to try plaintiff under the laws of the State for this offense. This question was determined at the present term of this court, in the case of *Gardner* v. *The People*, *post*, and it is deemed unnecessary to again discuss it in this case. It was insisted that the court erred in refusing to give the following instruction to the jury: "That before you can find the defendant guilty, you must believe, from the evidence, that not only liquor was handed to a person who asked for it, but that the liquor was paid for or charged to some one." This instruction is not the law. It assumes that the only mode by which a

sale of liquor can be effected, is by its being handed to a person who asked for it. It undoubtedly may be sold in many other modes than by being handed to a person, nor is it necessary that it should be asked for, to make its sale complete. A sale might be consummated, the property pass, and be paid for, in other modes than being asked for. This instruction, if given, would have precluded the jury from convicting, if a sale had been effected in any other mode. The instruction was properly refused, and the judgment of the court below should be affirmed.

Judgment affirmed.

Ezra L. Sherman, Appellant, *v.* Sheldon Smith *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

In an action against the indorser of a note, the declaration should aver the manner in which due diligence was used against the maker, and every fact necessary to show a right to recover and to rebut negligence.

In an action against a stockholder in a company organized under the act of 10th February, 1849, for manufacturing purposes, etc., to hold him under the tenth section of the act, there should be an averment of the amount of stock held by him. If to be held liable under the eighteenth section, there should be an averment that the debt was due to the laborers, etc., of the company. If to be held liable under the twenty-second and twenty-third sections, there should be an averment that the indebtedness of the company exceeded its capital stock, etc.

Verbal testimony showing when suit was brought, when declaration was filed, and when judgment was rendered against the maker of a note, is incompetent.

The general issue, in a case like this, against a member of a corporation, renders proof necessary that the defendant was a stockholder.

Assumpsit, brought August 29, 1856, by the appellees against the appellant.

Declaration has two counts only, both special. These were demurred to. Leave to amend.

First amended count states, a "corporation" made its note, May 14th, 1855, for $528, payable to A. Pierce's order in six months after date, with exchange on New York, indorsed by Pierce to appellant, and he to plaintiffs below, who sued it, on 25th of December, to the January term, 1856, of the Common Pleas Court, and duly prosecuted to judgment. Execution issued June 13, 1856, and put into coroner's hands, and returned *nulla bona*.

That due diligence has been used in the institution and prosecution of the makers to insolvency as aforesaid, of which he had notice. By means whereof, etc.

Second count states the making of the note, its indorsements and non-payment, as in first count.

Then they say, "whereupon a suit was duly instituted against said" corporation, in said court, within one year after note became due, and duly prosecuted to judgment. Execution issued and returned, no part satisfied, and no property to be found, etc. That the appellant was a stockholder when the note was made, and thereby seeks to charge him with liability to pay, under the act of 1849.

Concludes with a breach, that he was not paid said sum specified in said note. To damage, etc.

To the first count, the appellant demurred generally, with special causes assigned.

To the second count, he demurred generally, and assigned special causes.

The court overruled these demurrers, and ordered appellant to plead to the declaration.

He filed plea of general issue.

2nd plea. That he is not a stockholder.

3rd plea. That said note was made and given in violation of the law, and is void.

The appellees demurred to these two pleas, which demurrer was sustained by the court, and court ordered defendant to file his pleas by Monday.

On this leave and order, the defendant filed three pleas—one stating, that prior to the making said note, he actually paid into said corporation fifteen hundred dollars in money, the full amount of his subscription to the stock of said company.

3rd plea. That the whole amount of the stock of said corporation was paid in before the note was made.

On plaintiff's motion, these pleas were stricken from file, to which defendant excepted.

Defendant asked leave to file additional pleas, court refused, and he excepted. Cause tried by jury on the general issue, J. M. Wilson, Judge, presiding.

W. Kimball testified for plaintiffs on the trial, that he was clerk of the court. He produced a note, saying, this is the note in question, with indorsements. He stated that the judgment was by default for $538.37, reciting service on Tucker, secretary, and judgment default. Execution issued June 13, 1856; returned August 9, by Buckley, deputy sheriff of Cook county. That Beach was coroner and acting sheriff, and Buckley was deputy sheriff, of Cook county, and the return is in his hand-writing.

To every part of this evidence defendant objected, which objections the court overruled, and he excepted.

Defendant then moved to exclude the record evidence from the jury. 1st. Because the judgment and its date, and the execution and its date, are not described in the declaration. 2nd. Because the execution is directed to the coroner and acting sheriff; was not competent for the deputy sheriff to execute or return it.

Which motion the court overruled, and defendant excepted.

Verdict, $582.03.

Defendant moved for a new trial, on the ground that the court erred in refusing to exclude the judgment and execution from the jury.

Which motion the court overruled, and defendant excepted.

Judgment entered on the verdict. The defendant prayed an appeal, which was granted.

B. S. Morris, and Shumway, Waite & Towne, for Appellant.

W. T. Burgess, for Appellees.

Walker, J. The first question which we propose to consider is, whether the court erred in sustaining a demurrer to defendant's second and third pleas, instead of to the plaintiff's declaration. The first count of the declaration is clearly insufficient to entitle the plaintiff to recover on it, in not averring the manner in which due diligence was used. It does not anywhere allege when a declaration and copy of the note sued on were filed, nor does it aver any excuse for not obtaining judgment at the first term. For aught appearing in the declaration, the plaintiff may have been prevented from getting judgment at the return term by his negligence in not filing a declaration and copy of the note sued on in time for trial at that term; and if so, he thereby lost all recourse on the assignor, under the provision of the statute requiring diligence. *Bestor* v. *Walker*, 4 Gilm. R. 15. The declaration should have averred every fact necessary to show a right of recovery, and negative negligence on his part. This is the uniform practice, and it accords with the precedents.

The second count seems to be equally defective. It avers that a suit was brought against the makers within one year after the note became due, which was duly prosecuted to judgment against the makers; and that execution was issued, and returned, no property of the makers in their county out of which to collect the same. That the makers were an organized and incorporated company, under an act to authorize the formation of corporations for manufactories, agricultural, mining and mechanical purposes, approved February 10th, 1849; and that no certificate stating the amount of capital stock fixed and limited by said company

and paid in, as required by the eleventh section of that act, had been made by the president and a majority of the trustees of the incorporation, and recorded in the office of the county clerk of the county of Cook, where the business of the company was carried on; and that defendant was a stockholder in the company at the time the note was executed.

Such a certificate was required, by the eleventh section, to be made and recorded in the county clerk's office. And the tenth section provides for the consequence of a failure to comply with its requirements, and is as follows: "All stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of the stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded, as is prescribed in the following section, etc." Sess. Laws 1849, p. 89. As this section limits the liability of stockholders to the creditors of the company to an amount equal to the stock held by them, to hold defendant liable under it, there should have been an averment of the amount held by defendant. If it was intended to hold the defendant liable under the eighteenth section, there should have been an averment that the debt was due from the company to their laborers, servants, or apprentices, as that section only makes stockholders liable for such indebtedness. Or, if it was to hold defendant liable under the twenty-second and twenty-third sections of the act, there should have been an averment that the indebtedness of the company exceeded the amount of its capital stock, and the trustees had assented thereto, as these sections only give a right to recover against a stockholder under such circumstances. This count fails to show a liability under either of these provisions. This count was insufficient to sustain any judgment which could be rendered under it; and for that reason the judgment was erroneous.

The evidence in this case most clearly fails to sustain the finding of the court below. If the finding was under the first count, the evidence failed to show when suit was brought, when judgment was recovered, and when declaration was filed. It was also verbal evidence to establish matter of record, for which purpose it was entirely incompetent. Suit was brought to the January term; judgment was rendered by default, and the evidence does not show why execution was not issued until in June. The first count of the declaration was insufficient, and still more so the evidence.

If the finding was under the second count, it is equally unsupported by the evidence. The general issue puts the plaintiff upon the proof of every material allegation in his declaration, and there was not any proof that defendant was a stockholder in this company. This averment was, beyond all doubt, material, and should have been proved. Both counts, imperfect as they were, have not been proven, and the judgment of the court below must be reversed.

Judgment reversed.

Harvey B. Hurd, Appellant, *v.* Caleb Shaw, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The indorsement of the name of a person on the back of an indictment as a witness, is no sufficient evidence that such person was the prosecutor. Nor to establish this character need his name appear on the indictment in any way. The agency of a party as prosecutor may be established otherwise.

In a case for malicious prosecution, it must be shown that a prosecution has been tried on its merits; that the defendant was the prosecutor; that he was actuated by malice, and that there was a want of probable cause, or of that reasonable ground of suspicion a cautious man would entertain on the facts of a given case.

This was an action of trespass on the case for malicious prosecution.

The first and third counts in the declaration are for causing and procuring Shaw to be indicted for stealing a lot of screws, nuts, chains, crowbars, &c., of John H. Bates, and for prosecuting and causing the same to be prosecuted.

The second count of the declaration is upon the second count in the indictment, charging the property stolen to be the property of Richard Lappin.

The fourth and fifth counts are for causing the said Shaw to be indicted for obtaining goods, the property of said Hurd, by means of false pretenses.

The cause was tried at the September term, 1856, before J. M. Wilson, Judge, and a jury. Verdict, $400.

H. B. Hurd, *pro se.*

E. S. Williams, for Appellee.

Breese, J. The record in this case shows that Shaw was indicted in the Cook County Court of Common Pleas, for two offenses growing out of the same transaction, one for larceny, in

stealing the screws, chains, crowbars, etc., used in the attempt to move the house in which Shaw lived and which Hurd had purchased under an execution. These articles were the property of one Bates, who had loaned them for that purpose.

On this indictment the name of Hurd, as a witness, is not marked, though it appears he was sworn and testified on behalf of the prosecution, which resulted in the acquittal of Shaw, against strong circumstantial evidence of his guilt, especially that of his daughter, Octavia Shaw.

The other indictment was for obtaining goods under false pretenses, in which Hurd seems to have been the principal witness, and in which case no verdict was rendered, the State's attorney entering a *nolle prosequi.*

It no where appears from the evidence that Hurd was the prosecutor of this charge, or that he originated the indictment. It is not shown that he employed counsel to aid or conduct the prosecution, or that he was active in carrying it on by giving instructions, paying expenses or procuring the attendance of witnesses, or in any of those various ways in which a party may be known as a prosecutor of a criminal charge. The indorsement of his name on the indictment as a witness, is no sufficient evidence that he was the prosecutor. Nor, on the other hand, to establish this character, is it necessary his name should appear on the indictment at all, for his agency can be shown and his character established by any of the numerous acts above specified.

But if Hurd was the prosecutor, we think he had probable cause, and the weight of evidence favors the idea that Hurd did not sell the goods to Shaw on Hamilton's indorsement, but on that *and* the representations made to him by Shaw, that he was the owner of a tract of land near Chicago, which he had gone with Shaw to examine. It would seem from the testimony of Lavinia in the case, that he had made a deed to Shaw of this tract of land, for which Shaw was to pay him fifty dollars per acre, if he sold it for goods or money, but was not to put it on record. It was not put on record, but returned to Lavinia.

It would seem from this transaction, that Lavinia had placed in Shaw's hands this deed, to enable him to commit a fraud, and which it seems he did do, by getting the goods of Hurd on the strength of his representations that he was the owner of the land conveyed by it, and which he might with truth assert, for until the re-delivery of the deed to Lavinia, he was such owner. Having accomplished his purpose by it, he re-delivered the deed to his confederate, Lavinia.

The testimony of Hamilton does not make the case any better for Shaw. It seems like a combination between him, Shaw and

Lavinia, to trick some one, and Hurd seems to have been their victim.

It will be observed that no verdict was rendered on this indictment. No trial has, in fact, been had on the merits, but the prosecution was abandoned, for the reason that it turned out in evidence, that the goods, which were alleged in the indictment to belong to Hurd, were proved on the trial to belong to Conkling & Co. There has been, then, no trial on the merits.

We are inclined to the opinion, that an action for a malicious prosecution, unless actual malice be proved, should not prevail in any case where the merits have not been tried, and a verdict pronounced. Few persons will be found willing to perform the high public duty of prosecuting an offender, if they are to be subjected to the whims and caprices of the State's attorney, by whose act alone the prosecution can be abandoned at any stage, or exposed to the mistakes he may commit in preparing the indictment. The principles of policy and justice unite in support of such a rule.

But even if a verdict of acquittal on the merits be pronounced, it is not sufficient evidence of a want of probable cause, which 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 offense with which he is charged. *Richey* v. *McBean*, 17 Ill. R. 65; *Jacks* v. *Stimpson*, 13 ib. 701.

We think that, on both indictments, sufficient probable cause was shown for prosecuting them, and that being established, the defendant in this case, the appellant here, was entitled, at least, to so much of the fourth instruction as comes within the views here presented.

Whilst the courts should not discourage actions of this kind by establishing harsh rules of evidence, or by the recognition of rigid principles of law, by force of which a party may be deprived of an important remedy for a real injury, at the same time, all proper guard and protection should be thrown around those who, in obedience to the mandates of duty, may be compelled to originate and carry on a criminal prosecution, which may, from any cause, terminate in favor of the accused.

To subject him to an action, who, from praiseworthy motives and justifiable ends, sets on foot a criminal prosecution, it must be shown that the prosecution has been tried on its merits — that the defendant was the prosecutor — that he was actuated by malice, and that there was a want of probable cause, or of that reasonable ground of suspicion a cautious man would entertain on the facts of a given case.

We think the merits of this case on the proof, entirely with the appellant, and accordingly reverse the judgment and remand the cause, so that other proceedings may be had conformably to this opinion.

Judgment reversed.

Philetus Beverly *et al.*, Plaintiffs in Error, *v.* Hollis Sabin *et al.*, Defendants in Error.

ERROR TO COOK.

Under the school law of 1857, a tax for the erection of school-houses must be voted by the people. If a debt has been incurred for this purpose, and a judgment is outstanding, it would seem that a mandamus, commanding the assessment and levy of the tax, would be the proper proceeding.

Sabin, Clawson, and Stott, of Barrington, Cook county, and Goss and Stephens, of Cuba, Lake county, on the 2nd February, 1858, filed their bill in chancery, in the Cook Circuit Court, setting forth that for two years last past and upwards, they had been "residents and tax-payers" in the school district known as "part school district No. one, in township 42, and part school district No. one, in township 43 N., R. 9 E., in Cook and Lake counties; said district being composed of lands lying in two townships, viz.: in Barrington, Cook county, and Cuba, Lake county.

"And that the two townships aforesaid are, and for more than four years last past have been, laid off into districts, and that said district now is, and for more than four years last past has been, laid off a school district, and has been during all the period aforesaid, *a legally formed and organized* school district."

That the house called the school-house of the district is situated in Barrington, and that part of the district lying in Cook county was the quarter of the two parts.

That in the spring of 1856, a number of persons, but a small number of the voters, and much less than a majority of the said voters and tax payers therein, met, and pretended to hold a school meeting; that at the meeting no record was kept, and from that time no record has been kept.

That there was no legal notice given of the said meeting; that it was informally and illegally held. Some kind of a vote was taken, and that three persons, viz.: Beverly, Squires, and Ralph, had since that time claimed to act as directors of said school district.

"And that said meeting was unauthorized by and could not be held legally at that time in the year, under and by the statutes and laws of this State. And that previous to and before said meeting, said defendants, Nathan Squires and John Ralph, never held or pretended to hold, any office of any kind in said district."

That, soon afterwards, the said persons, claiming to act as directors, gave up the land on which the school-house of the district then stood, to a pretended owner of the land, which site the complainants believed had been either bought by the district, or donated to the district.

That, during the year 1856, the said directors erected on that site "a school-house for school purposes for said district."

That the complainants, as inhabitants and tax payers, had been unable to find out from said pretended directors how the business of the district had been transacted and then stood. That during two years last past no records had been kept; that the directors refuse to inform them relative to the business, and how the accounts of the district stood. That during two years last past, no regular meeting had been called in said district at which any business of any kind had been done. That Squires, before the last regular annual meeting should have been held, had caused notices to be put up, calling such meeting one week too late. And when the meeting convened, at the suggestion of Squires or his friends, they did not do any business for that reason.

That the house built by said pretended directors will cost from $1,500 to $2,500; and that a suitable house might have been built for $700 to $900; and if they had not intended it for a church, it would have been built so as not to cost over $900.

That since the house has been completed, it has been used on the Sabbath days for religious services, and Beverly has preached a part of the time therein.

That the upper room had been used for some months past by a society called the Good Templars, under the direction of said pretended directors, and had not, during that time, been used for school purposes at all.

"That said district is, and has been for some time, largely in debt on account of the aforesaid improvement made as aforesaid;" and that on 20th June last, 1857, said directors made two directors' certificates, and served the same, one of which was sent by them to the county clerk of Cook county, and the other to the clerk of Lake county. A copy of which sent to Cook county is attached to the bill, and is as follows:

We, the undersigned, directors of part district No. 1, township No. 42 and 43, range No. 9, in the counties of Cook and Lake, and State of Illinois, do hereby certify that said board have estimated and required to be levied, for the year 1857, two (2) dollars, for paying the indebtedness of said *dis.*, and the rate of ten (10) cents for dis. library, on each one hundred (100) dollars valuation of taxable property in said district.

Given under our hands this twentieth day of June, 1857.

PHILETUS BEVERLY,
NATHAN SQUIRES,
Directors.

That the clerks respectively have issued, to the collectors of the said townships, collectors' books in accordance with said certificates. That George T. Waterman is collector of Barrington, and John Jackson of Cuba, and that the collectors are now urging the payment of said tax, and threatening to sell complainants' property to pay the same, which they will do if not restrained by this court.

That said indebtedness is larger than it should be, because the house has been built larger than necessary for school purposes, and more with reference to church purposes; and the manner of paying for the same in goods, and buying wood at $3.50, and charging $5, has increased indebtedness. That directors claim a great portion of the indebtedness is going to them. That the expending of $1,000 more than was necessary on said building, and making profit thereon as charged, is a great fraud on the district.

"And your orators further show that the certificate made out by said pretended directors as aforesaid is illegal, and not authorized by law. That no vote of the tax payers, (*legal voters by fifth amendment,*) of said district, or any of them, had been taken, authorizing said directors to levy a tax for the payment of any indebtedness on said district, and that without such vote said pretended directors had no right to levy any such tax to be levied, and that the said county clerks of the respective counties aforesaid, had no right under such certificate to issue tax books to the aforesaid collectors; and that therefore said assessment and tax which said collectors are now attempting to collect of your orators, and out of the property of said district, is void, and that your orators and said district should not be compelled to pay the same."

That the bill was filed on behalf of the complainants and a majority of the tax payers of the district, to obviate the necessity of having more than one suit.

That the directors of schools had no right to run any district in debt for any purpose, for more than three per cent. on the assessors' valuation of the property in such district, and not

run a district in debt at all for any purpose without the sanction of a vote of said district, both of which the aforesaid directors had done, and were then seeking to collect a part of said indebtedness, made as aforesaid, by the enforcement of said tax.

That the defendants might be restrained from proceeding in the collection of the tax, assessed and levied as aforesaid.

That the directors might render an account of moneys received and paid out by them as such, and also their claims against the district, and of the debts and liabilities of the district.

And that injunction and summons might issue.

Bill sworn to, and injunction allowed by master.

February 12, 1858. Defendants, Beverly, Squires and Ralph, file their answer under oath.

That they had been duly elected school directors of the district, and were then acting, and for some time past had acted as such. That during all the time they had acted as such, records of their proceedings had been kept, though not very formal, yet sufficient to advise all persons of their acts as such. That such records had always been open to public inspection; and they deny that they ever refused to allow the complainants to inspect them, and to inform them what they, as directors, had done.

"That the defendants, as they are advised and believe, had by law, at that time, the discretion exclusively vested in them, of causing suitable lots of ground to be procured, and suitable buildings to be erected thereon for school-houses; and that being so vested with that authority, they did, in good faith, proceed to buy said lot of ground for said district, and to erect thereon said building; and they say, and insist, that the complainants have no right in this form of proceeding to inquire into their acts touching the purchase of said lot, and the erection of said house, and they pray the same benefit herefrom, as though they had answered to said bill specially; for that reason, upon this point, they pray the judgment of the court."

The defendant, Squires, gives a statement of his account against the district, in an exhibit, C, which, he says, is fair, just and reasonable.

The defendant, Beverly, gives a statement of his account against the district, in an exhibit, D, which, he says, is fair, just and reasonable.

They also give an account of J. S. Davis for lumber furnished.

That the certificates made and delivered by them to the clerks of Cook and Lake are legal, and in due form of law. And that no vote of "tax payers" is by law required. That on the 1st Monday of July, 1857, the district was justly indebted to

various persons, including the amounts of said accounts herein above alluded to, in the sum of $1,300, or thereabouts; the greater portion of which was for purchasing materials for and erecting said district school-house. That to pay off said indebtedness, and for no other purpose, did they cause said certificates to be issued and delivered.

That the total cost of the house is from $1,300 to $1,400.

General demurrer to the bill and denial of fraud, etc.

The cause was brought on by the complainants for final hearing upon the bill taken as confessed against said defendants. It was ordered by the court, that the injunction granted and allowed in this cause be made perpetual, so far as to restrain the defendants, Jackson and Waterman, from further proceedings to enforce the collection of the school tax levied and assessed upon said complainants, and mentioned in the bill of complaint in this cause as amended. And that the defendants pay the costs of this suit, to be taxed.

The decree was pronounced by MANIERRE, Judge.

W. T. BURGESS, for Plaintiffs in Error.

NICHOLS & MCKINDLEY, for Defendants in Error.

CATON, C. J. We cannot hold ourselves responsible for the consistency of all the laws which we are called upon to construe. Nor can we undertake that they shall accomplish their ends in the most direct, economical or convenient mode which could be devised. We must take them as we find them, and interpret them by the long established and well known rules of construction, although we may suppose that the legislature did not precisely appreciate the result to which their language irresistibly leads.

Previous to the revision of the school law of the last session, no material difficulty in a case like the one which gave rise to this suit, would occur. It may be admitted that the school directors were authorized to incur the debt to pay which this tax was assessed, and under the law of 1855 they also had authority to assess the tax. This authority was conferred by the 59th section of that law, from which the 44th section of the law of 1857 is substantially copied, into which, however, these words are inserted: "*Provided*, that the people vote the same as hereinafter expressed." And yet, in no subsequent part of that law is any provision made for taking a vote of the people upon the tax to be assessed. In this respect the law is no doubt incomplete. When this proviso was inserted, it must have been the intention to make a further provision, more in detail, for

such a vote; but for some reason or other, this was omitted to be done; and the question is, whether we may disregard the provision because no subsequent one was made. Upon this subject we cannot hesitate. By every known rule for construing statutes, we are bound to obey the legislative will, when we find it clearly expressed in a statute which they have a right to pass. Here every circumstance shows that this proviso was deliberately inserted. It is a new provision incorporated into the body of an old law, and clearly expresses that a vote of the people shall be taken upon the tax to be assessed. This intention is as clearly manifested as if the words "as hereinafter expressed," had not been inserted. Some criticism has been made because the word *people* instead of the word *voters* is used. We cannot doubt that this word, as here used, means voters, or the people who are entitled to vote in the district. We feel bound to observe and enforce the provision of this law.

The question then arises, what is to be done if the people refuse to vote the necessary taxes to pay the debts against the district which have been legally contracted. Such a contingency seems to be abundantly provided for by the 49th section of the school law of 1857. That section provides that when a judgment shall be obtained against a school district, it shall be ordered to be paid out of any money belonging to the district not otherwise appropriated; and if there be no such funds, then the court shall order and compel the board, by *mandamus*, to levy a tax for the payment of such judgment. This order of the court is made irrespective of any vote of the people on the subject of the tax, and it may be presumed was designed to supersede any such vote. The law, when taken together, clearly indicates the legislative intention that no tax should be levied, except in obedience to a vote of the people or an order of the court to satisfy a judgment which had been rendered against the school district. It has been said, and perhaps with truth, that it seems like a useless ceremony, and an unprofitable expense, when an acknowledged legal obligation exists against the district, that the directors cannot provide for its payment till the expense of a judgment has been incurred, the costs of which shall be added to the original debt. The wisdom of this it is not for us to vindicate. It is enough to know that such seem to be the provisions of the law which the legislature, in the exercise of a legitimate power, have passed.

The decree of the Circuit Court must be affirmed.

Decree affirmed.

Henry Mahler, Plaintiff in Error, *v.* Phineas Holden, Defendant in Error.

ERROR TO WILL.

Where estray animals are taken up and appraised, etc., in conformity to law, if the owner claims them, he is liable for the costs incurred, as well as for the expense of keeping the animals.

This suit was brought before A. Herbert, a justice of the peace of Will county, March 16, 1855, to recover for the taking up, advertising and keeping certain stray colts of defendant. Demand, $95. Plaintiff obtained judgment for $33.25, and costs, from which defendant appealed to Will County Circuit Court. The cause was tried at December term, 1855, before Randall, Judge, and a jury. The plaintiff proved the following facts:

That some time in the latter part of October, 1854, two colts of the defendant got into the inclosure of the plaintiff (who resides and is a freeholder in the town of Rich, Cook county, Illinois); that plaintiff turned them out and drove them away; that they returned, and got in again the next day, and that then, after making inquiries among the neighbors, and ascertaining that they did not belong in his neighborhood, took up said colts as estrays, and fed, and watched, and took proper care of them until about the 12th of January, 1855. That written notices were seen posted up in three of the most public places in said town of Rich, describing said colts, and stating that they were on the premises of plaintiff, and said notices were signed by plaintiff; that said notices were observed by witnesses at a number of different times during the first half of the month of November, 1854. That on or about the 18th day of November, 1854, said plaintiff obtained three freeholders of said town of Rich to come and look at said colts, who then went before Charles Sauter, who was then the nearest acting justice of the peace in said Cook county, and were by him duly sworn as appraisers, and they appraised said colts, one at $40 and the other at $50. That said plaintiff paid said appraisers fifty cents each for their service, and deposited with the said Sauter some $3.50 or $4 in money, out of which to pay his fees, and the balance for him to send to the county clerk of said Cook county, with the transcript of the proceedings before said Sauter. The worth of the keeping of said colts was proven to be three shillings each per day. And that said defendant sued out of the Cook County Court of Common Pleas a writ of replevin for said colts, against said plaintiff, and that the sheriff of Cook county, on or about the 12th day of January, 1855, by virtue of said writ, took

said colts from the possession of the said plaintiff and delivered them to the said defendant.

Defendant below then proved the making of a demand for the colts when in possession of the plaintiff, and his refusal to deliver up until he had been paid for keeping, etc.

Jury returned a verdict for the defendant below. A motion for a new trial was overruled by the court.

GOODSPEED & BARTLESON, for Plaintiff in Error.

J. MCROBERTS, for Defendant in Error.

CATON, C. J. This action was brought to recover the costs of taking up and advertising, and the value of the keeping of two estray colts. The evidence shows, that after the colts had been regularly taken up, appraised, and notice given, by the plaintiff, the defendant, who claimed to own the colts, replevied them, and refused to pay the costs and value of keeping; and the court instructed that he was not liable. In this the court erred. The statute authorized the plaintiff to proceed as he did, and expressly confers upon him the right to be reimbursed before the owner shall be entitled to take the property. The legislature has the undoubted right to provide for the protection and care of estray property, and impose the obligation upon the owner to pay the expense thereof. But the question here is not whether the owner would be liable, in case he chose to abandon the property rather than pay the charges. The owner replevied the property from the possession of the plaintiff, and he was under both a moral and a legal obligation to pay the expense of taking up, advertising, and for keeping.

The judgment must be reversed and the cause remanded.

Judgment reversed.

WILLIAM LINCOLN *et al.*, Plaintiffs in Error, *v.* THE PEOPLE, Defendants in Error.

ERROR TO TAZEWELL.

Where the witnesses may be mistaken in identifying the accused, by reason of a slight acquaintance with him, and an *alibi* is clearly proven by other witnesses, who give their residence and occupation, so that the truth or falsity of their testimony may be inquired into on another trial, the court will give the accused the benefit of a second trial.

THIS was an indictment, found against David and William Lincoln, for the larceny of a large iron gray horse. The defendants pleaded not guilty.

The testimony in the case was as follows:

John Smith testified that a large iron gray horse was stolen out of his pasture, in Tazewell county, near Groveland, on the night of the 29th of September last.

A. J. Davis. Had a horse stolen the same night—a strawberry roan.

B. G. Roe. Was slightly acquainted with the defendants. I saw them in Groveland, Tazewell county, on the 29th of September, 1857—that I supposed to be the defendants. I was not then acquainted with them. They were there the evening before the horses were stolen. Hinman and I were in the street. The men I have spoken of came up to Hinman and made some inquiries—I do not know what. I cannot say how they were dressed; think they had on dark clothes; one had a drab hat, the other a cap. They went south, on foot. I saw William Lincoln at the examination, and recognized him as one of the men I had seen at Groveland. I also recognized Joseph Lincoln as one of the same.

George Hinman. I think I saw these defendants in Groveland the night before the horses were stolen. One of them asked me if I knew of any person that wanted to hire hands, and showed me a paper with name of Brown upon it. I told them I could show them where Brown lived, but they said it was too late to go there that night. They were dressed in black, I think. One had whiskers, the other had not. I had no acquaintance with the defendants. I do not know that I ever saw either of them before I saw them in Groveland. I saw William Lincoln at the examination, and saw Joseph Lincoln on the side-walk. I recognized them both as the same men I saw in Groveland the night before the horses were stolen.

John Griffith. I saw the defendants at my house, in Groveland, the evening before the horses were stolen. They stopped but a few minutes. I saw William at Greely's, at the examination, and recognized him as one I had seen at Groveland. I never saw the other man until I saw him at court. They were dressed in dark clothes. I never knew either of the defendants before I saw them at Groveland.

Robert Samuels, sworn. Said he resided in Bath, Mason county. Did not know the defendants. Saw a couple of horses, of the description mentioned, pass through Bath some time about the last of September, 1857. There are two persons here answering the description of the persons having the horses. I believe the defendants to be the same persons. I think I saw

Joseph, a year ago, in Havana; he looks like the same man. One horse was a strawberry roan, one a large iron gray. They rode past my house in a walk. I had never seen them before. Both had on dark clothes. I only saw them as they passed. I think they are the same men, but am not certain.

Henry Welch. I live seven miles below Bath. I saw two horses, ridden by two men, about the 1st of October, 1857. One was an iron gray horse, the other a strawberry roan. The horses bore the description given by the witnesses. I do not know the men; they were dressed in black. The defendants look like the same men, but I am not certain; was not nearer then forty yards to them.

Moses Dooley, called for defendants. I live in Mason county, about five miles north-east of Havana. I know Joseph Lincoln. I saw him first the 26th of September, 1857. On the 29th and 30th of September, I hired him to help me cut corn that I had agreed to cut for Jacob S. Brown. He staid at Jacob S. Brown's from the 26th of September till the 5th of October. He was at my brother's sale, with me, on the 1st day of October. I know it was the 26th he came there, because my brother's sale was on the 1st of October. I slept with him every night he was there. I have lived in Mason county thirteen years. I have never talked with the defendants or their counsel.

Jacob S. Brown, sworn on the part of the defendants. I have known the defendants since they were children. Joseph Lincoln came to my house on the 26th of September last, and staid there about ten days. He was there every day and night. The defendants came to this State about three years ago. Witness' wife was a relation of defendants.

W. R. Phelps, for the people. I was living at Moscow, in Mason county, in September last. About a mile below that place, about the 1st or 2nd of October last, I saw two men come into the road ahead of me, one riding a roan horse, the other an iron gray; the largest was riding the gray. Defendants look like the same men.

Amos Smith, sworn. I do not know the defendants. I saw William Lincoln in Jersey county in November. He had whiskers on then. I arrested him. He was very anxious to get shaved.

The jury found the defendants guilty. The defendants moved for a new trial, which was overruled, to which the defendants excepted.

James Roberts, and A. L. Davison, for Plaintiffs in Error.

W. Bushnell, District Attorney, for the People.

CATON, C. J. We think this case should be submitted to another jury. The witnesses who express the opinion that the persons whom they saw at Groveland on the occasion before the horses were stolen, and express the opinion that the prisoners are the same persons, had no previous acquaintance with them, and had never seen them before, and might have been mistaken in their identity; and those who saw the persons riding the stolen horses, had less opportunity of observing them, and were still more likely to be mistaken. On the other hand, the witnesses, Dooley and Brown, who prove the *alibi*, could not possibly be mistaken in what they swore to. Unless their testimony is all unmitigated perjury, the prisoners are not guilty. These witnesses give their residence and occupation, and state circumstances, which, upon another trial, will enable it to be shown whether they have told the truth or a falsehood. We think that safety and justice require that the cause should be again tried.

The judgment must be reversed and the cause remanded.

Judgment reversed.

WILLIAM HARWOOD, Plaintiff in Error, *v.* JOHN W. JOHNSON and GEORGE H. KIERSTED, Defendant in Error.

ERROR TO MORRIS COUNTY COURT.

Where a party has disposed of property, being misled by the false pretenses of the purchaser, and has taken a note for the payment, and is about to reclaim it from the vendee, if a third party, upon being informed of the facts, puts his name to the note as security, two days after it was given, by reason whereof the property is not reclaimed, such third party will be liable in an action on the note.

SUMMONS issued Oct. 20th, 1856; summons returned by sheriff, served by reading the same to George H. Kiersted, Oct. 20th, 1856, and that John Johnson was not found.

The declaration was on a note, dated February 16th, 1856, executed by defendants, and payable to plaintiff, for one hundred and twenty-five dollars, with use.

There was a count for goods sold and delivered; for money lent and advanced to, and paid, laid out, and expended for defendant; for money had and received to and for the use of the plaintiff.

Plea, non-assumpsit, by George H. Kiersted, and similiter by plaintiff.

Jury find a verdict, no cause of action; motion by plaintiff to set aside verdict, and for a new trial,

1st. Because the verdict is against the evidence.

2nd. Because the verdict is against the instructions of the court, on the part of plaintiff.

3rd. Because of the instructions given by the court to the jury, on part of defense, and objected to by plaintiff.

This motion was overruled by the court, and the following bill of exceptions was thereupon filed:

And now, to wit, March 3rd, A. D. 1857, this cause came on to be tried before the court and a jury, and the plaintiff gave in evidence a note, in the words and figures following:

Morris February 16, 1856

on or Befour the tenth Day of March next Eye Promis to Pay to William Harwood or order one hundred and twenty five Dollers for Value Rec with use.

JOHN W JOHNSON

Security Geo H Kiersted.

Here the plaintiff rested his case.

The defendant then called *William T. Hopkins*, who testified that he never saw the note; that Teter asked him if he (Hopkins) had sold a farm to Johnson; told him no; told him Johnson did not own the farm he lived on; that it was a farm he rented of him (Hopkins); Teter then said Harwood had sold Johnson a horse; that Johnson had said he owned a farm; told Teter that Johnson was not good for the horse; that he was preparing to go away. This conversation was on Monday, February 18th, 1856; the horse was sold on Saturday previous. Harwood was present, and said he had sold a horse to Johnson for $125, on his representing that he was worth a farm and horses; said he had delivered the horse, and think he said he had taken the note; the note corresponds with the price; told Harwood Johnson had obtained his horse through fraud, to go and give up his note and take his horse; that whilst they were talking, Johnson came into town with a team; told Teter and Harwood to go and take the horse; they started after Johnson, and soon returned and said they had fixed it; that Kiersted had gone security on the note; that his impression is it was on Monday; bought the horse of Johnson the same day; think Teter consulted him on Saturday or Sunday previous, but his recollection is indistinct.

Cross-examined. Knew Johnson two years before the note was given; he had no interest in the "Le Bar" farm; it was owned by Butler; one hundred acres of the farm were improved; Johnson had no contract for the purchase of the farm, and he never paid anything on it; was the agent of Butler; superintended the renting of the place; Johnson rented it; John-

son owned no land to his knowledge; knew his circumstances; if he had owned any, should have known it; leased him the Le Bar farm; Johnson had some horses, think three; they were mortgaged to Reading and Hopkins, to secure them on a bond signed by them to Stone Petersen; the mortgage was as much, or nearly as much, as the horses were worth; Johnson had no other property that he knew of; advised Harwood to go and take the horse where he might be found, and if they could not get him, would have a writ of replevin issued for him; Johnson's lease of the Le Bar farm had expired at the time of the sale of the horse.

Examination in chief resumed. Told Harwood Johnson was about to run away; that he was giving his notes and getting property; Johnson left the county about the 10th of March, 1856; has not returned since.

George Brady, called and sworn on part of the defense, said, he remembered a conversation between Harwood and Kiersted about a year since; that Kiersted called to him to note a remark made by Harwood; Harwood admitted that he knew Johnson was going away for some time previous; Kiersted said he was not treated fair, he ought not to pay the note; if he had known Johnson was going away, he could have detained him; nothing was said about the signature; did not know whether Harwood said he had told Kiersted Johnson was going away; did not recollect that Harwood claimed to have told Kiersted that Johnson was going away; Kiersted claimed in the conversation that Harwood knew Johnson was going away, and did not inform him of that fact.

Cross-examined. Paid no attention to the conversation until my attention was called; they were in his store; was attending to the business of his store; heard nothing until his attention was called; they were disputing—talking loudly and excited; that Harwood might have asserted some things and he not have heard them; it was a busy day; they were put out with each other and excited; only heard what Kiersted called him to note; heard nothing afterwards; paid no further attention.

The plaintiff then called *John W. Teter*, who testified, that he was present when the note was given; that it was in his hand-writing; the parties came to his house, Saturday, after dark; Johnson asked him if he would write him a note for Harwood; Johnson said he had bought his (Harwood's) mare; that Harwood was no scholar; Harwood then said that he was about to sell Johnson his mare, but did not know whether he would let him have her or not; that he did not know him; that he (Teter) felt interested for Harwood, who was a poor, and honest, and industrious man, without education, and called on

him generally to do his business for him; asked Johnson about his responsibility; he said he had bought the Le Bar farm; that he had paid $2,500 for it; said he owned three other horses, and wanted this to make up a team, as there was one hundred acres broke on the farm, and it would need two teams; said he had four or five head of cattle; that he had 600 or 1,000 bushels of corn on hand, but did not want to sell it until he could get a better price; that he expected to get the money to pay for the mare from his father-in-law, and therefore wanted ten days longer on the note; that he (Teter) then wrote the note and handed it to Johnson, and he handed it to Harwood; Johnson said he always paid his notes when due, and this we could learn from Hopkins and Bishop, in Morris; that Harwood recently came to him (Teter) to attend to his business; wrote most of his letters; saw Harwood give the horse to Johnson; came to town with Harwood on Monday morning; called on Hopkins for the purpose of ascertaining about Johnson's responsibility; went to Hopkins alone; asked him whether Johnson had bought the "Le Bar" farm; he replied, no, that the farm was sold to some man in New York; that Johnson had no horses; that Johnson had two or three horses, but they were mortgaged to Reading & Hopkins; that Johnson owned no cattle; that he had the use of a cow owned by him (Hopkins); that Johnson owned no corn, but had been stealing his (Hopkins') corn, and selling it in Morris; told Hopkins of the bargain between Harwood and Johnson; Hopkins said, go and take the mare, Johnson is going to run away; went on the street; met Harwood; told him what Hopkins had said; Johnson came along with a team; had the mare in it; went to him, and Harwood said to him that he wanted his horse; that he had got him under false pretenses; Harwood was very angry; that he (Teter) then said to Johnson, Harwood wants his mare, as you have obtained her by false pretenses; Johnson asked him who said so; told him Hopkins; Johnson then said if Harwood was not satisfied, he would give him security; told him that Hopkins said that he (Johnson) did not own the Le Bar farm; he said he had bought it, and paid $500 on it; that he wanted Harwood satisfied; went with Johnson down street, to hunt Kiersted; found him in Ross' grocery; Johnson asked Kiersted to go on his note; Kiersted said he would; Johnson then told him what Hopkins had said about his (Johnson's) responsibility, and being the owner of property, and of his being about to run away, as it had been told to me by Hopkins, as before stated; Kiersted replied that Hopkins was a damn'd liar, and was trying to injure Johnson; Johnson then left; that he (Teter) then told Kiersted what Johnson had said about buying the "Le Bar"

farm; that Kiersted told him to ask Johnson about it when he came back; told Kiersted that Hopkins said Johnson did not own the farm; when Johnson returned, asked him whether he had bought the "Le Bar" farm and paid $500 on it; this was in the presence of Kiersted; Johnson said he had bought it, and had paid $500 on it, and had a better right to it than Hopkins, or any other man; Kiersted then said that he had signed a note for Johnson for $140, and that Johnson had paid it, and that he (Kiersted) would sign this; told Kiersted that Harwood was not going to let Johnson have the horse in this way; Kiersted replied that Johnson was good, and Hopkins was trying to injure him, and he would sign the note, and Harwood had better let Johnson keep the horse; Kiersted said Hopkins was saying these things to injure Johnson, and that Johnson was as good as Hopkins; this conversation was at the time Kiersted signed the note; Harwood let Johnson retain the horse; saw Hopkins have the horse afterwards.

Cross-examined. Drew this note for the parties on Saturday; it was then delivered by Johnson to Harwood; the horse was delivered by Harwood to Johnson the same day; the talk with Hopkins, Johnson and Kiersted was on Monday; Johnson said to Kiersted, "don't you think the rascal Hopkins says I am going to run away;" Harwood told Johnson that he would have his horse or the pay for it; that he (Teter) had stated all the agreement there was about it. Here the testimony closed on both sides, and which was all the testimony in the case.

Instructions on the part of the plaintiff, and given by the court:

1st. That the note sued upon, and given in evidence in this case, is a joint and several note, and although it shows upon its face that Kiersted is only the surety, that that does not alter the form of the instrument, and that, by the form of the promissory note given in evidence, each of the signers, John Johnson and George H. Kiersted, is liable as an original promissor, and the action is well brought against them as joint makers.

2nd. That although the jury may believe, from the evidence, that the plaintiff Harwood was, in good faith, and believing that he had a right so to do, about to replevy the horse, for which the note was given, or personally to take possession of him and rescind the contract; and that, in consideration that Harwood would permit Johnson to retain possession of the horse, Kiersted signed the note; and that, in consideration of Kiersted's signing the note, Harwood did permit Johnson to keep the horse, the consideration was sufficient to bind Kiersted for the amount specified in the note.

3rd. That although the jury may believe, from the evidence, that Kiersted signed the note a couple of days after it had been signed by Johnson, yet the parties to the note had a right to put it into such a shape, in reference to the date, as they saw proper, and might agree that Kiersted's liability should relate back to the date of the note, and that agreement may be as well implied from all the circumstances in proof, in reference to Kiersted's signing the note, as though it had been by express agreement, provided that the jury are satisfied that such was the intent of the parties.

4th. That if the jury believe, from the evidence, that Harwood gave to Kiersted, at the time, or immediately before Kiersted signed the note, all the information in reference to the ability of Johnson to pay, as well as all the information he had in reference to Johnson's honesty and integrity, and the intentions of the said Johnson, the law is for the plaintiff, and Kiersted cannot avoid the payment of the note by alleging fraud practiced upon him by Harwood, in withholding information.

5th. That the evidence given by the defendant, in reference to the time that Kiersted signed the note, was let in to the jury for the purpose of showing the consideration of Kiersted's signing the note, and not to change the form of the instrument, for the form of the instrument cannot be changed by parol testimony, and if Kiersted is liable upon the note, the action is well brought against him and Johnson jointly.

6th. That if the jury believe, from the evidence, that Johnson stated to Harwood, at the time that the contract was made for the horse, for which the note was given, that he (Johnson) had bought a farm, called the "Le Bar" farm, on which he had paid $500, and which he still held, and that in addition to that, he was the owner of several head of horses, and that the statement so made by Johnson was false; and if they further believe, from the evidence, that Harwood, at the time the horse was sold, relied upon the statements of Johnson as to his ability to pay, the false representations thus made to Johnson were a fraud upon Harwood, and gave him the right to rescind the contract.

Instructions on the part of the defense, but objected to on the part of the plaintiff: objection overruled, and plaintiff excepted.

1st. If the jury believe, from the evidence, that the note offered in evidence by the plaintiff was not signed as security by the defendant Kiersted, contemporaneous with the time it was executed and delivered to plaintiff by Johnson, and not until some days after the original transaction and delivery of the note, Kiersted would not be liable, unless some new and valid consideration be proved.

2nd. That the original consideration of the note would not support the promise of Kiersted, unless the jury believe, from the evidence, that Kiersted signed the note at the time of the original transaction and execution of the note.

3rd. If the jury believe, from the evidence, that the consideration for which Kiersted signed the note was that the plaintiff would not commit a trespass upon the property or person of Johnson, such consideration is not legally binding.

4th. That an agreement to forbear a suit must be mutually understood, agreed upon in terms, and binding, to support a consideration of guaranty, and, therefore, if the jury believe, from the evidence, that no suit of any kind was mentioned or agreed to be forborne by Harwood against Johnson at the time Kiersted signed the note, and that such signing was done after the original transaction and delivery of the note between Johnson and Harwood, then it is not competent for the plaintiff to set up the forbearance of Harwood to sue Johnson in support of the new consideration.

The County Court gave judgment for costs against the plaintiff in the court below.

This cause was argued at the previous term, when the following opinion was prepared by Mr. Justice SCATES, but was withheld from record. The opinion has been adopted by the justices at the present term, as their opinion and judgment.

SEELEY & BAUGHER, for Plaintiff in Error.

S. W. HARRIS, for Defendants in Error.

SCATES, J. Promises and agreements, as between the parties, to be binding, must be made upon a legal consideration.

And this consideration is equally necessary to support the promise of mere sureties and guarantors. Where the original agreement is that sureties shall sign it, and a guaranty be given, the original consideration between the parties will support the promise of the surety or guarantor. *Camden et al.* v. *McKoy et al.*, 3 Scam. R. 441; *Klein* v. *Currier*, 14 Ill. R. 237; *Neelson* v. *Sanborne*, 2 N. Hamp. R. 413; *Bailey* v. *Freeman*, 11 John. R. 221; *Wheelwright* v. *Moore*, 2 Hall R. 148; *Flagg* v. *Upham*, 10 Pick. R. 147.

Guaranties, being collateral undertakings for the debt of another, should not only be in writing to be binding under the statute of frauds, but, according to the English rule laid down on this subject, the consideration as well as the promise must be expressed in the writing. *Main* v. *Warlters*, 5 East R. 10;

Saunders v. *Wakefield*, 4 Barn. and Ald. R. 595; *Jenkins* v. *Reynolds*, 3 Brod. and Bing. 14.

But this has not been followed in many of the States—parol evidence being admitted to show the consideration. *Packard* v. *Richardson*, 17 Mass. R. 122; *Leonard* v. *Vredenburgh*, 8 John. R. 29; *De Wolf* v. *Raband et al.*, 1 Pet. R. 501.

Still, whether the consideration be in the writing signed by the surety or guarantor, or be shown by parol evidence, the original consideration between the parties, with some exceptions introduced by statute, as when further security is given by an officer, an administrator or guardian, as in *Ammons* v. *The People*, 11 Ill. R. 7, will not support the promise of one who subsequently signs the obligation as surety or as a guarantor. A new consideration must be shown. *Clark* v. *Small & Brown*, 6 Yerg. R. 418; 8 John R. 29; *Tenny* v. *Prince*, 4 Pick. R. 385; *Same* v. *Same*, 7 Pick. R. 242.

That consideration may be a subsisting legal obligation to do the same thing promised, or a moral obligation to discharge an old legal one not enforcible, *Cook* v. *Bradley*, 7 Conn. R. 57; or some matter of advantage to the promissor, or the debtor, or of detriment to the promissee—as forbearing suit, or other legal remedy or redress—Chit. on Cont. 35 to 38—whether commenced or not—id. 36 a; the waiver of a legal right at the request of another, id. 33, note 2; or the waiver of a tort, and with agreement to prove under a bankruptcy. *Brealey* v. *Andrew*, 2 Nev. & Perry R. 114; S. C. 7 Adol. & Ellis R. 108. And a guaranty may have a retrospective operation, so as to embrace debts already contracted, where it clearly appears that such was the intention of the parties. *Abrams* v. *Pomeroy et al.*, 13 Ill. R. 133.

Tested by these principles, and there appears ample evidence to sustain the promise of defendant on signing this note as surety, though signed a day or so after its execution by Johnson.

There can be no question that he obtained credit for the mare, and induced plaintiff to take the note, by false and fraudulent representations, proved be to such by the very person to whom he referred plaintiff to sustain his credit and coroborate his statements.

Upon making discovery of this fraud, and being informed of Johnson's intention of leaving the country, plaintiff determined to rescind the contract for the fraud, and reclaim his mare. This he immediately proceeded to do, charging Johnson with the fraud and design of leaving as he was informed. Johnson proposed to give security—when defendant, on being informed of all these circumstances, agreed to and did become his surety, declaring that it was not true, and was intended to injure John-

son. We cannot doubt plaintiff's intention and right to redress his wrong, and that he would have done so but for the interposition of defendant, and that defendant interposed with a view to arrest that course, with a full knowledge of all the facts. Plaintiff's forbearance to pursue his redress while in his power, would cause him the loss of his mare, if not permitted to enforce the promise upon faith of which he relied.

This state of things was manifest from all the circumstances of what was said and done, and needed no agreement in terms to be mentioned, as declared in the last instruction for defendant. We think the instruction erroneous, and calculated to mislead the jury, by impressing upon them the idea that the facts showing an intention to bring suit, and a forbearance to do so, must appear by express agreement. It may appear by implication from the circumstances, the declarations and acts of the parties, as well as by agreements.

We can lay no stress upon the want of a formal offer to return the note at the time plaintiff reclaimed the mare.

We think the jury have clearly mistaken the rights of the plaintiff, and the liability of the defendant, under this evidence, and that a new trial ought to be granted.

Judgment reversed and cause remanded for a new trial.

Judgment reversed.

We concur in the judgment reversing the judgment below, and in the opinion.

O. C. Skinner,
J. D. Caton.

The Michigan Southern and Northern Indiana Railroad Company, Appellant, *v.* Justin Day, Junior, Appellee.

APPEAL FROM COOK.

Where a box, shipped at Adrian for Chicago (the usual railroad time of transportation being three days) on the twenty-ninth October, arrived at Chicago on the third of November, and was not delivered by the freight agent until the fifteenth of the latter month, this will be considered so unreasonable a delay as to entitle the owner to damages.

Where the agent of a railroad company for the delivery of freight, authorized to make all necessary arrangements as to the time and place of its delivery, agrees to forward freight by another company, or by a line of boats, if this agreement is neglected, the railroad company will be liable.

Where it is the custom of a railroad company to receive the directions of shippers and owners of goods to be sent beyond the terminus of their road, if directions are given to forward by a particular line, which are not obeyed, the railroad company will be liable.

Shippers and owners of goods have the right to control their destination; and if their directions are obeyed, no responsibility for loss is incurred.

The employment of an agent, by a railroad company, to deliver all freights, necessarily includes the authority to make terms for its delivery at or beyond the terminus of the road.

THIS was an action of assumpsit, alleging a contract to carry a box from Adrian to Chicago, the box containing certain goods of the value of $3,000. There was a second count, same as the first, except that it alleges that the appellant undertook to deliver the goods in Chicago in three days from the date of the receipt for the box. There was a third count, averring a promise to deliver the box in a reasonable time. To this declaration the general issue was pleaded. There was a trial before MANIERRE, Judge, and a jury, and a verdict and judgment for the appellee, for eight hundred and twenty dollars.

N. B. JUDD, and F. WINSTON, for Appellant.

H. B. HURD, for Appellee.

BREESE, J. This is an action of assumpsit, by Day against the M. S. and N. I. Railroad Company, as a common carrier, on a contract, as alleged in the first count of the declaration, to carry a box, containing certain goods and merchandize, from Adrian to Chicago. The second count alleges that the defendant undertook to deliver the goods in three days from the date of their receipt, and in the third count, to deliver in a reasonable time, with breaches assigned.

Trial, and verdict and judgment for the plaintiff, and motion for new trial, which being refused, the evidence was preserved by bill of exceptions, and the case brought here by appeal.

The errors assigned are: first, admiting improper evidence on the part of the plaintiff; second, overruling appellant's objections to the testimony offered by the plaintiff; third, giving the instructions asked by the plaintiff; fourth, refusing and modifying the instructions asked by the defendant; and fifth, overruling the motion for a new trial, and "in every other step taken and opinion rendered from the beginning to the end of the trial."

We may remark here, that the portion of the fifth error assigned, marked by inverted commas, is wanting in that respect to the court, trying the cause, which every member of the bar should show toward it, when complaining of its judgments. It amounts to a wholesale denunciation of the court, and cannot be permitted without the censure and rebuke of this court. It ought to be known, that errors, which are relied on to reverse a

judgment, should be specially assigned, and no general statement, involving censure of the court, can be tolerated.

The second error assigned, is embraced in the first, so that we have to consider only the first, third, fourth, and the unexceptionable portion of the fifth assignment.

It will not, however, under the view we take of the case, be necessary to consider particularly the errors as they are assigned, inasmuch as on the argument of the cause, one important question only was presented, and urged upon our attention, and that is, "did the railroad company make a proper delivery of the goods?"

It is urged on the part of the appellant that there was no delay in their delivery, they having been shipped at Adrian on the 29th of October, arriving at Chicago on the 3rd of November, and delivered by the freight agent on the 15th of that month.

We think, considering the distance between the two points, and the time they were received, a delay of twelve days before their delivery, was unreasonable, and would subject the company to damages on that score, if no other. Where, in case for the non-delivery of a parcel in a reasonable time, it appeared that the parcel in question, had been delivered to the defendant, in London, on the 8th of August, addressed to the plaintiff, at Birmingham, where it should have arrived on the 10th, but did not arrive until the 3rd or 4th of September, it was held upon this evidence, that the plaintiff was entitled to recover. *Raphal* v. *Pickford*, 6 Scott New R. 478. But it is said, if the delay was unreasonable, the railroad company is not liable as carrier, but only as warehouseman or factor, and should be declared against as such; that its contract to carry terminated when the goods reached Chicago, and that the direction by their owner to deliver them to a particular packet line, and the agreement to do so by the agent of the company, is a new contract, which the agent had no authority to make to bind the company; that so soon as the owner of the goods interposed his directions, the common law liability of the company ceased on the arrival of the goods at Chicago.

On this proposition this controversy depends, and raises the question, "was there a proper delivery of the goods?"

H. L. Kingsbury states in his testimony, that he, as agent of Day, the owner, delivered a written order to Smith, the freight delivery agent of the company, to deliver the goods at the "Red Bird" packet office, whence they were to be shipped to La Salle; that Smith made a memorandum of the order in his book, and engaged so to deliver them, and this before it was known that the goods had arrived at Chicago.

Gilbert Roseter states, and so does James Turner, that it was the custom of the appellant to forward goods that were marked to go forward; that in such cases they were delivered by the agents of the company to forwarders, to be sent to their destination, and goods that were directed to merchants in the city, who were known to the company, were delivered to them at their stores. They concur in stating, that Smith was in the habit of taking orders from persons to whom goods were marked, at Chicago, to deliver them at the desired places, to be forwarded.

This was the course of business adopted by this company, and from the testimony we should infer it was their uniform practice.

The appellant seems to be under the impression, that the contract with Smith was to forward the goods, and there being no count in the declaration on such an undertaking, the court should have instructed accordingly.

It will be borne in mind, that the declaration counts upon a contract to carry and deliver the goods, and by the contract the company was bound to deliver them at Chicago, as the owner might direct, if such direction was within the usual course and custom of the business of the company, or within the general custom of roads terminating at Chicago. On this point, we have adverted to the proof, which is quite satisfactory, that Smith was the agent of the company, for the delivery of all freight arriving at Chicago, from their road, and was authorized to make all the necessary arrangements in regard to their delivery, both as to place, and to the manner of their delivery.

It is laid down as an universal principle, that whether the agency be of a special or general nature, that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the ends and objects of the agency. Story on Agency, sec. 85. And if the agency arises by implication from numerous acts done by the agent, with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of the like nature. Ib., sec. 87. Paley on Agency, 209, 210.

The employment of Smith, therefore, to deliver all freights, necessarily includes the authority to make terms in regard to the delivery—to undertake to deliver them to a particular person, or at a particular place, within the place to which they are directed. Smith acting within his powers, as agent of the company, as he had been in the habit of acting, and as the nature of the business in which he was engaged required he should act, and as the law made it his duty to act, the only remaining question of importance is, are common carriers bound to obey the instructions of the shipper, or owner of the goods, in regard to their delivery?

The undertaking of a common carrier to transport goods to a particular destination, it is said, necessarily includes the duty of delivering them in safety, and his obligation to deliver safely can only be avoided by the act of God or the public enemy. It is not sufficient that the goods be carried safely, but they must, and without any demand upon the carrier, be delivered, and when his responsibility has begun, it continues until there has been a due delivery. Angel on Carriers, sec. 282.

So it is held, sec. 281, if a carrier is instructed by his employer to deliver goods on board of another vessel for a continuance of the transportation, and the goods are lost on board such other vessel, he is not responsible if he has safely placed them on board such other vessel, as, by so doing, his character as common carrier has ceased.

The doctrine pervades the books, that the instructions of the owner or freighter must be obeyed as to the delivery, and if they do obey them in good faith, they are released from liability.

In 8 Cowen R. 223, *Ackley and Gray* v. *Kellogg et al.*, common carriers, who received goods to transport from New York to Troy, and at the latter place transferred them, pursuant to instructions from the bailor, on board a canal boat bound for the north, and the goods were lost by the upsetting of the boat, were held not to be liable, that their character as common carriers ceased at Troy, and that having taken proper care that the goods were safely put on board the canal boat, they were not responsible for the loss. So where the master of a vessel is directed to tranship, or deliver on board another vessel, a delivery on board such other vessel is the termination of the duty of a common carrier. *Van Santwood* v. *St. John*, 6 Hill's R. 158.

The case shows, that the direction of the freighter or owner must be obeyed to the letter, and if obeyed, no responsibility for loss is incurred.

A case running on all fours with this is reported in 18 Eng. L. and Eq. Reports, arising in the Court of Exchequer, 554—557, *Scotthorn* v. *The South Staffordshire Railway Company.* It appeared on the trial of the cause, that the plaintiffs, who had been engineers carrying on business near "Great Bridge" in Staffordshire, having resolved to emigrate to Australia, had purchased a variety of articles necessary for the undertaking, and one of them had come up to London to take his passage by the ship Melbourne. Before doing so, however, he delivered the goods in question, packed, and labeled "Scotthorn & Co., to the East India docks, passenger ship Melbourne, Australia," to his brother-in-law, to be forwarded to London. The goods were

accordingly sent to the Great Bridge station of the South Staffordshire Railway, and one pound paid for their conveyance to London. By the practice of the S. S. Railway, all goods received at that station are forwarded as far as Birmingham by their own line, and for the rest of the journey by the London and North-Western Railway.

Before the goods arrived in London, Scotthorn having found that no berths could be obtained in the Melbourne, called at the Easton station and left with a clerk in the office, a receipt which had been given for the goods, having previously written across it, "Send the boxes, &c., to Scotthorn & Co., engineers, Bell Wharf, Ratcliffe Highway, London. George Scotthorn." The clerk promised that the fresh direction should be obeyed, and on being asked, said that no additional charge would be made. The goods were, however, taken to the Melbourne, carried to Australia, and lost to the plaintiff.

On these facts it was contended by the company that there was no evidence to support the contract in the declaration, and the judge left it with the jury to say whether the clerk at the Easton station had authority from the company to receive the countermand given, and directed them, if they thought he had, to find for the plaintiff; at the same time reserving the right to the defendants to move to enter a non-suit. The jury found for the plaintiff, and defendants having moved for a rule to show cause why a non-suit should not be entered, after argument for and against, the court discharged the rule.

Baron Alderson said, "the whole question is, what was the contract between the parties? And that actually amounts to a question of fact. Now there is abundant evidence to show that the contract was as stated in the declaration, to carry according to the directions of the plaintiffs. It is very true that originally, when the defendants were put in possession of the goods, the orders were to take them to the East India docks; but before their arrival in London, the plaintiffs having changed their intentions, communicated that change to the agent of the defendants in London, who had authority to deliver the goods. The altered directions were, 'Do not send the things to the place marked on the outside of the packages, but transmit them elsewhere.' The question is not, whether the clerk had power to make a new contract on behalf of the defendants; it is enough that he was told not to send them according to the written directions. By some neglect, the instructions were not obeyed; the articles are sent to Australia and lost. Then, have the defendants performed their contract? I think there was ample evidence to go to the jury to show that they have not, and that

the verdict is therefore right." In this view the other Barons, Platt and Martin, concurred.

It being in proof that it was the custom of this company to receive the directions of shippers and owners of goods to be sent beyond Chicago, and to follow those directions, and deliver as directed, if they had delivered the goods to the "Red Bird" packet office, as they had agreed to do, and they had been lost or damaged, the company would not have been liable, except for the delay in delivering. Without any authority whatever, and contrary to the express understanding of the agent, Smith, the goods were delivered to another and different line. There is, therefore, no delivery according to the contract, as the jury have found, and we think correctly.

No objection is perceived to any of the instructions given by the court, coming up, as they do, to the views here expressed.

When the great changes in the course of business, which railroads have introduced, are considered, the importance of well defined rules as to their duties and obligations to the public is so very obvious, that nothing need be said on that head. These modes of conveyance have now nearly all the passenger business, and a large proportion of the freights, and are now so connected with the business and affairs of life as to be indispensable; and whilst the courts will not feel it their duty or right to hold them liable beyond the clear and well defined boundary of a just responsibility, up to that they will be held, and a reasonably strict performance of all their contracts required of them.

Holding as we do, on principle and authority, that a contract to carry is not performed without a delivery, and that the responsibility of carriers does not cease until there is a delivery, and that they are bound to obey the directions of shippers and owners of freight as to its delivery, within the limits we have prescribed, we can see no ground for disturbing the judgment in this case, and accordingly affirm the same.

Judgment affirmed.

John Conner *et al.*, Plaintiffs in Error, *v.* The People, Defendants in Error. The Same *v.* The Same, and The Same *v.* The Same.

ERROR TO McLEAN.

A *scire facias* upon a recognizance should aver that the recognizance had been returned to, and made matter of record, in the Circuit Court; also, that there had been a judgment of forfeiture against the defendants.

Conner et al. *v.* The People. Same *v.* Same. Same *v.* Same.

The *scire facias* takes the place, in this State, of a summons and declaration, and should show every allegation necessary to a recovery.

THE facts in these cases are precisely similar. The judgments were rendered by DAVIS, Judge, at the September term, 1856.

At the April term, 1855, the grand jury presented an indictment against John Conner, to the McLean Circuit Court, then in session, and on same day a capias issued, which was returned "not found."

And on the 24th of April, 1855, an alias capias issued, which was returned "Executed by arrest of Conner, and his discharge by executing bond in penal sum of $200, with Patrick Ryan and Daniel Kinney as securities."

At the September term, 1855, a forfeiture of said bond or recognizance was declared, and a *scire facias* ordered to be issued, and in February, 1856, a *scire facias* issued out of the clerk's office of said court to the sheriff of McLean county to execute, and returnable on the first Monday in April following. Said writ of *scire facias* was returned executed on John Conner and Patrick Ryan. Daniel Kinney was "not found."

At the September term, 1856, final judgment was rendered on said bond or recognizance against John Conner and Patrick Ryan, for the sum of $200 and costs; and upon the record of said proceedings, plaintiffs assign the following errors:

The said *scire facias* does not show that the bond taken by the sheriff was returned to the court, filed, or in any way made part of the record.

The *scire facias* fails to show that the recognizance was declared forfeited.

SWETT & ORME, for Plaintiffs in Error.

W. BUSHNELL, District Attorney, for the People.

WALKER, J. The record in these cases present for our consideration the same questions, and will be determined together in this opinion. There was in each case a writ of *scire facias* sued out of the McLean Circuit Court against defendants, to recover the amount of a recognizance entered into for the appearance of Conner to answer to indictments previously found in that court against him. The court rendered in each case a judgment by default against the defendants for the amount of the recognizance, and to reverse these judgments they bring these cases to this court. These writs were each substantially defective, in not averring that the recognizance had been returned to, and had become a matter of record in the Circuit

Court, before the writs of *scire facias* were sued out. This was essential, and until the recognizance becomes a record, there can be no proceeding had to fix the bail or recover a judgment, and there must be an averment or recital of that fact. This is the established doctrine of this court. *Noble* v. *The People*, 4 Gilm. R. 434; *Bacon* v. *The People*, 14 Ill. R. 313. These writs were also defective in failing to aver that there had been a judgment of forfeiture against the defendants. *Thomas* v. *The People*, 13 Ill. R. 696; *Kennedy* v. *The People*, 15 Ill. R. 418. The averment that the principal cognizor had failed to appear, as had been suggested by the People's attorney, was not an averment that there had been a judgment of forfeiture. There was no averment that the defendants had been called and defaulted, or any steps taken to fix the bail. Under our practice the writ of *scire facias* supplies the place of both the summons and declaration, and should contain every material allegation, to show a right of recovery, and without such averments it is insufficient to support a judgment. The writs in this case were not aided by copying into the transcript the orders in the original proceeding, as they were not copied into the writs of *scire facias*, and form no part of the record in this case. The judgment of the Circuit Court in each of these cases should be reversed, and the causes remanded, with leave for the People to amend their writs of *scire facias*, and for further proceedings.

Judgments reversed.

George Reeves, Appellant, *v.* Trueman Eldridg, Appellee.

APPEAL FROM WARREN.

Where a case is referred by order of court to arbitrators, who by the order were directed to seal their award and file it in court, etc., and the clerk swore the arbitrators, and notified them to take upon themselves a general submission, which they did, of all matters; Held, that the arbitrators were only a special tribunal for the matters litigated by that suit, that they should have notified both parties of the time and place of hearing, and that the award was bad.

The facts of this case are fully stated in the opinion of the Chief Justice. The cause was heard before Thompson, Judge, at March term, 1857, of the Warren Circuit Court.

Goudy & Judd, for Appellant.

Paine & Wead, for Appellee.

CATON, C. J. The appellee sued the appellant, in the Warren Circuit Court, in assumpsit, counting on a special contract in writing, by which Reeves agreed to build a house for Eldridg, and an account for building materials, money, labor, etc. Declaration was filed 31st March, 1856; no pleas filed.

At the September term, 1856, by the consent of the parties, the cause was referred to Thompson Brooks, A. S. Smith, and William Ward, as arbitrators, for their adjudication, with the order, that they should seal up their award and file it in that court by the first day of the next term, and the cause was continued.

At the March term, 1857, the plaintiff entered a motion for judgment on the award. In support of the motion an order was offered in evidence, dated 16th September, 1856, under the seal of the court, directed to the arbitrators, notifying them of their appointment, and directing them to "hear and determine, at such time as you may deem proper, upon all matters and dealings between said parties, but particularly the cause of action between the said parties pending in said court."

The plaintiff further offered the following oath and award, to wit:

STATE OF ILLINOIS, } ss:
WARREN COUNTY, }

Personally appeared before me, Thompson Brooks, A. S. Smith, and William Ward, Esqs., each of whom took an oath to faithfully and impartially arbitrate upon all matters and differences between Truman Eldridg and George Reeves, and more particularly concerning a contract to build a house by said Reeves for said Eldridg, and an award make therein to the best of their understanding and ability.

THOMPSON BROOKS,
WM. W. WARD,
A. S. SMITH.

Subscribed and sworn to, this 17th day of September, A. D. 1856. ABRAM CRISSEY, *J. P.*

STATE OF ILLINOIS, } ss:
WARREN COUNTY, }

The undersigned, arbitrators in the cause of Truman Eldridg *v.* George Reeves, having been duly sworn, and having, as required by their oaths, determined the cause submitted, do hereby award and decide herein as follows: We find for the plaintiff, Truman Eldridg, five hundred and twenty-six dollars and seventy cents; and we, having delivered to each party a copy hereof, ask to be discharged herein, with our cost.

Given under our hands and seals, this 17th day of September, A. D. 1856.

A. S. SMITH, [L. S.]
THOMPSON BROOKS,
WM. W. WARD.

Both the papers were delivered to the clerk, open and not sealed up, and by him filed, September 27, 1856, and were read in evidence, without objection, on the hearing of this motion,

which was for judgment on the award. There was also proof of notice of the motion, and this was all the evidence. The court sustained the motion and rendered judgment on the award.

There are several fatal objections to this judgment. In the first place, nothing was submitted to the arbitrators by the agreement to submit and the order of reference, but the action pending in court, while the clerk notified them that all matters in difference between the parties were submitted to them. The oath which they took obliged them to assume the burden of a general submission. These referees were constituted a special tribunal, for the trial of a particular cause. They assumed a more extended jurisdiction, and, for aught we know, and such is the presumption, they took all matters in difference between the parties into their consideration, in making up their award. Again, no notice was given to the parties of the time and place of the hearing before the arbitrators, so far as this record shows. For aught that appears, one party may have been there, and not the other. Either the award should show, or at least it should appear in proof, that the parties appeared before the arbitrators at the hearing, or that they had notice and might have appeared. Indeed, almost the whole proceeding, after the order of reference, seems to have been irregular.

The judgment must be reversed.

Judgment reversed.

The Chicago, St. Paul and Fond du Lac Railroad Company, Plaintiff in Error, *v.* Owen McCarthy, Defendant in Error.

ERROR TO McHENRY.

Contractors for constructing a railroad are the servants of the company authorized to construct it, and the tortious acts of the contractors, while about the business of the company, are properly chargeable to it.

This was an action of case, commenced by defendant in error against plaintiff in error, in McHenry Circuit Court.

The following declaration was filed:

For that whereas the said defendants, on the first day of August, 1856, under and by virtue of their act of incorporation, claimed to have the right to enter upon the close and farm of said plaintiff, situate in the town of Hartland, in the county of McHenry aforesaid, and construct and build their railroad track over and across the said close and farm of the said plaintiff as

aforesaid; and the plaintiff avers that the said defendants, on the day and year last aforesaid, at the county aforesaid, did enter upon the close and farm of him, the said plaintiff, and commence the construction of their said railroad track, over and across the same, and continued so to construct the same from the day last aforesaid until the day of the commencement of this suit; and the plaintiff avers that it was the duty of the said defendants, and by law the said defendants, during all the time they were so constructing the said railroad track over and across the close and land of the said plaintiff, to keep up the fences, and to put up the fences taken down by them, while so engaged in the construction of said track, and to put in and maintain cattle guards, and use and take all necessary trouble and precaution to prevent cattle, horses and other animals from escaping upon and entering upon said close and lands of said plaintiff; nevertheless the said plaintiff avers that the said defendants, not regarding their duty and obligations in this behalf, did not keep up the fences and put up the fences by them taken down during the construction of their said track as aforesaid, nor did they put in and maintain cattle guards, and use and take all necessary trouble and precaution to prevent cattle, horses and other animals from escaping upon, and entering upon the close and lands as aforesaid of said plaintiff; and the plaintiff further, in fact, saith, that the said defendants, during all the time they were so constructing their said railroad track as aforesaid, took down and removed the fences belonging to said close and lands of the plaintiff, and negligently suffered the same to remain down, by reason of which premises, and the negligence of the said defendants in this behalf, the cattle, horses and other animals running at large in the highway and common lands of said town of Hartland were allowed to and did escape therefrom into and upon the close and lands of the said plaintiff, situate in the said town of Hartland, in the county of McHenry, and then and there destroy, eat up, trampled upon and subverted the grass, grain, corn, wheat and herbage then and there growing and standing upon said close and land of said plaintiff, to wit, at the county of McHenry aforesaid, whereby, etc.

The cause was tried before the court and jury, at the March term of said court, 1857, I. G. Wilson, Judge, presiding.

The bill of exceptions shows that it was proven, on the part of the plaintiff, that the contractors engaged in the construction of defendant's railroad entered upon the inclosed parts of plaintiff's farm, where the line of said road was located, for the purpose of constructing said road during the month of August, 1856; that they took the fences down at the points where the

line entered said inclosure, and left them down during most of the time they were doing said work, or, if they put them up, it was done in a very negligent and careless manner; that the fences around said inclosure were also thrown and taken down at other points by men engaged in said work, and that, in consequence of the said taking down of said fences, the crops growing within said inclosure were damaged by cattle entering said inclosure from the highways and common lands adjoining plaintiff's farm.

The value of the crops thus injured was variously estimated by plaintiff's witnesses at from three to four hundred dollars. It was also proved, on the part of plaintiff, that during the latter part of the time, the company was running a construction train over its road, and that hogs went into the field over the cattle guards.

On the part of the defendant, it was proved that the work of constructing the entire length of said road, from Chicago to Janesville, was let to Page & Co., contractors, and that said damage was occasioned by the carelessness and negligence of the men in the employ of Page & Co., who were engaged in constructing the road for the company.

It was also proved, on the part of plaintiff, that no cattle guards were constructed at the points where said line entered said inclosure, and that said cattle also entered for want of said cattle guards.

This was all the evidence in the case. The court, at request of plaintiff, instructed the jury as follows:

1st. If the jury believe, from the evidence, that during the time alleged in the plaintiff's declaration, the defendants were engaged in constructing the Chicago, St. Paul and Fond du Lac Railroad over and across the close and farm of said plaintiff, and that during that time they took down and left down the fences around said close and farm, and negligently and carelessly suffered them to remain down, and that through their negligence and carelessness in so doing, they suffered hogs, cattle and other animals to escape from the common lands and highways into and upon the lands and close mentioned in the plaintiff's declaration, and destroy the crops, to wit, corn, wheat, oats and potatoes, then growing, belonging to the plaintiff, then the law is for the plaintiff, and he is entitled to recover whatever damages he has proved he sustained in consequence of such acts of the defendant, not exceeding the amount claimed.

2nd. That if the jury believe, from the evidence, that during the time alleged in the plaintiff's declaration, the defendants were constructing and running their railroad over and across the lands of the plaintiff mentioned in the declaration, and that during that time, they negligently and carelessly omitted to put

in and maintain sufficient and necessary cattle guards, whereby cattle and hogs were suffered to escape over and through such cattle guards into and upon the close and lands of plaintiff, and destroy the crops then growing, then the law is for the plaintiff, and he is entitled to recover whatever the jury believe the damage is proved to be in consequence of such negligence of the defendants, not exceeding the amount claimed.

On the part of the defendant, the following instruction was asked, and refused by the court:

If the jury believe that Page and others were the contractors for the construction of the railroad over the lands of the plaintiff, and that the damages complained of in this case resulted from the negligence of said Page & Co., and that the railroad company had no knowledge of such acts of negligence, then the law is for the defendant.

The jury found a verdict for plaintiff, and assessed his damages at $365.

Defendant moved for a new trial, and in arrest of judgment.

The said motions were overruled by the court, and judgment given for the plaintiff on the verdict.

Breese, J. The evidence discloses a case of great negligence on the part of the contractors of this company, on whom the responsibility is attempted to be shifted.

To railroad companies are granted extraordinary privileges, and they must be held so to exercise them as to do the least possible amount of injury to others. The maxim, "*sic utere tuo ut alienum non lædas*," well applies.

The contractors are the servants of the company, and authorized by law, being such servants, to enter upon the defendant's land and take down his fences, if necessary; but the company must be responsible, for the consequences of the act. The contractors have no right there, except through the grant to the company, and of course are the servants and agents of the company in doing that particular work. Their tortious acts are properly chargeable to the company. The instructions given on behalf of plaintiff below were proper.

We see no difference in principle between this case and *Hinde et al. v. Wabash Nav. Co.*, 15 Ill. 72, and accordingly affirm the judgment.

Judgment affirmed.

James H. Eames, impleaded with Henry W. Burlingame and Joel Gray, Plaintiff in Error, *v.* David Preston *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

A promissory note executed by one of a firm, in the firm name, with a scrawl, is a sealed instrument, as to the party who signed it, and assumpsit will not lie upon it.

If one executes an instrument with a seal, and others sign after him without a seal, they are presumed to adopt the seal already affixed; it is otherwise if a party signs an instrument, not affixing a seal, and others sign and seal after him, without his consent—it is, as to the first signer, a simple instrument.

The summons in this case was served on Eames; the other defendants not found.

The first count of the declaration avers that on the 9th November, 1854, at Chicago, the defendants, by name of "Eames, Gray & Co.," made their note, in writing, promising to pay, eighty-five days after the date thereof, to the order of Nelson C. Roe, by description of "N. C. Roe, Cash'r," $511.93, for value received, with interest at ten per cent., and delivered it to said Nelson C. Roe, who afterwards indorsed it to the plaintiffs by name of "Preston & Co.," by means, etc.; and promise to pay plaintiffs' note.

The common counts were added to the above.

Breach, that defendants have not paid said sums of money.

Plea, general issue.

The cause tried by J. M. Wilson, Judge, and a jury, and verdict for plaintiffs for $626.84.

On the trial of the cause, the plaintiff having introduced testimony tending to prove that the note hereafter mentioned was executed by defendants, as charged in the declaration, then offered to read the following note in evidence:

$511.93. Chicago, Nov. 9, 1854.

Eighty-five days after date we promise to pay to N. C. Roe, Cas'r, or order, Five Hundred and Eleven 93-100 Dollars, for value received, with interest, at ten per cent.

EAMES, GRAY & CO. [ ]

To the introduction of which the defendant Eames objected. The court overruled the objection, and allowed said note to be introduced as evidence, to which ruling the defendant Eames excepted. No other evidence given in the cause. The court found for the plaintiff, $626.84, and gave judgment thereon, to which defendant Eames excepted.

W. T. Burgess, for Plaintiff in Error.

G. Goodrich, for Defendants in Error.

CATON, C. J. This was an action of assumpsit brought against Eames, Burlingame and Gray, upon a note thus executed, "Eames, Gray & Co. [ ]," and the only question is, whether assumpsit can be maintained on this note. If this be a sealed instrument, then assumpsit cannot be maintained upon it, (1 Chit. Pl., title Assumpsit, p. 99,) and this would seem to settle the question, for this is certainly an instrument under seal. If the member of the firm who executed the note had authority under seal to add the seals of all, then the seal attached is the seal of all; if he had not, then it is his seal only. In any event it is, as to him, a sealed instrument. If, as to the others, it is a simple instrument, that would not remove his seal. If one party executes an instrument and attaches his seal, and others afterwards sign it silently without attaching seals, they are presumed to adopt the seal of the first, and, as to all, it is a sealed instrument. If, however, the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was when he first executed it. Nor would this prevent it from being a sealed instrument as to those who deliberately attached their seals. As to one of the makers of this note, it was a sealed instrument, and assumpsit could not be maintained upon it.

The judgment must be reversed.

Judgment reversed.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellant, *v.* ADOLPHUS CARTER, Appellee.

APPEAL FROM LA SALLE COUNTY COURT.

Where there is an exception in an enacting clause of a statute, the plaintiff suing under it must show that the defendant is not within it; if the exception is in a subsequent section, it must be pleaded in defense to avoid the penalty.

In an action under the statute against a railroad company, for injuries to animals, the road not being fenced, the plaintiff should aver that the animals were not within the limits of a village, etc.

In an action on the case for killing animals, "*gross*" negligence need not be averred; negligence in such a case is matter of proof. An averment that the railroad company had not fenced, may be treated as surplusage.

THIS was an action of trespass on the case, brought in the La Salle County Court, at the September term, 1857, by plaintiff

below, to recover damages from defendant below, for killing three colts of plaintiff on railroad of defendant.

To the declaration of plaintiff there was a demurrer by defendant; and for special cause of demurrer, the defendant assigned the following, to wit:

1st. In neither of said counts is there any averment that the colts mentioned were not killed within the limits of any town, city, or village, and did not come upon the railroad of said defendant within the limits of such town, city, or village.

2nd. In neither of said counts is there any averment that said colts were killed through the wanton or willful and gross negligence of the agents or servants of said defendant.

3rd. In neither of said counts is there any averment that said colts were killed through the gross and culpable negligence or wanton recklessness of the agents or servants of said defendant.

4th. And also, that said declaration is, in other respects, uncertain, informal and insufficient.

The demurrer was overruled; to which ruling defendant excepted, and prays an appeal.

D. L. Hough, for Appellant.

Glover & Cook, for Appellee.

Walker, J. The assignment of error in this case questions the decision of the court below in overruling the demurrer to plaintiff's declaration. The first count is constructed under the act of the legislature, approved on the 14th day of February, 1855, which provides, that "Every railroad corporation whose line of road, or any part thereof, is open for use, shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad, or any part thereof, are opened, erect and thereafter maintain fences on the sides of their road, or the part thereof so open for use, suitable and sufficient for to prevent cattle, horses, sheep and hogs from getting on to such railroad, except at the crossings of public roads, highways, and within the limits of towns, cities and villages, with openings, or gates, or bars, at the farm crossings," etc. The doctrine is laid down in Chitty's Pleadings, p. 223, "that where there is an exception in the enacting clause of a statute, the plaintiff suing under it must show that the defendant is not within the exception; but if there be an exception in a subsequent clause, that is matter of defense, and the other party must show it, to exempt himself from the pen-

alty." See also Gould's Plead. 179. This count fails to negative the fact that the colts might have been killed at a crossing of a public road, or in the limits of a town, city, or village. And if they were so killed, the defendant is not liable under the statute; and to have shown its liability, it should have specifically averred that they were not killed in the excepted places, as this exception is within the enacting clause of this statute. There is no averment of negligence on the part of the company, or of its officers, agents, or servants, and was therefore clearly bad, and the demurrer being to each count, should have been sustained to this one.

The second count refers to this statute, but is more general, and alleges that the colts were killed by the mere negligence and carelessness of the agents and servants of the defendants in operating their engines and cars, on their railroad. In an action on the case, it is not necessary to aver gross negligence, but only to aver that the act was negligently and carelessly performed; see 1 Chit. Pl. 80. And when the right of recovery depends upon the degree, as for willful or gross negligence, it is a matter of proof and not of pleading. The allegations in this count, that the defendants had failed to fence their road, may be treated as surplusage, and the plaintiff has still shown a cause of recovery. But the court below erred in overruling the demurrer to the first count, and for that reason the judgment of that court should be reversed and the cause remanded.

Judgment reversed.

Charles Lee, Appellant, *v.* Peter Quirk, Appellee.

APPEAL FROM BUREAU.

An affidavit for a continuance, which does not state the residence of a witness, is insufficient.

In order to authorize the testimony of a plaintiff under the statute, in a suit originating before a justice of the peace, where a defendant refuses to be sworn, he must make affidavit that he has a claim or demand against the defendant, and that he has no witness by whom, or other legal testimony by which, to establish it.

In an action to recover for work and labor, an instruction which excludes from the jury all consideration of the proof of a special contract, is erroneous.

The apportionment of costs by the Circuit Court, on an appeal from the decision of a justice of the peace, is the exercise of a discretion with which the Supreme Court cannot interfere.

A jury may be called into court for further instructions, either by agreement of counsel or at their own request.

THIS was an action originally commenced before a justice of the peace by Quirk against Lee, for work and labor. A judgment was rendered by the justice against Lee, for $42.10, and he appealed to the Circuit Court.

At the January term, 1857, of the Bureau Circuit Court, Lee moved the court to continue the cause, and in support of the motion read an affidavit, in which he swore that one Andrew Brown was a material witness for him; that he (Brown) had gone to Iowa for a temporary purpose, some four or five weeks before, and was expected to return in a short time; that Lee did not know that the witness was out of the county until the term of the court; that he caused a subpœna to be issued for the witness, which was returned not found; that the suit is brought to recover for work claimed to have been done by plaintiff, and that Lee could prove by the witness, Brown, that what work was done by plaintiff, was done under a special contract to work a year for $220, to be paid at the end of the year; and that plaintiff worked about two months, and then quit without any just reason; and that plaintiff, during the last two or three weeks he worked for defendant, improperly behaved and conducted himself, for the purpose of inducing Lee to discharge him; that he (Lee) expected to be able to procure the testimony of Brown by the next term, etc.

The court overruled the motion for a continuance.

The case then came on for trial before a jury.

On the trial, the plaintiff proved by one Spaulding, that Quirk worked for Lee for some two or three weeks after the 15th or 20th of June, 1856; that Lee paid him some money two or three days before Quirk quit work; how much, witness did not know.

Quirk then offered to make oath that he knew of no witness by whom he could prove the length of time he had worked for Lee, except by his own oath or Lee's. Quirk was sworn on his *voir dire*, and stated that he could not prove the length of time he had worked for Lee, except by his own oath or that of Lee; that one Fisher was living on Lee's farm; that Quirk worked there a part of the time with Fisher; that Fisher was there all the time that Quirk worked there, except two or three times; that one Brown worked for Lee, commencing about a week after Quirk did, and worked there all the time till Quirk left, and that the work that Quirk did was done under a contract to work a year, provided he and Lee agreed.

On this evidence Lee refused to testify, and objected to Quirk being sworn in chief. The objection was overruled.

Quirk swore that he worked for Lee from April 14, 1856, to June 21, 1856.

Quirk proved by another witness that wages were about $18 per month.

The court instructed the jury, on behalf of Quirk,

That if they believed, from the evidence, that the plaintiff worked for the defendant from the 14th of April to the 21st of June, 1856, then they will find for the plaintiff the value of the work, as shown by the testimony, deducting such payments as the defendant has made to plaintiff.

The court also instructed the jury, for the defendant,

That if the plaintiff agreed to work for defendant for a year, at a certain sum per month, or for the whole time, and if he left the service of the defendant, without sufficient cause, before the year expired, and without defendant's consent, then plaintiff cannot recover in this action, and the jury must find for the defendant.

If the jury believe, from the evidence, that the services sued for were rendered under a special contract to labor for a year, then the year's labor is a condition precedent, to be performed by plaintiff before he can recover; and if plaintiff is entitled to recover at all, he cannot recover until the year has elapsed; and if the jury believe the year had not expired at the commencement of this suit, then they will find for defendant.

After the jury had retired, the defendant asked the court to instruct the jury,

"That if the plaintiff called on the defendant for $36, or any other sum, and the defendant paid him money, and the plaintiff received the money without objection as to the amount, that is evidence to the jury that the amount called for was paid by defendant."

Which instruction the court neither gave nor marked refused, nor was the same given to the jury.

The jury found a verdict for the plaintiff below for $39.50.

The court overruled a motion for a new trial, and rendered judgment in favor of Quirk for $39.50, and all his costs.

The appellant assigned the following errors:

Overruling defendant's motion for a continuance.

Permitting appellee to testify.

Admitting proof of the value of the services.

Giving the instruction asked by appellee.

Refusing appellant's instruction.

Overruling appellant's motion for a new trial.

Rendering judgment in favor of appellee for *all* his costs.

W. H. L. Wallace, for Appellant.

Glover & Cook, for Appellee.

BREESE, J. The affidavit for a continuance of this cause was insufficient. It does not state the residence of the witness, neither positively nor by any fair inference. This is indispensable, as connected with his identification, and diligence in obtaining his attendance.

The plaintiff, on the facts shown, should not have been permitted to testify, for the reason, that he did not take the preliminary oath required by the statute. 1. He did not make affidavit that he had a claim or demand against the defendant. 2. He does not show, in the affidavit, that he had no witness or other legal testimony to establish whatever demand it may be inferred he did have. On the contrary, he shows he had two witnesses, Fisher and Brown, by which he could establish it, and he was required to use diligence to obtain their testimony. Because he has not been diligent, he cannot resort to this privilege conferred by the statute.

The first instruction given on behalf of the plaintiff was wrong.

The defense set up was the special contract to work one year for a stated sum.

The instruction is, "If the jury believe, from the evidence, that the plaintiff worked for the defendant, from the 14th of April to the 21st of June, 1856, then they will find for the plaintiff the value of the work, as shown by the testimony, deducting such payments as the defendant has made to plaintiff."

This instruction excludes from the jury, entirely, all consideration of the proof of a special contract. Merely working for the defendant, which is the point of this instruction, does not give the plaintiff a right to recover, if a special contract existed under which the work was done, and that contract violated by the plaintiff himself.

For these errors the judgment is reversed, and the cause remanded. As to the apportionment of the costs, it has always been held discretionary with the court, and with its exercise we cannot interfere.

It is not customary to ask the court to instruct the jury, after they have retired. Instructions are asked for, and disposed of, before the jury retire. They may be called into court for further instructions, at their own request, or by consent of parties or their counsel.

Judgment reversed.

William Fisher *et al.*, Appellants, *v.* Henry Bowles, Appellee.

APPEAL FROM PEORIA.

If a person suffers his name to be used in a business, or holds himself out as a copartner, he will be so regarded, whatever may be the agreement between himself and the other copartners.

This was an action of assumpsit.

The summons was served on William Fisher only.

The declaration alleges, that defendants were joint owners and partners in building and running the steamboat "Lacon," and that defendants were indebted to plaintiff in the sum of $1,000 for services as engineer on said boat.

There was also a count for goods, etc., sold and delivered, for work and labor done at request of defendants. For money lent. For money paid by plaintiff, for the use of defendants, at their request. For money had and received by defendants for plaintiff's use, and for money found due upon an account stated. Damage claimed, $1,000.

Defendant filed the following pleas:

The general issue, and that prior to the time the said steamboat Lacon commenced running, he was not a partner with the defendant, Simpson: which plea was verified by the affidavit of said William Fisher.

The cause was tried by jury, at March term, 1858; a verdict was rendered for the plaintiff for $535, upon which judgment was rendered by the court, Powell, Judge, presiding.

N. H. Purple, for Appellants.

H. Grove, for Appellee.

Breese, J. From a careful examination of the evidence, as presented in the record, we see no reason to find fault with the verdict of the jury, as it fully sustains their finding. The question of liability, and to what extent, was fairly before them; and although the instructions given on behalf of the plaintiff may be regarded as somewhat loose, yet they are sufficiently accurate and pointed to convey to the jury a correct notion of the law, as applicable to the facts before them.

Partnership cannot always be proved by written articles. In fact, in very many cases, writings do not exist, and especially in a steamboat concern. In such cases, and in all cases, the rule is, if a person suffer his name to be used in a business, or

otherwise hold himself out as a partner, he is to be so considered, whatever may be the agreement between him and the other partners. 3 Kent's Com. 52; Collyer on Part. 75, sec. 80; *Stearns* v. *Haven*, 14 Vermont R. 540.

The court, in this case, say, whether persons are partners *inter se*, may depend on their contract between themselves. Whether they are partners as to others, depends on their conduct.

A party permitting his name to be used, or holding himself out as a partner, will be equally responsible with other partners, although he may receive no profits, for the contract of one is the contract of all. *Guidon* v, *Robson*, 2 Campbell R. 802.

This rule of law arises, not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which persons would be exposed, if they were to suppose they lent their money, performed the work, or furnished the materials, upon the apparent credit of three or four persons, when, in fact, they did all those to two only, to whom, without the others, they would have lent nothing, performed no work, or furnished materials. *Waugh* v. *Conver*, *Carver & Giesler*, 2 Henry Blackstone, 235, a leading case, with copious and instructive notes.

The judgment is affirmed.

Judgment affirmed.

Alva Dunlap, Appellant, *v.* James Daugherty *et al.*, Appellees.

APPEAL FROM PEORIA.

Where the clerk of a court of record of another State, certifies that the acknowledgment to a copy of a recorded deed, was, when it was taken to the original, in conformity with the laws of such State, and that the person who took it was then a justice of the peace, it will be sufficient; although the certificate of conformity bears date the seventh of August, 1855, and the acknowledgment the fourteenth of July, 1821.

A party who interposes the benefit of limitation, derived under the ninth section of the twenty-fourth chapter of the Revised Statutes, to an action of ejectment, must show that the payment of taxes, and the color of title, were by and in the same person. Payment of taxes by different persons, for seven years, one of whom had only a contract for a conveyance, is insufficient.

That the justice who took the acknowledgment, was such, and acted in Windham county, Connecticut, will be presumed, where the grantor is described in the deed, as residing in the same county, and the county is named in the caption of the certificate.

Dunlap *v.* Daugherty et al.

THIS was an action of ejectment, brought by appellees against appellant, for S. W. Sec. 2, T. 10 N., 7 E., in Peoria county. Plaintiff below produced patent for the land to Henry Howe, dated May 27, 1818; next a certified copy of a deed from Henry Howe to John Morgan, to which was attached the following certificates: "Windham County, ss. Canterbury, July 14, 1821. Then personally appeared Henry Howe, signer and sealer of the foregoing instrument, personally appeared and acknowledged the same to be his free act and deed, before me, Andrew T. Judson, justice of the peace." Then followed the certificate of the recorder of Pike county, that the above is a true copy. Also the following certificate:

"State of Connecticut, County of Windham, ss: I, Uriel Fuller, clerk of the Superior Court, in and for said county of Windham, (which said court is a court of record,) do hereby certify that Andrew T. Judson, Esq., whose name appears to be attached to the certificate of acknowledgment of the annexed certified copy of a deed from Henry Howe to John Morgan, was, on the 14th day of July, A. D. 1821, a justice of the peace in and for said county of Windham, and State aforesaid, duly commissioned and qualified; and I do further certify, that said *certified copy of said deed* is executed and acknowledged in conformity with the laws of the State of Connecticut, as they were in force on the said 14th day of July, 1821.

"In testimony whereof," etc.

Which deed was objected to, on account of insufficiency of proof, (no objection being taken to want of locality in certificate of justice), which objection the court overruled, and permitted the deed to go to the jury.

The plaintiff then offered a quit-claim deed from John Morgan to the plaintiffs, dated June 2, 1855, properly executed, containing the following description: that certain piece or parcel of land, situate, lying and being in the county of Peoria and State of Illinois, being the south-west quarter of section two, in township ten north, in range seven west of the 4th principal meridian. Patented to Henry Howe, and by him conveyed to me by deed, dated at Canterbury, Windham county, Conn., July 14, 1821. To the reading of which deed, the defendant objected, for reason of insufficiency of description of the land, which objection was overruled.

Possession of premises was admitted by defendant, at time suit was brought. The defendant then read in evidence, as claim and color of title, a deed of the land in controversy, from the auditor of the State of Illinois, to Robert H. Peebles, dated February 10th, 1832, on sale of taxes, January 12th, 1831, for taxes of 1830, which deed was objected to, and objection overruled.

Defendant then read in evidence, a deed of the land from Robert H. Peebles to John Tillson, Jr., dated February 10th, 1832; next a deed from John Tillson, Jr., to Russell H. Nevins, dated April 26th, 1832; then a deed from Russell H. Nevins to Elihu Townsend and others, and from Elihu Townsend and others to David H. Nevins, February 25th, 1835; to the reading of which, objection was made, on account of insufficiency of certificate of acknowledgment, and objection overruled.

Defendant then read deed from David H. Nevins to Townsend and others, February 26th, 1835, and from Townsend and others to Charles F. Moulton and others, Dec. 17th, 1835; also deed from last named grantors, to Lamb and Dunlap, April 30th, 1838, which was objected to on account of insufficiency of acknowledgment, and overruled.

Defendant then offered and read in evidence, for purpose of establishing claim and color of title, in good faith only, a deed from C. Orr, sheriff of Peoria county, to Lamb and Dunlap, dated June 3rd, 1842, upon sale for taxes of the year 1839, in 1840. Next a deed from Lamb and Dunlap to Nevins and Alstyne, November 15th, 1844; to which deed objection was made, on account of insufficiency of acknowledgment, and overruled. Also a deed from Nevins and Alstyne to Mordecai D. Lewis and others, September 1st, 1845; and from last named grantees, to Charles S. Folwell, October 19th, 1846; and from said Folwell to defendant, January 22, 1850; all of which conveyances properly described the land in controversy.

Defendant also introduced in evidence, an agreement between defendant and Folwell, for the purchase of said land, dated December 6th, 1849; and proved by George C. Bestor, that he acted as agent of said Folwell, in effecting said sale to defendant, and received the deed for delivery, in October, 1852, and delivered the same to defendant some time after.

Charles S. Folwell testified, that the said Mordecai D. Lewis and others, grantees of said land from Nevins and Alstyne, held the land as trustees of the United States Bank, and the conveyance was made by them to witness, to hold as such trustee. That witness paid the taxes on said land, for the years 1844, 1845 and 1846, as agent for said trustees, and as such trustee. Defendant proved the payment of all taxes assessed on said land, by Charles S. Folwell, in the years 1845, 1846, 1847, 1848, 1849, and of all taxes assessed for years 1850, 1851, 1852, 1853 and 1854, by defendant, and that the said land was vacant and unoccupied from 1842 till 1853.

The court, POWELL, Judge, instructed the jury as follows:

1. That the second section of the act of March 2nd, 1839, is unconstitutional.

2. That the defendant has not proved any legal evidence in this case; and if the jury believe, from the evidence, that the plaintiffs have shown a title in themselves, derived from the United States, they are entitled to recover.

The defendant asked the court to give the following instruction, which was refused.

If the jury believe, from the evidence, that the defendant had, at the time of the commencement of this suit, color of title, made in good faith, to the land in controversy, and that he, and the persons under whom he claims and holds such color of title, have paid all taxes legally assessed thereon, for seven successive years, which such land was vacant and unoccupied, and that such taxes were all properly paid, under the title which the defendant has shown in evidence, by or for persons under whom he claims, and who, at the time of the payment of such taxes, also held the same color of title, also, in good faith, then they will find for the defendant.

To the giving which instructions for plaintiffs, and refusing the instruction asked by defendant, defendant excepted.

The jury found for plaintiffs; defendant moved for a new trial, which was overruled, and an appeal taken by defendant, and the appellant makes upon the record the following assignment of errors:

1. The court erred in permitting the deed from Henry Howe to John Morgan, to be read to the jury.
2. The court erred in permitting the deed from John Morgan to plaintiffs, to be read in evidence to the jury.
3. The court erred in giving the instructions for the plaintiffs.
4. The court erred in refusing the instruction asked by the defendant.
5. The court erred in overruling defendant's motion for a new trial.
6. The court erred in rendering judgment against defendant.

Manning & Merriman, for Appellant.

N. H. Purple, and Wead & Williamson, for Appellees.

Walker, J. This was an action of ejectment brought by appellees against appellant in the Peoria Circuit Court, for the recovery of S. W. Sec. 2, T. 10 N., 7 east. The plaintiffs below read in evidence a patent from the United States, for the land, to Henry Howe, dated May 27th, 1818; next, a certified copy of a deed from Henry Howe to John Morgan, to which was attached the following certificates: "Windham County, ss. Canterbury, July 14th, 1821. Then personally appeared Henry

Howe, signer and sealer of the foregoing instrument, personally appeared and acknowledged the same to be his free act and deed, before me, Andrew T. Judson, justice of the peace." Then followed the certificate of the recorder of Pike county, in due form, that the above is a true copy. Then follows this certificate: "State of Connecticut, County of Windham, ss.: I, Uriel Fuller, clerk of the Superior Court in and for said county of Windham, (which said court is a court of record) do hereby certify that Andrew T. Judson, Esq., whose name appears to be attached to the certificate of the acknowledgment of the annexed certified copy of a deed from Henry Howe to John Morgan, was, on the 14th day of July, A. D. 1821, a justice of the peace in and for said county of Windham, and State aforesaid, duly commissioned and qualified; and I do further certify, that the said *certified copy of said deed* is executed and acknowledged in conformity with the laws of the State of Connecticut, as they existed and were in force on the said 14th day of July, 1821. In testimony whereof, I have hereunto set my hand and affixed the seal of said Windham county, at Windham county aforesaid, this seventh day of August, A. D. 1855. Uriel Fuller, clerk." To this certificate the seal of court was annexed. The plaintiffs then read in evidence a quit-claim deed from John Morgan to the plaintiffs, dated June 2nd, 1855, properly executed, but containing a description of the land as lying in Peoria county and State of Illinois, and describing it as lying "in range seven *west* of the fourth principal meridian. Patented to Henry Howe, and by him conveyed to me by deed dated at Canterbury, Windham county, Conn., July 14th, 1821."

The defendant then read in evidence color of title derived from tax sales of 1830 and 1840, with a connected chain. Folwell, of whom defendant purchased, received a deed for the premises in October, 1846. Defendant agreed with Folwell for the purchase of this land the 6th of December, 1849, and received a deed after October, 1852, through Folwell's agent, which bore date the 22nd of January, 1850. Defendant also proved that Folwell paid the taxes on this land for the years 1844, 1845, 1846, 1847, 1848, and 1849, and by himself for the years 1850, 1851, 1852, 1853, and 1854. The defendant admitted possession of the land at the commencement of the suit, and that it was vacant from 1842 till 1853. The jury found a verdict for the plaintiffs, upon which the court rendered a judgment, and from which the defendant appeals to this court.

The first question which we propose to consider, is, the sufficiency of the clerk's certificate of conformity to the copy of the deed from Howe to Morgan, to entitle it to be read in evidence. The act of 1851, p. 123, allowing copies of deeds to be

read in evidence when the certificate of acknowledgment is not in conformity with the laws of this State, provides that the party offering it shall exhibit with it a certificate of conformity, as provided for in the sixteenth section of chapter twenty-four of the Revised Statutes. The provision referred to is, "Any clerk of a court of record within such State, territory or district, shall, under his hand and the seal of such court, certify that such deed is acknowledged or proved in conformity with the laws of such State, territory, or district." Taking these two provisions together, it appears this copy was certified by the proper officer, and if his certificate were attached to a deed instead of to a copy, its sufficiency could hardly be questioned. The clerk certifies that the person whose name appears to the certificate of acknowledgment, was, at the time it bears date, an acting justice of the peace in the county of Windham, State of Connecticut, duly commissioned and qualified, and that the certified copy of the deed is executed and acknowledged, in conformity with the laws of the State of Connecticut, as they existed and were in force at the date of the certificate of acknowledgment. The fact that Judson was a justice of the peace in Windham county, Connecticut, and that Howe, the grantor, is described in the deed as residing in the same county and State, affords strong evidence, when taken with the fact that Windham county is at the caption of the certificate, that the justice acted within the county of Windham and State of Connecticut when he took the acknowledgment.

The clerk certifies that this certified copy is acknowledged in conformity with the laws of Connecticut in force at the date of the original deed. When the certified copy is examined, it is found that there is no other acknowledgment to it, but what purports to be a copy of the certificate to the original deed, and the clerk's certificate could have referred to no other, and if the copy of the certificate of the justice to the copy of the deed was in conformity with the laws of Connecticut when it was made, it follows that the original certificate must have been in conformity. We perceive no error in admitting the copy in evidence.

The next question is, whether the defendant has brought himself within the provisions of the ninth section of the twenty-fourth chapter of the Revised Statutes. That section provides, that "Whenever a person having color of title, made in good faith, to vacant and unoccupied lands, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title." In giving a construction to this provision, it may be necessary to contrast it with the first clause of

the eighth section of the same chapter, which provides, that "Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of such lands or tenements, to the extent and according to the purport of his or her paper title." When language so nearly similar is employed at the same time, and in the same act, in two different sections, and both relating to the same class of things, we find it difficult to ascertain the legislative intention. The legislature must have had a different object in passing the two sections. They must have intended to protect different kinds of titles, or persons occupying a different relation to the same character of title, or both. If they had intended the two provisions only to operate upon one kind of title, and all persons in the same relation to that character of title, why adopt both provisions, when the latter would have covered all that is embraced in the two. But that such was their intention is repelled by the significant fact that the language employed is different, and certainly makes a clear distinction in the persons who may be connected with the title intended to be protected. By the eighth section, the person must be in possession under claim and color, and must pay taxes under such claim and color of title, for the required period of time; while by the ninth section he is not required to have possession, nor permitted to hold or pay taxes under a person having color, but must himself have the color of title and pay the taxes. This section does not permit a person claiming under color to rely upon the statute. But the eighth section, by its phraseology, does permit the person claiming under the color of title to hold the possession and to pay the taxes, for his claim and possession, and the color of title when united, make the claim and color of title and the possession required by the statute. This is the construction already given to the eighth section by this court. *Cofield* v. *Furry*, 19 Ill. R. 183; *Darst* v. *Marshall*, 20 Ill. R. 227. Justice would require that more protection should be given to the actual occupant, who expends his money and labor in improving the soil, and pays the taxes for the required period, than to the person who only pays the taxes, without occupation, for the same length of time; and we doubt not that such was the intention of the legislature in adopting the eighth section, and hence they inserted the provision for the protection of persons holding possession, and paying taxes under claim from the person having the color of title. While by the ninth section, in favor of the tax payer having color of title, it is required

that both things must unite in the same person: that the person paying the taxes must at the time have the color of title. This court says, in the case of *Newland* v. *Marsh*, 19 Ill. R. 376, in construing this section, that the statute "does not commence running only from possession taken of the land, but from the time of the concurrence of the two things: the color of title and payment of taxes, and has performed its office when the color of title and payment of taxes have gone together for the period of limitation."

In this case, the two things required have not concurred; the color of title and payment of taxes have not gone together for the period of limitation. There was not a period of seven successive years in which the person paying the taxes had the color of title at the time of payment. Folwell paid for two years before he became the owner. The defendant paid for two or three years, under his contract for a conveyance, and before he received his deed, and without including these payments by him, payment of the taxes for seven successive years was not shown. And the defendant not having shown color of title and payment of taxes running together for the period limited, has failed to bring himself within the provision of the ninth section, he cannot rely on it as a bar to plaintiff's action, and the judgment of the court below should be affirmed.

Judgment affirmed.

Jonathan Richards *et al.*, Appellants, *v.* The Michigan Southern and Northern Indiana Railroad Company, Appellee.

APPEAL FROM COOK.

To terminate its liability as a common carrier, a railroad company is not bound to give notice of the arrival of goods.

When goods reach their destination, and are properly stored, the responsibility of the carrier ceases, and that of warehouseman attaches.

If notice of the arrival of goods, requiring their removal in twenty-four hours, is given, it does not follow that the liability as carrier continues for that time; such a notice only implies that the goods may remain twenty-four hours free of charge.

This is an action of assumpsit. The declaration contains three counts and the common counts. The first count states the defendant to be a common carrier, by railway, of goods, from Toledo in Ohio to Chicago in Illinois; that plaintiffs, on the 8th August, 1856, delivered to defendant a box of goods, of the

value of two hundred dollars, to be carried to Chicago and to be there delivered to plaintiffs; that for the charges to be paid thereon, defendant received the goods and promised to carry and safely deliver them at Chicago to plaintiffs; but not regarding, etc., did not take care of the goods, but lost the same and did not deliver them.

2nd count. In consideration that plaintiffs, at Toledo, delivered to defendant a parcel of goods directed to plaintiffs, to be carried to Chicago, and there be delivered to plaintiffs, the defendant promised to carry and deliver the goods at Chicago, to plaintiffs, but did not deliver them.

3rd count. In consideration that the defendant, as common carrier on, etc., at Chicago, at its own request had the care and custody of plaintiffs' goods, the defendant undertook to take due care of them while in its custody, and deliver same to plaintiffs, but took so little care of them that they were lost.

Common counts, for money paid, had and received, on account stated.

The defendant pleaded the general issue.

The cause was submitted to the court upon an agreed statement of facts.

At October term, 1857, the court, MANIERRE, Judge, rendered judgment for the defendant.

The facts agreed upon are: That the defendant is carrier of goods, by railway, from Toledo in Ohio to Chicago in Illinois. That the plaintiffs bought, at Baltimore, a box of goods, worth, at Chicago, one hundred and eighty-five dollars, which came into possession of defendant at Toledo, and was carried by it to Chicago. The defendant had paid back charges of three dollars and sixty-three cents, and its charge for carriage to Chicago was three dollars fifty-seven cents. The cars containing the box reached Chicago at 9 P. M. of the 12th August, 1856, and the box was unloaded into defendant's warehouse at noon of the 13th August.

A notice of receipt of the goods was put into the post office, at Chicago, between the hours of five and six on that afternoon, the 13th August. The following is the notice:

MICHIGAN SOUTHERN & NORTHERN INDIANA R. R.
FREIGHT AGENT'S OFFICE,
CHICAGO, August 13th, 1856.

RICHARDS, CRAMBURGH & SHAW:

The following articles, consigned to your address, are now ready for delivery at this depot, viz.:

1 box D Goods.

Weight, 420.

You are requested to remove the same within twenty-four hours, otherwise it will be put in store at the expense and risk of the owner. In no case will freight

be delivered except to the owner or consignee, or to his written order, unless it is called for by yourself. Please send this notice, after having signed the order below, and insert the name of the person to whom you wish it to be delivered.

Yours respectfully, CHARLES M. GRAY, *Agent.*

Plaintiffs received this notice from the post office at 10 o'clock, forenoon, August 14th.

On the evening of the 13th August, between seven and eight o'clock, a fire broke out in a stable near defendant's warehouse, which extended to and destroyed the warehouse containing plaintiffs' goods. The fire did not originate in any negligence of defendant, nor was defendant negligent in efforts to save the goods from burning. The goods of plaintiffs were burned in said fire.

MARSH & KING, for Appellants.

A. CAMPBELL, JUDD & WINSTON, and GLOVER & COOK, for Appellee.

WALKER, J. This was an action of assumpsit, brought by plaintiffs, in the Cook Circuit Court, for the recovery of the value of a box of merchandise, shipped over defendant's road from Toledo to Chicago, which, as the agreed facts of the parties show, was taken by defendant to the latter place, at 9 o'clock P. M., on the twelfth day of August, 1856, and was unloaded from the cars and placed in defendant's warehouse, at noon of the 13th August, 1856, and a notice was put into the post office, between five and six o'clock P. M., that the box had arrived, consigned to plaintiffs, and was ready for delivery, and they were requested to remove the same within twenty-four hours, or it would be put in store at the expense and risk of the owner; that plaintiffs received this notice from the post office at ten o'clock in the forenoon, on the fourteenth of August. Between seven and eight o'clock, on the evening of the thirteenth, a fire broke out in a stable near defendant's warehouse, which extended to and destroyed the warehouse containing these goods; that the fire did not originate in any negligence of the defendant, nor the loss by negligence of defendant in the use of efforts to preserve the goods; that the goods were destroyed by the fire in the warehouse, and that these goods were worth, in Chicago, one hundred and eighty-five dollars. The cause was tried by the court, without the intervention of a jury, by consent, when the court found for and rendered a judgment in favor of defendant, from which plaintiffs appeal to this court.

This court has held, at the present term, in the case of *Porter* v. *The Chicago and Rock Island Railroad*, that to terminate

its liability as a common carrier, it is not necessary that a railroad should give notice of the arrival of goods to the owner and consignee. And that so soon as the goods arrive at their destination, or at the terminus of their road, and they are unloaded and placed safely and securely in the defendant's warehouse, that the responsibility of common carriers ceases, and that of warehousemen attaches. In this case there was an attempt to give notice, which did not reach plaintiffs until after the goods were destroyed. But it is insisted that, as this notice only required the plaintiffs to remove the goods within twenty-four hours, otherwise they would be put in store at the expense and risk of the plaintiffs, that the defendant thereby undertook to keep them until that time expired, under the liability of a common carrier. The true construction of this notice, it seems to us, is, that the goods could remain in defendant's warehouse, free of charge during that time, and if not removed, the defendant would afterwards charge storage as warehouseman, or if they chose, have them stored with some other warehouseman, at plaintiffs' expense and risk. This notice is certainly as susceptible of this construction as the one contended for by plaintiffs, and if the defendant is to be held liable for such greatly increased responsibility by contract, the intention should be clear and not by such doubtful construction. There is no pretense that there was any fault chargeable to defendants in the loss of these goods, and therefore they cannot be charged for their loss, as warehousemen or common carriers. We are therefore of the opinion that the court below committed no error in rendering the judgment which it did, and that it should be affirmed.

Judgment affirmed.

Samuel S. Porter, Appellant, *v.* The Chicago and Rock Island Railroad Company, Appellee.

APPEAL FROM PEORIA.

Carriers by railway are neither bound to deliver to the consignee personally, or to give notice of the arrival of the goods, to discharge their liability as such. But they must take proper care of the goods, by safely storing them or by some other act.

When the articles to be transported, have arrived at their destination, and have been removed and stored in a warehouse which is owned by the carrier, or by some other party, the duty of the carrier is terminated. If the goods are stored in a building owned by the carrier, the liability changes to that of warehouseman.

Because goods were destroyed in a railroad car, by an accidental fire, the carrier is not thereby released. It is the duty of the carrier to show what becomes of goods entrusted to him; the burthen of proof is with him.

Porter *v.* The Chicago and Rock Island Railroad Co.

THIS was a suit commenced in the Peoria Circuit Court, by appellant against appellee, upon certain bills of lading or railroad receipts for wheat and corn, shipped by plaintiff from Peoria over the defendant's road, to Munn, Gill & Co., of Chicago.

The case was tried, March term, 1858, before E. N. POWELL, Judge, without a jury.

The evidence showed that the plaintiff, by Updike & Co., sent over the defendant's railroad, on the eleventh and ninth days of August, 1856, five car loads of wheat and four car loads of corn, each car containing one hundred and sixty sacks, each sack holding two and one-fourth bushels, consigned to Munn, Gill & Co., of Chicago, who were commission merchants and agents of plaintiff for the sale of the grain, and that the said Updike & Co. received from the company receipts similar to the following:

PEORIA, ILL., August 11th, 1856.

Received in good order, from Updike & Co., to be forwarded by the Peoria & Bureau Valley Railroad, the following articles, to be delivered in like good order to Munn, Gill & Co., at Chicago Station, he or they paying freight at the rate of seventeen cents a hundred pounds.

MARKS.	ARTICLES.
Acct. S. S. Porter.	3 Cars Wheat, No. 468, 616, 394.

D. S. THOMPSON.

That Munn, Gill & Co. received from defendant and sold a part of this grain. That the balance of said grain was destroyed by fire on the night of the 13th August, 1856, in the depot of said company in Chicago.

R. T. Gill, one of the firm of Munn, Gill & Co., testified that they received notices of the arrival of cars on August 9, 1856, August 11, 1856, and August 13, 1856, similar notice of car 272. That about the 1st July, 1856, witness directed defendants, by Mr. Jones, the local freight agent, to have all grain received for them to be delivered at Flint & Wheeler's warehouse; and subsequently gave directions to have certain car loads delivered on the track, but only such cars as were particularly specified. Witness stated that there was no written notice given to Jones, and no other notice was given by Thomas or by any member of said firm to his knowledge, and that they did sometimes receive grain from the warehouse in bags without objection, subsequent to the time of the notice.

Charles H. Ball testified that he went into the employ of Munn, Gill & Co. in July, 1856. That the defendants at that time were in the habit of delivering grain for Munn, Gill & Co.

at Flint & Wheeler's warehouse, and so continued, except in some cases when orders were given to the contrary.

The following facts were agreed upon: That by the charter of the defendant, it was not permitted to charge storage on goods in their warehouse, after such goods were delivered at place of destination. That it is not the custom of defendant to charge storage on goods transported by it, but that after such goods have been kept a reasonable time, the same have been carried to other warehouses. That Duty S. Thompson was defendant's agent at time of signing the bills of lading.

Thomas D. Winter's deposition was read by defendant, who testified that some of the printed notices sent to Munn, Gill & Co., as testified by Gill, were made by himself from authority from Joseph Jones, local freight agent; that he had no personal knowledge when the cars specified in the notices actually arrived in Chicago.

John Comisky testified that the cars, with exception of car 282, were unloaded at the depot in Chicago, on the 12th and 13th August, 1856, and that it was the custom of the company to have the cars unloaded as quickly as possible after arrival; that Munn, Gill & Co. had given him orders to have all grain that came in bags unloaded at the depot, until further orders. This witness stated that he kept no memoranda of dates of arrival of the cars, but knows that they were in the depot on the night of the fire.

J. Jones, Jr., testified that he was local freight agent, at Chicago, of defendant; that the depot at Chicago was burned on night of 13th August, 1856, caused by the heat from buildings opposite. The grain in the cars named arrived a few days before the fire; don't know when notices were sent, but the clerk, whose business it was to send notices, had orders to notify parties immediately upon arrival of way bills, and it was the custom so to notify them without reference to whether the freight had arrived or not.

Thomas D. Jamieson testified that about 8th or 9th August, 1856, he received a written order from Munn, Gill & Co. to put in five cars of grain in bags in depot; two days afterwards Charles H. Ball gave me verbal notice to put all grain in bags for Munn, Gill & Co. in depot, as they had a warehouse of their own and could haul it cheaper than to store at Flint & Wheeler's.

MANNING & MERRIMAN, for Appellant.

JUDD & WINSTON, N. H. PURPLE, GLOVER & COOK, and G. C. CAMPBELL, for Appellee.

WALKER, J. The questions presented by the record in this case involve the determination of the extent of the liability of carriers by railway. And upon an examination of the reported cases, it will be found that there is some conflict as to what acts, after the arrival of the goods at their destination, will discharge them from their liability as carriers. It has been said, and we think with reason, "that the cases have settled the question that carriers by railway are neither bound to deliver to the consignee personally, or to give notice of the arrival of the goods, to discharge the liability of common carrier." Redfield on Railways, 251. This mode of transportation is so essentially different from that by wagons and other vehicles, that a delivery to the consignee, at his place of business or residence, would be unadapted to their nature and the course of business by which they exist. And yet, to say that all duty ceases upon an arrival at the terminus of the road, or at their destination upon the route of the road, would be to leave the owner to a great extent unprotected, and to require less at the hands of the carrier than the law would seem to sanction. To hold that they were thus relieved from the liability of carriers, would be to leave the owner to contend with the same difficulties in showing theft, embezzlement or loss by negligence by the carriers, their agents and servants, that he would have had at any time after they were first placed upon the road. The goods are still as completely under the control of the carrier as before, and the owner or consignee would be as effectually precluded from exercising any control over them. He could do no act for their security and protection while locked up in the car, and none but the carrier and his agents and servants could even know that they had arrived. We are strongly inclined to the belief that no decision can be found that such act releases them from their liability of carriers, and that it should not, without something further on their part.

While there is some conflict in the evidence as to whether this grain should have been delivered at Flint & Wheeler's warehouse, it seems that the preponderance shows that all grain, in bags, consigned to Munn, Gill & Co. which arrived after the 11th of August, was to be stored in the depot. And the evidence shows this grain was all in bags, and the evidence tends to show it arrived after that time; and no delivery was made in the car or otherwise after its arrival.

The evidence shows that all of the grain, with the exception of that contained in one car, had been unloaded and placed in the defendant's freight depot before the fire occurred by which it was destroyed. The question then presents itself, whether, as to that portion destroyed by fire in the warehouse, the defend-

ant's relation of carrier had ceased, and on this point there seems to be some diversity in the decided cases. While some hold that such character does not cease until the consignee has had notice and reasonable time to remove the goods, others have held that the carrier's duty ceases as soon as the goods are taken from the cars, and safely stored in a warehouse of the company, or that of some other person. In the case of *Thomas* v. *The Boston and Providence Railway*, it was held, that "where suitable warehouses are provided, and the goods *which are not called for* on their arrival at the places of destination are unloaded, and stored safely in such warehouses, the duty of the proprietors as common carriers is, in our judgment, terminated." 10 Met. R. 472. This decision is supported by the cases of *Moses* v. *The Boston and Maine Railway*, 32 N. H. R. 523, and *The Norway Plaines Company* v. *The Boston and Maine Railway*, 1 Gray R. 263. In the latter of these cases, the court says, that "this view of the law, applicable to railroad companies as common carriers of merchandise, affords a plain, precise and practical rule of duty, easy of application, well adapted to the security of all persons interested. It determines that they are responsible, as common carriers, until the goods are removed from the cars and placed upon the platform; and if, on account of their arrival in the night, or at any other time, when, by the usage or course of business, the doors of the merchandise depot or warehouse are closed, or, for any other cause, they cannot then be delivered, or if, from any reason, the consignee is not there to receive them, it is the duty of the company to store them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them, when duly called for by parties entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company is liable, as warehousemen or keepers of goods for hire." The court also held that notice to the consignee was not necessary to exonerate the railroad of its liability as a common carrier.

This doctrine, it seems to us, is well adapted to this mode of transportation and the general course of business of the country, as at present conducted. The goods have then reached their destination, and the owner or consignee, by the use of diligence, may be there to receive them, and take them into his own control, and failing to do so, the presumption should be that he has elected to permit them to be stored by the company, to be held as warehousemen or keepers for hire. The goods are then placed in precisely the same situation as goods in any other warehouse. And the owner has the same opportunity to estab-

lish the liability of the company in their new capacity of warehousemen, as he would have in any other case of a warehouseman.

The fact that the goods in the car were destroyed by an accidental fire, would not excuse the defendants from liability as common carriers. Story on Bailment, 128. Their undertaking as common carriers holds them liable for all losses, except those occasioned by the act of God or the public enemy. Ibid. sec. 529. "And when a loss occurs, the *onus probandi* is on the carrier, to exempt himself from liability, for *prima facie* the law imposes the obligation upon him. It will, therefore, be sufficient *prima facie* evidence of loss by negligence that the goods have never been delivered to the bailor or his agent, or to the consignee." Ibid. sec. 529.

In this case, it appears, from the evidence, that the contents of one of the cars had not been unloaded and placed in the depot, and for the failure to deliver the grain destroyed in it, the defendants would be liable, and the court below having failed to render judgment for the value of its contents, committed an error, for which the judgment of that court should be reversed and the cause remanded.

Judgment reversed.

SAMUEL C. DAVIS *et al.*, Appellants, *v.* THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY, Appellee.

APPEAL FROM COOK.

The liability of a common carrier by railway terminates, if the goods after reaching their destination are properly stored in any warehouse; and notice need not be given of their arrival, and if it is given, no other liability grows out of it than that the goods will be retained, free of charge, for the time specified.

THE facts of this case are the same as in that preceding. The judgment was rendered by MANIERRE, Judge, without the intervention of a jury, upon an agreed state of facts, at April term, 1858. The judgment was for the defendant below, appellee in this court.

GOOKINS, THOMAS & ROBERTS, for Appellants.

JUDD & WINSTON, and GLOVER & COOK, for Appellee.

WALKER, J. The material facts in this case, are similar to those in the case of Richards et al. against this defendant, decided at the present term; and the legal principles involved, and their application to the facts, are discussed in that case, and also in the preceding case of *Porter* v. *The Chicago and Rock Island Railroad Company.* And we deem it unnecessary to again discuss them in this case.

The judgment of the court below should be affirmed.

Judgment affirmed.

THE CITY OF OTTAWA, Plaintiff in Error, *v.* GEORGE B. MACY *et al.*, Defendants in Error.

ERROR TO LA SALLE COUNTY COURT.

Where a statute directs that assessments for city improvements shall be made upon real estate in any natural division of the city benefited thereby, it is a limitation on the powers of the commissioners not to go out of a natural or obvious division, to make assessments; but having selected the area, then to assess such property in it, for taxation, as will most likely be benefited.

A notice to parties interested in the property assessed, which conforms to the law under which the city is incorporated, and to the city ordinance in that regard, will be sufficient, although it is general, to "all persons interested," to attend and make their objections to the confirmation of the assessment.

Where the city charter does not, but the ordinance passed under it does direct, that the collector shall make return of his warrant in thirty days, an omission to make the return within that time, will not make the proceedings void; such an ordinance is merely directory and for the benefit of the city council.

If the collector shall make a return that he could not find goods and chattels whereon to levy and collect the amount assessed, that will be conclusive of the fact stated. If the return is false, the officer is responsible.

THIS was an application by the collector of the city of Ottawa, to the County Court of La Salle county, for judgment against certain lots in that city, for assessments made on said lots for improving certain streets.

The delinquent list of the collector sets forth the lots within the limits of the city of Ottawa benefited by the improvement of La Salle street, the valuation of such lots and the sums of money assessed thereon, which remained due and unpaid.

The return of the collector is in the words and figures following:

I, ALBERT F DOW, city collector of the city of Ottawa, county and State aforesaid, certify that the above and foregoing list, upon which an assessment has been made for the purpose set forth in the caption hereof, and which remains un-

paid, is true, according to the best of my knowledge and belief, and that I have been unable to find goods and chattels of the owners thereof, upon which to levy and make good such assessment.

ALBERT F. DOW, *City Collector.*

The affidavit of the city clerk shows that no payments were made on said list from the date of said return up to February 23rd, 1858, the time of making application for judgment.

There is proof of publication of the notice of the application for judgment.

Such notice gives a description of the improvement, and of lots, and states in whose names they were assessed, the valuation, and the amount of assessment on each lot.

The objections interposed are as follows:

1st. Sec. 2, art. 8, of the city charter, under which the assessment was made, was unconstitutional.

2nd. The assessment was not uniform on all the real estate in the natural division of the city benefited.

3rd. The commissioners did not give sufficient notice of the time and place of making the assessment.

4th. The commissioners did not view the premises assessed.

5th. The city clerk did not give sufficient notice of the time and place of confirming the assessment.

6th. The collector's return does not show a demand made for the assessment of the owners of lots.

7th. The collector's return was made after the warrant had expired.

8th. Some of the lots assessed were owned by minors, and that no guardian was appointed, and no notice was served on the guardians of such minors.

9th. Some of the lots were church property and not subject to assessment.

10th. The proceedings in making the assessment were informal and insufficient in many respects.

On the hearing of the objections, the following notices were introduced, viz.:

COMMISSIONERS' NOTICE.

Public notice is hereby given to all persons interested, that the undersigned, commissioners appointed by the city council of the city of Ottawa, to assess the sum of seven thousand six hundred and sixty-six dollars and fourteen cents on the real estate benefited by the graveling of La Salle street, from the south side of Main street to the canal bridge, and paving and curbing the gutters of the same, will meet at J. Avery's office, in said city, on the 25th day of July, 1857, at 9 o'clock, A. M., for the purpose of making such assessment.

HENRY J. REED,
GEO. WHIPPLE,
SAML. B. GRIDLEY, } *Commissioners.*

Ottawa, July 18th, 1857.

The certificate of the corporation printer shows that said notice was published in the number of the Ottawa *Free Trader* dated July 18th, 1857.

The commissioners' return shows that they met at the time and place in said notice specified, and made the assessment.

ASSESSMENT NOTICE.

Public notice is hereby given to all persons interested, that the commissioners appointed by the city council of the city of Ottawa, to assess the sum of seven thousand six hundred and sixty-six dollars and fourteen cents on the real estate in the part of the city benefited by graveling of La Salle street, from the south side of Main street to the canal bridge, and paving and curbing the gutters of the same, have completed their assessment and made return of the same to my office. Any person wishing to appeal from said assessment must file their objections, in writing, in my office on or before Tuesday, the 18th day of August, 1857, at 7 o'clock, P. M., as the city council will at that time, at the council room, hear all objections to the assessment, and revise and confirm or amend the same.

August 8th. J. AVERY, *City Clerk.*

The certificate of the corporation printer shows that the said notice was published two weeks in the Ottawa *Free Trader*, commencing with the number of said paper dated August 8th, 1857.

The record of the proceedings of the city council shows that the assessment was confirmed at the time and place in the notice mentioned, after hearing all objections.

The warrant of the city collector was dated September 28th, 1857, and directed him to make return thereof in thirty days, and was returned and filed January 26th, 1858.

The following ordinances were introduced:

AN ORDINANCE *concerning Assessments for Public Improvements.*

SEC. 1. *Be it ordained by the City Council of the city of Ottawa,* That, whenever the city council shall deem it necessary to cause any street or public way to be paved, MacAdamized, planked, or otherwise improved, or any main drains, acqueducts or sewers to be laid, the subject shall be referred to an appropriate committee, whose duty it shall be to prepare and report to the city council the plan of such improvement, with an accurate estimate of the expenses therefor, including, in every case, the costs of making the assessment. It shall be the duty of the city surveyor to aid and assist the committee in the preparation of said report, and to make all estimates in writing; all of which shall be submitted to the city council, in connection with such report.

Sec. 2. Whenever any improvement shall be ordered, the order therefor may be in the following form:

Ordered, That —— street, from —— street to —— street, be paved *(or* otherwise improved, *as the case may be)* with, *(describe the manner and materials, etc.)* If the order be for a main drain or sewer, it may read as follows: Ordered, That a main drain or sewer *(as the case may be,)* be laid through and under —— street,

from —— street to —— street, as follows. In either case the order may conclude as follows: And that the sum of —— be assessed upon the real estate in the division of the city benefited thereby, to defray the expenses of such improvement.

Sec. 3. In all cases where a special assessment shall be required for the purpose of improving any public square, or to defray a part of the costs of any market grounds, public parks, or the erection of any market, or other public improvement in any part of the city, for which a special assessment may be made, the form and proceedings herein prescribed, with modifications, (if required,) may in any case be followed.

Sec. 4. When the assessment shall be ordered, and after the committee shall have made their report and estimate of the same, the city council shall by ballot choose three reputable freeholders, residing in the city, to make the same. Their names shall be recorded by the clerk as follows:

The city council proceeded to make choice, by ballot, of three commissioners to make such assessments. On the first ballot *(or as the case may be,)* A. B., C. D., and E. F., received —— ballots each, *(as the case may be,)* which being a majority of all the aldermen authorized by law to be elected, they were declared duly elected as commissioners to assess the sum of —— dollars on the real estate in the division of the city benefited by the *(state the nature of the improvement,)* in pursuance of the order of the council passed ———, 185–.

Sec. 5. The clerk shall make out notices of their appointment to the commissioners, requiring them to appear and be qualified, as such, within five days after the service of notice. Notices shall be served by the city marshal. Commissioners shall take the following oath, to be administered by the clerk, and entered upon or attached to the assessment roll:

The undersigned, commissioners appointed by the city council of the city of Ottawa, to assess the sum of —— dollars upon real estate by us deemed benefited by the paving of *(or* otherwise improving) —— street, *(or for such other purpose as the assessment may be made,)* in proportion to the benefit resulting thereto, as nearly as may be, we solemnly swear that we will faithfully and impartially execute our duty according to the best of our ability.

A. B.,
C. D., } *Commissioners.*
E. F.,

Sworn to and subscribed before me, this —— day of ———, 185–.

———, Clerk.

Sec. 6. Before entering upon their duties, the commissioners shall give at least six days' notice in the corporation paper, of the time and place of making their assessment, and they may, if necessary, adjourn from day to day. Said notice may be in the following form:

COMMISSIONERS' NOTICE.

Public notice is hereby given, to all persons interested, that the undersigned, commissioners appointed by the city council of the city of Ottawa, to assess the sum of —— dollars on the real estate in the part of the city by us deemed benefited by the *(here state the substance of the order,)* will meet at ——, in said ——, on the —— day of ——, at the —— house of ——, clerk, for the purpose of making said assessment.

A. B.,
C. D., } *Commissioners.*
E. F.,

OTTAWA, ———, 185–.

The commissioners shall attach to their assessment roll a certificate of such publication, signed by the proprietor or general agent of the corporation paper.

Sec. 7. The commissioners shall be present at the time and place mentioned in such notice, for the purpose of making said assessment. When the same shall be completed, it shall be entered in a well bound book, to be provided by the city; the roll shall contain the names of the owners of real estate, when known, a description of the lots and parts of lots which may be assessed, the valuation of each, separately, and the sum of money assessed thereon. It may be in the following form:

ASSESSMENT ROLL.

A description of the real estate in the part of the city of Ottawa deemed benefited by the paving *(or otherwise, as the case may be,)* —— street, *(or* by laying of a main drain, *or otherwise, as the case may be,)* with the valuation thereof, and the sums of money severally assessed thereon by the commissioners, to wit:

ORIGINAL TOWN OF OTTAWA, *(or as the case may be.)*

Name of Owner.	Description.	Lot.	Block.	Valuation.	Assessment.

Sec. 8. When the said roll shall be completed, the commissioners shall attach thereto a return, which may be in the following form:

We, the undersigned, freeholders and residents of the city of Ottawa, duly elected by the city council to assess the sum of —— dollars on the real estate in the part of said city by us deemed benefited by the paving —— street, *(or* by laying of a main drain or sewer, *or as the case may be, following in each case the description of the improvement in the order therefor,)* do hereby report and return to the city council:

That, in pursuance of said appointment, they were duly qualified before entering upon their duties, as appears by the oath recorded herein.

That they published a notice of the time and place of their meeting for the purpose of making said assessment, in the ———, corporation newspaper, for the period of six days previous to such meeting, a certificate of which publication is hereunto annexed; that they were present at the time and place, and for the purpose designated in said notice, and did then and there and do hereby, in pursuance of said appointment, assess the said sum of money upon the real estate hereinbefore set forth and described as benefited, in the respective proportions of said sum set opposite to each lot and part of lot, respectively, in the foregoing assessment roll, having first fixed a valuation on the real estate, which is likewise set forth in said roll.

All of which is respectfully submitted.

A. B.,
C. D., } *Commissioners.*
E. F.,

OTTAWA, 185–.

Sec. 9. The commissioners shall complete their assessment and file the same in the office of the city clerk, within forty days after their appointment, unless further time shall be given them for the purpose. The clerk shall thereupon cause a notice of the return of such assessment to be published for six days in the corporation paper, and a certificate of such publication, under the hand of the corporation printer, or his general agent, shall be written upon or attached to the roll. The notice may be in the following form:

ASSESSMENT NOTICE.

CITY CLERK'S OFFICE,
OTTAWA, ——, 185–.

Public notice is hereby given, to all persons interested, that the commissioners appointed by the city council of the city of Ottawa, to assess the sum of —— dol-

lars on the real estate in the part of the city benefited by the *(here state the substance of the order)*, have completed their assessment and made return thereof to my office. Any persons wishing to appeal from said assessment must file their objections, in writing, in my office, on or before Tuesday, the — day of ——, 185–, at 7 o'clock P. M., as the city council will at that time, in the council room, hear all objections to the assessment, and revise and confirm, or amend the same.

J. A., *Clerk.*

Sec. 10. When all objections to the assessments shall have been heard, and the roll revised and corrected by the city council, an order of confirmation shall thereupon be entered by the clerk, (if such order shall be made,) which order may be in the following form, to wit:

Whereas, due notice has been given by the city clerk of the return of the assessment made by the commissioners appointed by the city council, on the —— day of ——, 185–, to assess the sum of ——dollars on the real estate in that part of the city benefited by the *(here state the nature of the assessment,)* and all objections to such assessment having been duly heard and disposed of by the city council, *(or,* no objections thereto having been made, *as the case may be,)* it is therefore—

Ordered, That the said assessment, as revised and corrected by the city council, be, and the same is hereby confirmed. It is further ordered, that a warrant be issued and directed to the city collector, for the collection thereof, returnable in thirty days after date.

Sec. 11. The city collector shall have the same power in the collection of warrants as he possesses in the collection of general taxes. If any part of the assessment shall not be collected by the return day of the warrant, he shall make return thereof in the manner required for the return of general warrants. The order of sale shall be entered by the city clerk, and the sale and returns thereof shall be made by the collector in the manner prescribed for taxes. All warrants for special assessments shall be charged by the city clerk to the collectors receiving the same, and such collector shall be liable therefor in the same manner and to the same extent as he is for general taxes.

Sec. 12. No assessment shall be deemed to be invalid in any case where the same shall be made in conformity with the proceedings and forms herein prescribed.

By order, J. Avery, *City Clerk.*

Passed *February* 24, 1857.

An Ordinance *to carry into effect an Act of the General Assembly of the State of Illinois, entitled "An Act to amend the charter of the several towns and cities in this State—Approved March* 1, 1854."

Sec. 1. *Be it ordained by the City Council of the city of Ottawa,* That in all cases where taxes assessed on any lot or real estate in this city, by the corporate authorities thereof, are not paid within the time limited, it shall be the duty of the city collector, after having given notice of such intended application, by advertisement at least thirty days previous to such application, in some newspaper published in this city, to apply to the county court of La Salle county, at the December term thereof, and cause judgment to be entered in said court against such delinquent lot or real estate, for the amount of taxes due and unpaid, and costs; and the said court shall proceed to hear and determine such application, and render judgment against such delinquent lot or real estate, in the same manner,

and the said judgment shall have the like effect, as though said delinquent list had been returned to said court by the sheriff or collector of the county, in the collection of State and county taxes; and the said court, after the entry and rendition of said judgment, shall issue a precept or order to the city collector, directing him to sell such delinquent lots or real estate at public auction, to pay said delinquent taxes and costs; and the said sale shall be made on the second Monday after said court shall have adjourned, by the city collector, at the door of the court-house in said county, the said city collector having previously given notice of said sale by advertisement, by one insertion in some newspaper published in this city.

Sec. 2. *Be it further enacted*, That in all cases where assessments have heretofore been made, or shall hereafter be made by the corporate authorities of this city, on any lot or real estate in this city, for the purpose of improving any street, sidewalk, avenue or alley, in front of or adjacent to such lot or real estate, or for any purpose whatsoever, either by ordinance, resolution or other proceeding, and such assessment shall not be paid within the time limited by the ordinance, resolution or order making such assessment, it shall be the duty of the city collector to apply to the county court of La Salle county, at any regular term thereof, and cause judgment to be entered in said court against said lot or real estate, for the amount of such assessment and costs; and said court, upon such application being made, shall render judgment against such lot or real estate, for the amount of said assessment due and unpaid, and costs, and shall issue a precept or order to the sheriff of said county, commanding him to sell said lot or real estate, or so much thereof as may be necessary to pay said judgment and costs, in the same manner and with like effect as if sold upon execution at law.

Error assigned, is, refusing to render judgment against the lots to which the objections were made.

Leland & Leland, and J. Avery, for Plaintiff in Error.

O. C. Gray, for Defendants in Error.

Breese, J. Of the ten objections made in the County Court to which this writ of error was directed, the first and ninth are considered as abandoned by the defendants in error. In truth, the ninth objection that some of the lots assessed were church property, and therefore not subject to assessment, could not be made by these defendants, as they show no interest in that property. Nor can the eighth objection avail them, that some of the lots assessed were owned by minors, for whom no guardians were appointed, and for the same reason. The minors themselves, or their guardians for them, when appointed, can make the objection, if advisable. The tenth objection is of a nature so general as to preclude any particular inquiry into it, and we will confine ourselves to those considered meritorious.

It is alleged by the defendants that the assessment was not uniform on all the real estate in the natural division of the city benefited by the improvement.

Section two of article 8 of the charter of the city of Ottawa provides that the expenses of any improvement in the foregoing section, except side walks and private drains, shall be assessed upon real estate in any natural division benefited thereby, with the costs of the proceedings therein, in proportion, as nearly as may be, to the benefits resulting thereto. Act of Feb. 10, 1853, to charter the city of Ottawa.

It is contended that this means that all the property in the natural division must be assessed, and not alone the particular property in such division benefited by the proposed improvement. We do not regard this as a positive command to the commissioners to assess all the property in the natural division benefited. The language of the charter is not that the assessment shall be made on all the real estate of any natural division, but upon "real estate in any natural division benefited thereby." It is a limitation on the power of the commissioners, not to go out of a natural or obvious division to make assessments, but having selected the area, then to assess such property in it for taxation as will, most likely, be benefited.

The fifth objection to which the defendants' counsel has called the attention of the court, not arguing the third and fourth, is, that the city clerk did not give sufficient notice of the time and place of hearing objections to the confirmation of the assessment by the city council.

The sixth section of article 8 provides, "When the commissioners shall have completed their assessment, and made a correct copy of it, they shall deliver the same to the city clerk within forty days after appointment, signed by all the commissioners. The clerk shall thereon cause a notice to be published in one or more newspapers published in said city, for six days, to all persons interested therein, of the completion of the assessment and the filing of the roll. Time and place shall be designated for hearing objections."

It is insisted that this form of notice "to all persons interested," as under it a person may be deprived of his property, is not sufficiently special, and that the notice should contain either a description of the lands assessed, or the names of the owners of the property assessed; that the notice is too general to effect the object intended by notice. It is a sufficient answer to this objection to say, that it conforms to the requirements of the statute; it is general, because the statute allows a general notice. The commissioners notified all persons interested that they had assessed a certain sum on the real estate in the part of

the city benefited by graveling La Salle street, from the south side of Main street to the canal bridge, etc., and a day, hour and place named in the notice when objections to the assessment would be heard.

This notice is also in strict conformity with the form adopted by the city council, entitled, "An Ordinance concerning assessments for public improvements."

Section four of article 8 requires the commissioners to give six days' notice in one or more newspapers published in the city, of the time and place of meeting, prior to making assessments, "to all persons interested."

Now this notice could not well be specific, for it could not be known to the commissioners whose property, or what particular property, would be assessed; and, therefore, a general notice was all the notice that could be given. If a more particular notice might have been given after the assessment, the legislature should so have required. In their wisdom, it was not deemed necessary; but the same phraseology is used in the sixth section. The notice given contains a description of the property assessed, sufficiently particular to arrest the attention of the owners of lots or land in that described locality.

By the second section of the act entitled "An Act to amend the charters of the several towns and cities in this State," approved March 1, 1854, (Laws of 1854, page 22), power is given to the corporate authorities to provide, by resolution or ordinance, for "the kind and time of notice of assessments." This notice is in conformity with the city ordinance on that subject.

The seventh objection goes to the fact, that the collector did not make return of his warrant in thirty days, as required by the ordinance of the city to which reference has been made.

The ordinance does make this requirement, but the charter does not, and are the proceedings all void if he does not so return it? It is a mere direction of the city council to their officer to make the return within that time and for their benefit. We cannot see how it can injuriously affect the owners, if the warrant be not returned in that time, if the direction of the council be not obeyed.

As to the fourth objection, not waived by the defendants, and yet not insisted on by them, it is sufficient to say, that the law under which the commissioners acted, does not require them to go upon and view the premises to be assessed.

The sixth objection is, that the collector's return does not show any demand for the sums assessed, nor that the owners had no goods and chattels.

Section eight, of article nine, provides, that the collector shall return the list, etc., with a certificate, signed by him, that

the taxes remain unpaid, and that he could find no goods and chattels whereon to levy and collect the amount of the tax. The return conforms to this provision.

We have held such a return conclusive of the fact stated, the officer being responsible for a false return, if it be one. *Taylor* v. *The People*, 2 Gilm. R. 351; *Job et al.* v. *Tebbets*, 5 ib. 382.

We can see no force in the objections made to rendering judgment against the lots assessed.

The judgment of the County Court is reversed, and the cause remanded, with directions to enter judgment against the lots, notwithstanding the objections.

Judgment reversed.

The City of Ottawa, Plaintiff in Error, *v.* Abner A. Fisher *et al.*, Defendants in Error.

ERROR TO LA SALLE COUNTY COURT.

The common council of the city of Ottawa is not bound to decide upon the confirmation of an assessment, on the day fixed for that purpose, by the notice given. The day named was for hearing objections; deliberation may be necessary.

This was a special assessment for grading, graveling, and otherwise improving Main street, in the city of Ottawa.

The delinquent list of the collector sets forth the lots within the limits of the city of Ottawa benefited by the improvement of Main street, the valuation of such lots, and the sums of money assessed thereon, which remain due and unpaid.

There was proof of publication of the notice of the application for judgment.

Such notice gives a description of the improvement, and of lots, and states in whose names they were assessed, the valuation and the amount of the assessment on each lot.

On the 8th day of March, the following, among other objections, was filed:

The city clerk did not give sufficient notice of the time and place of confirming the assessment.

The record of the proceedings of the city council shows, that on the 8th day of September, 1857, said assessment roll was reported to the council, and taken up for consideration, and all objections thereto read, after which the assessment and objections were referred to the finance committee.

September 15th, 1857, no quorum. On motion of Alderman Smith, adjourned to Thursday evening next.

On said Thursday evening the finance committee reported back said assessment, and recommended several corrections and alterations, upon which the council then confirmed the assessment, after correcting the same.

LELAND & LELAND, and J. AVERY, for Plaintiff in Error.

O. C. GRAY, for Defendants in Error.

BREESE, J. In addition to the objections considered in the case of *The City of Ottawa* v. *George B. Macy et al.*, this one is made, namely, that the city council did not finally dispose of and determine the question of confirming the report of the commissioners on the day it was made.

It will be seen that the day fixed in the notice was for hearing objections, not for deciding upon them. They might require time and much deliberation. The parties interested could attend the meetings of the council until a final disposition was made of the matter, if they deemed it important.

The judgment of the court below is reversed, and the cause remanded, with instructions to render judgment against the lots, notwithstanding the objections.

Judgment reversed.

THE CITY OF OTTAWA, Plaintiff in Error, *v.* THE TRUSTEES OF THE FREE CHURCH *et al.*, Defendants in Error.

ERROR TO LA SALLE.

Church property may be assessed for special purposes, though not liable for ordinary taxes.

THIS was a proceeding to enforce a special assessment in the city of Ottawa.

The delinquent list of the collector sets forth the lots within the limits of the city benefited by a sewer in Jefferson street, the valuation of such lots, and the sums of money assessed thereon, which remain due and unpaid.

The return of the collector is in the words and figures following:

I, ALBERT F. DOW, city collector of the city of Ottawa, county and State aforesaid, certify that the above and foregoing list upon which an assessment has been made for the purpose set forth in the caption hereof, and which remains unpaid, is true according to the best of my knowledge and belief, and that I have been unable to find goods and chattels of the owners thereof upon which to levy and make good such assessment.

ALBERT F. DOW, *City Collector.*

Ottawa, Jan. 18*th*, 1858.

Sworn to, Feb. 23rd, 1858.

The affidavit of the city clerk shows that no payments were made on said list from the date of said return up to February 23rd, 1858.

There was proof of the publication of the notice of the application for judgment.

Such notice gives a description of the improvement, and of the lots, and states in whose name they were assessed, the valuation and amount of the assessment. There was proof of the regularity of the other proceedings.

On the first day of the term a rule was taken on the defendants to file objections by the 8th day of March.

Among other objections was the following:

Some of the lots were church property and not subject to assessment.

LELAND & LELAND, and J. AVERY, for Plaintiff in Error.

O. C. GRAY, for Defendants in Error.

BREESE, J. All the objections made in the case of *The City of Ottawa* v. *George B. Macy et al.*, are made in this case, and are disposed of in the same way.

The additional objection that church property was assessed, is not tenable. Though not liable for ordinary taxes, it is for local assessments of this character.

The principles of the case of *The Trustees of the Ill. & Mich. Canal* v. *The City of Chicago*, 12 Ill. R. 403, govern this case.

The judgment of the court below is reversed, and the cause remanded, with instructions to render judgment against the lots assessed.

Judgment reversed.

GEORGE DIVILBISS, Administrator of Nathan'l C. Divilbiss, deceased, Plaintiff in Error, *v.* JAMES S. WHITMIRE, Assignee of D. J. Stewart, Defendant in Error.

ERROR TO MARSHALL.

The return to a summons in chancery, which states service by delivering a true copy to the within named, etc., he being a white person over ten years old, on, etc., as within commanded, is a nullity, and no default can be taken upon it.

THIS was a bill in chancery, filed in the Marshall Circuit Court, in March, 1856, by Whitmire, as assignee of Stewart, against Nathaniel C. Divilbiss, who is now deceased. A summons was issued, and returned as set out in the opinion. Upon this return a default was taken, and a decree of foreclosure by default was entered upon it.

N. H. PURPLE, for Plaintiff in Error.

J. CLARK, for Defendant in Error.

BREESE, J. It is only necessary to advert to the first error assigned, which is, "Rendering a decree by default against the defendant, there being no service of process on him, and no equity on the face of the bill."

The summons is in the usual form, against Nathaniel C. Divilbiss, and the return upon it is as follows:

I have served this writ by delivering a true copy of the same to the within named James Divilbiss, he being a white person over 10 years old, on this second day of May, A. D. 1856, as within commanded.

A. GARDNER,
Sheriff Marshall County, Ill.

The seventh section of the Chancery Practice Act, (R. S., chap. 21,) is as follows:

"Service of summons shall be made by delivering a copy thereof to the defendant, or leaving such copy at his usual place of abode with some white person of the family of the age of ten years or upwards, and informing such person of the contents thereof, which service shall be at least ten days before the return day of such summons."—p. 94.

This return is so destitute of all these important requirements as to render it unnecessary to expend words about it—it is a perfect nullity. *Townsend et al.* v. *Griggs*, 2 Scam. R. 366; *Montgomery et al.* v. *Brown et al.*, 2 Gilm. R. 584. The de-

fendant not having been served with process, his default was improperly entered, and the final decree thereon irregular and erroneous.

The decree is reversed, and the cause remanded.

Decree reversed.

Peter Schoonover, Plaintiff in Error, *v.* Thomas Christy, Defendant in Error.

ERROR TO LA SALLE COUNTY COURT.

If a party contracts in writing to work for another a certain length of time, and afterwards to perform other work upon specified terms, for which he was to be compensated by a colt and a cow, if he refuses to perform, the other party may take him at his word, and the claim to the animals will be lost.

This is an action of assumpsit, commenced before a justice of the peace, and appealed to the La Salle County Court, and tried before Cotton, Judge.

In the County Court, the plaintiff, on the trial, introduced testimony tending to show that plaintiff commenced work on defendant's farm about the 9th day of March, 1855, and so continued to work until about the 9th day of April, 1855; that on or about the 9th day of April, 1855, plaintiff agreed to work for defendant until the 1st day of October, 1855. That defendant was to give plaintiff, for such labor, one sorrel horse or mare. That after the contract made on the 9th day of April, the plaintiff and defendant made a written contract or agreement, in which plaintiff agreed to work for defendant from the 1st day of April to the 1st day of October, 1855, and immediately after said 1st day of October, to commence hauling straw and manure for defendant, and to spread the same upon defendant's farm. That plaintiff was to haul and spread all the straw and manure around defendant's barn, and continue to haul and spread the same until it was finished. That for said work and labor the defendant was to give plaintiff one sorrel horse and one red cow. That plaintiff continued to work for defendant until about the 15th day of July, when plaintiff was taken ill and remained idle for about twenty-seven days. That after plaintiff recovered his health, he again commenced work for defendant, with the approbation of the defendant, and worked until about the 1st of October. That on or about the 10th day of October, the plaintiff offered to go on and work the number of days he had lost during his sickness. The defendant replied, that if the plaintiff would

go on and haul out the manure and straw, that he then might work the number of days he had lost by sickness. This the plaintiff absolutely refused to do. That plaintiff and defendant both signed the agreement, after it was read to the plaintiff. Plaintiff can read writing with difficulty. That something was said about dating the last agreement back to April 1st. That Christy agreed to the same, and that the first contract was to be destroyed.

The defendant then offered in testimony a written agreement, signed by plaintiff and defendant, and proved the execution of the same by one *Silas Morey*, who testified that he was present when the agreement was executed by the parties, that both plaintiff and defendant signed the same, which agreement is in the words and figures following, to wit:

APRIL THE 1ST, 1855.

AN ARTICLE OF AGREEMENT, Made and entered into this day, between Peter Schoonover and Thomas Christy. The said Christy doth agree to work for the said Schoonover, faithfully, from the day of this date until the first day of October next, and the said Christy then agrees to commence hauling manure by the job, as described. The said Schoonover agrees to furnish team and wagon, and find feed for the team. The said Christy agrees to take good care of the team, and board himself, and haul and spread all the manure on Schoonover's farm, including that which is under the barn, together with all the old straw piles on said farm; also, to help haul all the last year's straw unstacked—all to be neatly spread and drawn according to Schoonover's direction—for which the said Schoonover agrees to give the said Christy one large sorrel horse colt, one year old in June next, and one red cow, bought of Silas Morey, with her increase. The said Schoonover is to take good care of the same, without further responsibility. It is further understood the said Schoonover is to retain said stock until said labor is done.

SILAS MOREY. PETER SCHOONOVER.
THOMAS CHRISTY.

That said Morey signed the contract at the request of the parties, as a witness. That said contract was made on or about the 17th day of April, 1855. The said agreement was read to plaintiff, and I think it was fully understood by him.

The defendant then showed another contract to witness Morey, who testified that he had seen the agreement before; saw it on the 9th day of April, 1855, the day on which it was made. It was signed by plaintiff and defendant. Said agreement is in the words and figures as follows, to wit:

APRIL THE 9TH, 1855.

MEMORANDUM OF AN AGREEMENT, Made and entered into this day, between Peter Schoonover and Thomas Christy. The said Christy agrees to work for the said Schoonover from this date, faithfully, until the first day of October next, for which the said Schoonover agrees to give the said Christy the sorrel colt, being a

horse colt, one year old in the month of June next. The said Schoonover agrees to take good care of the colt until said labor is performed.

In presence of
SILAS MOREY.

PETER SCHOONOVER.
THOMAS CHRISTY.

That the parties had this contract on the 17th day of April, when the first contract above mentioned was made. That Schoonover said, "Here is the old contract; it is of no use now; take it, do what you please with it." That Christy knew that the first contract was dated back to April; it was read to Christy as being made on the 1st day of April.

The court then instructed the jury, on the part of the plaintiff, as follows:

1st. If the jury believe, from the testimony, that the contract made on the 9th day of April, 1855, was the contract under which the work was done from the 9th day of April to the first day of October, 1855, and Schoonover refused to let plaintiff make up his lost time by work, he had a right to abandon the contract and sue the defendant in an action of assumpsit for his work, and recover what his work was worth.

The jury found a verdict for plaintiff, and thereupon defendant moved for a new trial. The court overruled the motion; to which ruling of the court the defendant then and there excepted. There was a judgment on the verdict in the court below for $81.36.

BUSHNELL & GRAY, for Plaintiff in Error.

A. W. CAVARLY, for Defendant in Error.

BREESE, J. All the facts and circumstances in this case concur in showing that the contract dated April 1st, 1855, though actually signed on the 17th, is the true contract between these parties; and as the defendant in error refused to comply with it, the plaintiff had a right to take him at his word, and to act on that refusal. His refusal destroys the claim he might have perfected to the cow and colt. *Fox* v. *Kitton*, 19 Ill. R. 519.

The first instruction, therefore, given in behalf of the defendant in error, was erroneous.

The judgment is reversed and the cause remanded.

Judgment reversed.

Elisha Freeman *et al.*, Appellants, *v.* Gustavus W. Morse, Appellee.

APPEAL FROM KANE.

The purchaser of goods at a sheriffs' sale, which have been receipted for to him, is the owner of such goods, and may replevy them.

This was an action of assumpsit. The declaration contained but one count, which was for money had and received. There was a plea of the general issue and a replication.

The bill of particulars filed with the declaration, stated an account for money had and received, $1,000, and claiming $700 for a note made by G. W. P. & A. H. Bowman, to one Harris Hoyt, and by him assigned in blank, to the plaintiff below, but appellee in this court.

The appellants had a judgment against Harris Hoyt, and the appellee gave them the said note against the Bowmans, for collection, with the express understanding that whatever might be collected upon it should be applied in satisfaction of the judgment against Harris Hoyt. The appellants enforced their judgment against Hoyt by sale of his goods on an execution, which was returned satisfied. The appellants also collected three hundred dollars or thereabouts on the note of the Bowmans, which was not applied in any way in satisfaction of the judgment in their favor against Harris Hoyt. Morse brings this action to recover from appellants whatever sum they received from the Bowmans upon the note. The appellants resist this claim by an attempt to show that a melodeon, a carpet and some other articles bought by them at the sale of Hoyt's goods on their execution, were not delivered by Hoyt. The cause was heard before I. G. Wilson, Judge, and a jury, at January term, 1858, of the Kane Circuit Court. There was a verdict and judgment for appellee in the Circuit Court, for $318.33 and costs.

Eastman, Beveridge & Lumbard, for Appellants.

T. C. Moore, for Appellee.

Breese, J. This case lies in a small compass, although the papers are voluminous. The record shows quite plainly, that the appellants here are seeking a double satisfaction of the debt due them from Harris Hoyt.

It appears this note on the Bowmans was payable to Hoyt, and he had assigned it in blank to Morse, and Morse had de-

livered it to the appellants with directions to appropriate it on the judgment they held against Harris Hoyt. That after collecting a portion of it, they caused an execution on their judgment to be issued against Harris Hoyt's property, and coerced the collection of the debt.

Of course, then, Morse had a clear right of action to recover of the appellants the amount of the Bowman note.

But the appellants say, they did not get all the property of Hoyt that they bid off at the sale; that Hoyt kept a carpet and melodeon which he refused to deliver up to them, saying "appellants had a note of his which was to be applied on this judgment, and if he delivered up these things they would get pay twice." Appellants had receipted to the sheriff for these articles, and by the purchase at the sheriff's sale, they became to all intents and purposes the owners of them, and they could have replevied them out of Harris Hoyt's possession.

They did not choose to do so, but attempt to set up this fact, the detention by Harris Hoyt of the carpet and melodeon, against the claim of Morse for the value of the Bowman note, which they had released and given up to Bowman. This they cannot do.

In looking into the evidence, we think it fully sustains the verdict, and there does not appear to be any substantial objections to the instructions.

The judgment is affirmed.

Judgment affirmed.

William H. Gardner, Appellant, *v.* The People, Appellees.

APPEAL FROM WARREN.

Before a party can be tried on an indictment, it must appear from the record that it was returned into open court.

Because an incorporated city is authorized to pass ordinances, in relation to the sale of spirituous liquors, declaring such sale a nuisance, the general law is not thereby repealed. While a license from city authorities would protect the holder of it, yet if those authorities fail or refuse to grant a license, the general law would be violated by a sale in the city limits, and the aggressor may be punished under it.

The appellant was indicted for selling spirituous liquors, without license, at the March term, 1856, of the Warren County Circuit Court. The indictment contains two counts.

There is an entry on the record as follows, to wit:

"The People, etc., } Indictment for selling liquor.
vs. } A true bill.
William H. Gardner. } John Brown, Foreman.

Ordered that a capias issue herein, instanter, returnable to the present term of this court, and that said defendant be held to bail in the sum of one hundred dollars."

This is the first appearance of the case on the record, and there is no other entry of the return of the indictment into open court.

At the September term, 1857, before THOMPSON, Judge, the defendant having plead not guilty, was tried. The jury found him guilty, as charged in the second count. The defendant moved for a new trial, and also in arrest of judgment, both of which motions were overruled, and the defendant excepted.

On the trial, the prosecution proved that the defendant sold spirituous liquors, in a quantity less than one gill, and received ten cents in payment, in the month of March, 1857, at the defendant's drug store, in the city of Monmouth, county of Warren, and State of Illinois. That the witness told defendant, before he bought the liquor, that he was not very well, and that the witness was not, in fact, well at the time, and that he drank the liquor in the store; that the defendant kept a drug store, and the witness never bought liquor of any kind, from the defendant, but the once.

The defendant then proved, by John T. Morgan, the city clerk of the city of Monmouth, and the records of the city council, that an ordinance was passed on the 12th day of June, 1854, which had remained in force ever since, which is entitled, "An ordinance relating to spirituous, malt, fermented and intoxicating liquors."

Section 1 declares the keeping on deposit and in store, etc., for the purpose of selling, a nuisance.

Section 2 makes the selling a nuisance, and provides a penalty.

Sections 3 and 4 establish the method of proceeding for a violation of the ordinance.

Section 5 provides that the provisions of the ordinance shall not apply to the sale, etc., made by any established apothecary or druggist, for sacramental, chemical, mechanical, or medicinal purposes, provided the same is sold in good faith, under the prescriptions of a physician, or upon satisfactory assurances made by or on behalf of the person purchasing the same, in respect to the use thereof, and provided further, that said druggist shall furnish a list, under oath, to the clerk of the city council, of all

sold during the previous quarter, and then declares the druggist liable to a penalty for omitting to do so.

The ordinance was read in evidence, which was all the evidence offered in the case.

The court gave the following instructions, at the request of the prosecution, to which the defendant excepted.

"The court will instruct the jury, that if they believe from the evidence, beyond a reasonable doubt, that defendant sold spirituous liquors in a less quantity than one gallon, within eighteen months prior to the finding of the indictment, they will find the defendant guilty, although they may also believe the said liquor was sold in the town of Monmouth, if they also believe the said liquor was sold in the county of Warren and State of Illinois, if the same was not so sold in good faith, in conformity with an ordinance of the said city of Monmouth."

The reasons assigned for a new trial were, that the verdict was against the law and the evidence.

The reasons assigned for arrest of the judgment, were the want of jurisdiction in the court, and that the defendant was liable to, and controled by, a city ordinance.

The defendant in this court assigns for error, as follows, to wit:

1st. The Circuit Court erred in refusing to grant a new trial.

2nd. The Circuit Court erred in refusing to arrest the judgment.

3rd. The Circuit Court erred in entering a fine against the defendant, and rendering judgment for the fine and costs.

4th. The proceedings are otherwise informal and erroneous.

A. G. Kirkpatrick, and Goudy & Judd, for Appellant.

J. B. Hawley, for Appellees.

Walker, J. The defendant was indicted by a grand jury, and tried in the Warren Circuit Court on a charge of selling liquor without a license to keep a grocery. The jury found a verdict of guilty. The defendant entered a motion for a new trial and in arrest of judgment, which motions were overruled by the court, and judgment rendered on the verdict for a fine of $10 and costs; and the defendant brings the case to this court by appeal.

The motion in arrest of judgment should have been allowed by the court below. It nowhere appears from the record, that the indictment was ever returned into open court. It is error to put a defendant on trial on an indictment unless it is returned into open court, and the only evidence of that fact must be found

in the record of the case. *Gardner* v. *The People*, 3 Scam. R. 85; 4 Black. Com. 306; R. S. 1845, p. 309, sec. 3. This requirement is proper for the protection of the citizen against being forced to defend himself against charges never acted upon or presented by a grand jury. If it were otherwise, by either accident or design, he might be compelled to make such defense.

It appeared in evidence, on the trial below, that the city of Monmouth, in Warren county, was legally incorporated, and had passed an ordinance declaring the keeping of spirituous liquors on deposit or in store for sale, and selling it, a nuisance, and provided a penalty. It also provides the mode of proceeding for the recovery of the penalty. There is a provision in the ordinance that its provisions shall not apply to sales by any established apothecary or druggist, for sacramental, chemical, mechanical or medicinal purposes, provided the same is sold in good faith under the prescription of a physician, etc. There was no question raised as to the authority of the city to pass this ordinance. The evidence shows that defendant sold spirituous liquor in a less quantity than one gill, and received ten cents in payment, in the month of March, 1857, at his drug store, in the city of Monmouth, county of Warren, and State of Illinois. That this ordinance was in force and unrepealed at the time defendant sold the liquor.

It is urged that when the legislature gave to the city of Monmouth the power to license, regulate and prohibit the sale of spirituous liquors in the city limits, that they repealed section 132, of the chapter R. S. entitled criminal jurisprudence. That section imposes a penalty for selling liquor without a license. The act incorporating the city of Monmouth, gives the city the exclusive right to license the sale of spirituous liquors. If they grant a license, that license will protect the holder from the penalty of section 132. But if they fail or refuse to license the sale of such liquors, the general law of the State would be violated by their sale in the city limits. The charter of the city does not in terms repeal the general law, and if it operates as repeal, it is because the provisions of the two acts are repugnant. Jurisdiction may be concurrent and yet not repugnant. This same charter authorizes the city to levy taxes, to suppress gaming and bawdy houses, to suppress gaming, and disorderly conduct, and to impose penalties for a breach of the peace, and many other things that are prohibited by general enactments of the State; and if the grant of power to license and regulate the sale of spirituous liquors repeals the general law on that subject, it must follow that the State has, for the same reason, no power to levy taxes, to punish persons for keeping

gaming houses, for gaming, for breach of the peace, or any other offense that the city is authorized to punish, when committed in the city limits. Such a power would be antagonistic to the very principles of government. An act may, at the same time, be an offense against the United States government and also against a State government. *Moore* v. *The People*, 14 Howard R. The same act may also constitute several crimes or misdemeanors, and the trial and punishment for one will be no bar to a prosecution of another growing out of the same act. *Freeland* v. *The People*, 17 Ill. R. 380. It has been held that by the legislature conferring upon an incorporated city or town such power, does not, by implication, repeal the general law on the same subject; but to have that effect, the repeal must be express or the acts repugnant in their provisions. *The People* v. *Morris*, 13 Wend. R. 325; *Village of Rochester* v. *Harrington et al.*, 10 Wend. R. 547; *Baldwin* v. *Green*, 10 Mo. R. 410; *Harrington* v. *The State*, 9 Mo. R. 525; *Stone* v. *The State*, 8 Blackford R. 361. We are of the opinion that both reason and authority are in favor of the construction that the legislature did not, by merely giving the city the right to act, repeal the general law of the State on the same subject. What effect the recovery of a penalty under the ordinance might have, we are not now called on to determine, and until that question is presented for determination, we are not disposed to discuss it.

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

Judgment reversed.

Andrew J. Topper, Appellant, *v.* Samuel P. Snow, Appellee.

APPEAL FROM KNOX.

Where a plea of partial failure of consideration is interposed to an action upon a note, the affirmative rests with the defendant, and if he fails to sustain his plea, judgment will go against him.

Assumpsit on two notes given by Topper to Snow, dated April 3rd, 1854, one for $219, due Oct. 1, 1855, and one for $231, due Oct. 1, 1856.

1st. Plea, general issue.

2nd. Plea, that notes were given for the purchase of land, and sets out contract from Snow to Topper, bearing date April

3, 1854, reciting the said notes; also, the sale of land; also, that whereas Topper purchased the land for taxes of 1852, in case he should obtain a tax deed on the premises on the 28th June, 1855, or as soon thereafter as could be, the land remaining unredeemed, and he having advertised the same according to law, then Snow was bound to make to Topper a warranty deed of the land; which plea further averred that the time for the redemption of said land had expired; that the same had been advertised according to law, and Topper had obtained his deed upon said tax sale, but that plaintiff had not, before the commencement of said suit, made and tendered to the defendant any warranty deed of said land, according to the terms of said contract. The replication denies that the said sale of said land was the consideration of said notes; admits that the tax sale had passed redemption; that the same had been properly advertised; that the land had not been redeemed; that the deed had been properly made on said sale, and that plaintiff did make and tender to defendant a warranty deed of said land before the commencement of this suit.

The cause was tried before the court, THOMPSON, Judge, without jury. On the trial the notes and contract were read in evidence, and *Robert L. Hanneman* testified to a tender of a warranty deed for the land described in the contract, before suit, to L. Douglass, one of defendant's attorneys, and that Douglass admitted the tender was made.

L. Douglass testified that he had acted as attorney for defendant, in a previous case between the same parties, and was his attorney in this suit; that before the commencement of this suit, Hanneman tendered to witness the deed referred to; that witness inspected it and handed it back to him; that afterwards he saw defendant, and supposed he told the defendant of the tender, but could not say; that defendant told witness to let them go on and collect the note if they could; that he was never authorized by defendant to get the deed, or receive it; that he never intended, in conversation with Hanneman, to say that the tender was a good tender to defendant, but only intended not to dispute the offer of the deed to witness.

Judgment was rendered for plaintiff below.

MANNING & MERRIMAN, for Appellant.

GOUDY & JUDD, for Appellee.

CATON, C. J. This was an action upon several promissory notes. The defendant filed a plea of the general issue, and also a plea of part failure of consideration, setting out a written

contract between the parties, bearing even date with the notes, reciting a conveyance of certain lands by quit-claim deed, and an agreement to give a warranty deed for the same land, in case the grantor should obtain a tax deed. Avers that the notes were given for this land, and that the plaintiff had obtained the tax deed, and had neglected to make the warranty deed, etc. The plaintiff, in his replication, denied that the notes were given for the land, but avers the tender of the warranty deed. The case was tried by the court, who found for the plaintiff, for the amount of the notes, which decision is now assigned for error.

The court was certainly bound to find the issue for the plaintiff. The contract, as set out in the plea, does not show or intimate that the notes were given for the land in the contract and plea mentioned, nor is there a particle of evidence in the case showing for what the notes were given. That contract also has a provision to deduct from the notes, in case the land shall be redeemed from a tax sale to Snow, but makes no reference to the notes in case it is not redeemed, and in that event, it obliges Snow to get a tax deed, and convey, by warranty deed, to the defendant. That part of the contract is perfectly independent of the notes, and that is the part which, in the plea and upon the trial, it was complained had been broken by the non-delivery of the warranty deed. That part of the contract has no connection with the latter part, which provided for a certain reduction on the notes, in case the land should be redeemed, any more than as if they had not been upon the same piece of paper. The plea is based upon that first part, averring that the notes were given for the land, and that the consideration had failed because the deed was not made. The issue was, that the notes were not given for the land, and the affirmative of this issue was on the defendant, and he failed to produce any evidence in support of his plea. There was nothing left for the court to do, but to find the issue against him. Even had the defendant set up a defense under the latter part of the contract, claiming a reduction on the notes, by reason of a redemption of the land from the tax sale, he must have failed in this, for the reason that there was no proof of such redemption, and consequently, no right to claim the reduction.

The judgment must be affirmed.

Judgment affirmed.

Benjamin O. Hodge, Appellant, *v.* Marcus D. Gilman *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The party receiving a paper interlined in a material part, should see that the interlineation is noted in the attestation. Such interlineations must be explained by those who claim the benefit of them.

Where a material alteration appears upon the face of the instrument, the *onus* is upon the person holding it, to show that the alteration was made before attestation, or has been assented to.

This was a proceeding in chancery. The bill states that the complainant was indebted to the defendants, on the 7th day of July, 1857, in a certain sum of money, for which indebtedness the defendants requested him to give his note at sixty days, and promised him that they would allow him that time to pay said indebtedness, if he would give his note; that being desirous of the extension, he did so, and drew the note, which is hereinafter set forth; that he also signed, in connection with said note, and on the same sheet of paper, a power of attorney, in the usual form, etc., to enter up judgment on said note, at any time after the same became due; that it was the distinct understanding between him and the defendants that he was to have sixty days' time in which to pay the note.

The bill further states that, on the 9th day of July, 1857, the said defendants caused judgment to be entered upon said note against the complainant, that execution was issued, and a levy threatened on the goods of the complainant, until the defendants were informed of the complainant's discovery of the facts hereinafter set forth, since which time no proceedings have been taken with said execution, which still lies in the hands of the sheriff, to the great damage of the complainant, who expressly states that he would have been able to pay the note in sixty days, and had made arrangements so to do.

The bill further states that the complainant has seen the papers on which the said judgment was entered. "And your orator expressly states that the said note is the note that he signed for M. D. Gilman & Co., but that the said power of attorney last mentioned is not the power of attorney that was signed by your orator in connection with the note aforesaid; that the words 'before or' are interlined with a pen before the printed words 'after due,' in the power of attorney by virtue of which the judgment and execution above mentioned were entered and issued in said court; and your orator further adds, that if the signature of 'B. O. Hodge' was written by your

orator to the said power of attorney (and your orator believes that it was), then the interlineation above mentioned must have been made, and your orator is confident that it was made, after your orator had signed the same; for your orator is well acquainted with the instruments commonly called judgment notes, and your orator took particular pains to read, and did read, that portion of the power of attorney which gave the power to enter up judgment, and the said power of attorney was filled out in a printed form, and expressed that judgment might be entered on the said note at any time after the said note became due; and your orator saw no printed or written words that modified the meaning of said note and power of attorney, as your orator has hereinbefore expressed the same to be. And your orator says that, according to the best of his knowledge and belief, the said interlineation was made after your orator signed the said note and power of attorney. And your orator expressly charges that the same was made for the purpose of defrauding and injuring your orator, and that it was made by, or procured to be made by, the said defendants, M. D. Gilman & Co."

The bill further states that the said power of attorney is a sealed instrument, that the same is witnessed, that the witness knows nothing of the interlineation, nor was his attention called to it. That the attestation to the signatures, which was filed with the clerk of the court when judgment was entered, was by E. P. Hooker, and not G. H. Morrison, the subscribing witness to the note. The complainant craves leave to refer to the note.

The bill charges that the alteration was made fraudulently, etc., and prays for an injunction, and that the judgment should be set aside for fraud. The bill waives the oath of the defendants.

The injunction prayed for was granted.

The answer of the defendants is joint and several, and admits that a judgment was entered, as stated in the complainant's bill.

The answer denies that said sixty days' note was made on any such understanding as is stated in the bill, but states that they were to have the election to retain said sixty days' note, and return two other notes, made by said Hodge, or to return said sixty days' note, and retain said other two notes; and that, accordingly, they retained the said sixty days' note, and returned said two other notes.

The answer admits that the words "before or" are interlined, but says that they were interlined before signing; denies that there was any agreement to wait sixty days before entering judgment, and says that they already had the complainant's notes, due and past due, for the same debt, on which they might have recovered judgment in less than sixty days. The defend-

ants do not know whether the attention of the witness was called to the interlineation of the words "before or," but say that the attention of the complainant was called to them. The answer denies all fraud and collusion.

The answer further says, that the only treaty which was had concerning giving sixty days' time for the payment of said note, was in connection with a proposition that the complainant should secure his own note by pledging other notes as collateral.

The answer further admits the issuing and levy of the execution as charged.

The answer denies fully and repeatedly that the interlineation referred to was made after signature.

A general replication was filed.

Two depositions were taken, but the testimony elicited is of no importance, except the answers of G. H. Morrison to certain questions, which are as follows:

Interrogatory 2nd. Did you, some time in July, 1857, witness a certain note and power of attorney to enter up a judgment, drawn in favor of M. D. Gilman & Co., and signed by Benj. O. Hodge, of Galena?

Ans. Yes.

Int. 3rd. Was your attention called to any interlineation in said power of attorney?

Ans. It was not.

Int. 4th. Did you see any interlineation of said power of attorney when you signed it as a witness?

Ans. No. I did not.

Cross-Int. 7th. Did or did not Hodge look over the power of attorney to confess judgment before signing it?

Ans. I saw him looking at it, and think I heard him read a portion of it before I signed it as a witness.

The note and power of attorney are copied in the opinion of the court.

At the January term, 1857, a decree was rendered dissolving the injunction, and dismissing the bill, with costs; from which decree the complainant appealed. J. M. Wilson, Judge, ordered the decree.

J. A. Ware, for Appellant.

Mather & Taft, for Appellees.

Caton, C. J. This bill was filed to enjoin the collection of, and to set aside and vacate a judgment entered in the Common Pleas, in favor of the respondents, against the complainant. The judgment was confessed by an attorney, and the ground

alleged for the relief sought, is, that the power under which the attorney acted was altered in a material part after it was executed by the complainant, without his authority, and so it was not his deed. The note and the power of attorney, as they appeared at the time the judgment was confessed, were as follows,—those parts in Roman letters being in print, and those in italics being in writing:

$1047.87. *Chicago, July 7th,* 1857.

Sixty days after date, promise to pay to the order of *M. D. Gilman & Co., ten hundred and forty-seven* 87-100 dollars, for value received, with interest at the rate of *ten* per cent. per annum *after due, payable at their office in Chicago.*

B. O. HODGE.

Know all men by these presents, that whereas, the subscriber, *B. O. Hodge,* justly indebted to *M. D. Gilman & Co.*, upon a certain promissory note for the sum of *ten hundred and forty-seven* 87-100 dollars, bearing interest at the rate of *after due and* *ten* per cent. per annum due *sixty days* from date, and payable to the order of *M. D. Gilman & Co.* Now, therefore, in consideration of the premises, I do hereby make, constitute, and appoint *Gallup & Hitchcock*, or any attorney of any court of record, to be *my* true and lawful attorney irrevocably, for and in *my* name and stead to enter *my* appearance at any time, when the same can be legally done before any court of record or justice of the peace, in any of the States or territories of the United States of America, at any time *before or* after the said note becomes due, to waive service of process, and confess a judgment in favor of the said *M. D. Gilman & Co.*, or *their* assigns, upon the said note, for the above sum, or for as much as shall appear to be due, according to the tenor and effect of said note and interest thereon, to the day of the entry of said judgment; and also *twenty-five* dollars for counsel fee, and release all errors that may intervene in entering up said judgment or in issuing execution thereon.

Hereby ratifying and confirming all which *they*, said attorneys, may do by virtue hereof.

Witness *my* hand and seal at *Chicago*, this *7th* day of *July*, 1857.

In presence of *B. O. HODGE.* [*L. S.*]

G. H. Morrison.

The alleged alteration is in the interlining of the words "before or" between the words "time" and "after," in the power of attorney. It is not denied that the words are material, for it was in fact only by force of these words that the judgment was entered at the time it was, which was before the maturity of the note. The only testimony taken at all material to the point in issue, was that of the subscribing witness, (Morrison), who says he witnessed the power of attorney, and that at that time, his attention was called to no interlineations in the power of attorney, and that he saw none. This, in fact, amounts to but very little, for the first interlineation which occurs, and

of which no complaint is made, we may fairly presume was made at the time it was executed; or, at least, if it was inserted afterwards, it was in pursuance of an implied authority from the maker, for it made it correspond with the note to which it referred and was attached. The fact, however, that there was a subscribing witness to the instrument, whose attention should have been called to the interlineation, and it noted in the attestation, by the party for whose benefit the paper was executed, should by no means be overlooked in the consideration of the case. The party who receives a paper interlined in a material part, should see that the interlineation is noted in the attestation, or he must assume the responsibility of explaining it afterwards. It is, at least, the settled law of this court, that such interlineations must be explained by the party claiming the benefit of the paper, the presumption of law being that the interlineations were made after the execution by the maker. This presumption arises from business convenience, the security of parties, and the necessities of the case. The law must presume either that it was made before or after it was executed; and if the former, no man would ever be safe in signing any paper, no matter how fairly drafted, for the holder, having it in his possession and control, could interline it at pleasure, and then call upon the maker to show that the alterations were made after its execution, which, if the alterations were made by the same hand that wrote the body of the instrument, it would, in most cases, be impossible for him to do. But we shall not stop to discuss at length the propriety, and even the necessity, of this legal presumption. It is sufficient that it has been deliberately settled by this court, in the case of *Walters* v. *Short*, 5 Gilm. R. 252, and that we now entirely approve of that decision.

In the argument here, a distinction is attempted to be drawn between this case and that, insisting that *there* the party producing the instrument was claiming to recover a judgment upon it, while *here* a judgment has already been obtained upon the note, which the maker seeks to avoid by setting up affirmatively that the power of attorney has been altered since its execution. It is true, that the complainant in this case must take the affirmative, to show that the instrument has been altered since he signed it; and so it is when an action is brought upon a promissory note, when the handwriting of the maker is proved. That binds him *prima facie*, and to avoid the apparent obligation of the instrument, he must assume the responsibility of showing that it is not the instrument it was when he signed it; that it has been since altered; and anything which would prove an alteration in the one case, would establish it in the other. That, we say, as matter of law, is done by showing to the court,

that the instrument has been interlined in a material part, which changes the *onus* and imposes the duty upon the other side to show that the alteration was in fact made before it was executed; or that it was done subsequently, with the authority or consent of the maker. Nor does this necessarily require the production of a witness who saw the alteration made. The very face of the paper may show satisfactorily that the alteration was made with the consent of the maker, or at least it may raise that presumption, and destroy the first presumption arising from the simple fact of interlineation. The first interlineation in this power of attorney may be of this kind. Again, an interlineation may be shown to be in the handwriting of the maker. In that case, when the instrument is inspected, and a material interlineation or alteration is apparent, the law at once presumes that it was without authority, but that presumption is at once destroyed and succeeded by another when the alteration is shown to be in the handwriting of the maker. And so in many other ways may the first presumption be destroyed by a further inspection of the face of the paper.

In this case there is nothing on the face of the paper itself, or in the extrinsic proof, in the least weakening the presumption of law already stated. The alteration is in a material part of the paper, to the palpable detriment of the complainant, and as manifestly to the advantage of the respondent, and above all, it is not naturally consistent with the terms of the note to which it refers, and is a harsh and unjust provision, which, if the law will not at once repudiate, as oppressive and inconsistent with public policy, yet it may be characterized as a modern invention of refined avarice, to which it is to be presumed no sane man will submit, until his children are crying for bread, or his affairs are so desperate that the most reckless measures cannot make them worse. There is nothing then in the character of this alteration calculated to rebut the legal presumption which arises from the fact of interlineation. That presumption is left to work its way, and under its influence we are bound to say that the power of attorney under which the attorney acted, who confessed this judgment, was not the one which the complainant executed. Several other points have been raised on the argument—as to the jurisdiction of the court of law to set aside the judgment, and some others which we do not think it necessary to discuss.

The decree below must be reversed, and decree entered here according to the prayer of the bill.

Decree reversed.

Aaron E. May, Plaintiff in Error, *v.* James B. Tallman, Defendant in Error.

ERROR TO BUREAU.

An actual removal of an entire mass of a cumbrous article (as a crib of corn,) is not necessary to constitute a delivery and change of possession.

Where one party is to deliver another three hundred bushels of corn, and points to a crib in which it is, which is accepted, and two wagon loads are taken out of it, this constitutes a good transfer of title.

When two instructions are asked for, both of which contain the same principle of law, the court may give the one and refuse the other.

Circuit Courts may refuse to repeat a principle of law which has previously been fairly stated to the jury.

This cause was heard before Hollister, Judge, and a jury, at March term, 1856, of the Bureau Circuit Court. The bill of exceptions states the proof as follows: "The said plaintiff, to maintain the issue on his part, amongst other things, gave testimony tending to prove that the corn mentioned in the pleadings was sold and delivered by the defendant to plaintiff; and the defendant, on his part, amongst other, gave in evidence facts tending to prove that said corn was not sold and delivered to the plaintiff."

Taylor & Stipp, and O. C. Gray, for Plaintiff in Error.

Peters & Farwell, for Defendant in Error.

Caton, C. J. This was an action of trover. The evidence tended to show the case supposed in the following instruction, which was given for the plaintiff, and an exception taken: "4th. If the jury believe, that when the plaintiff called upon the defendant for the corn that was to have been received by the plaintiff upon the contract, and the defendant pointed to a crib, and said, there is your corn, take it, and thereupon the plaintiff, after consulting with the witness, Dana, as to whether, in his opinion, there was three hundred bushels, as the contract, if proved, was that the plaintiff was to receive, and upon the witness giving his opinion there was, he went without objection and took two loads of the corn, which was not measured by the parties, and May was not even present, and that afterwards, when the plaintiff came for the balance, the defendant would not let him have it, that then the defendant is guilty of a conversion of the balance of the corn, unless the jury believe it was the intention of the parties that the corn was not, by their acts, to be the property of the plaintiff." To the rule of law

here laid down we can see no just exception. As between the parties to the sale, at least, the evidence here supposed was sufficient to prove that the title passed. Even where a strict delivery is necessary to protect the purchaser, an actual removal of the entire mass of a cumbrous article like a crib of corn is not necessary to constitute a delivery and change of possession. An offer was made by the seller of the crib of corn on certain terms, which after consultation were accepted by the purchaser, who took two loads of the corn away without objection. It is difficult to conceive what would be a good transfer of title, if this was not. The instruction was properly given.

The court refused to give this instruction for the defendant: "If the jury believe, from the evidence, that the plaintiff was to take out of the crib only enough corn to pay him (plaintiff) the balance on the price of the sheep, and the jury also believe that there was more corn in the crib than would pay said balance, then the jury must find for the defendant on the corn." But gave the following: "In order for the plaintiff to recover for the corn, it is necessary for the jury to believe, from the evidence, that it was the intention of both parties that Tolman should have the whole of the corn pointed out, as what was due on the contract." We shall not stop to examine whether the instruction refused was law or not; it is sufficient to say that the instruction given contained the same principle manifested in the one refused, but in a broader and more favorable form for the defendant, and therefore he cannot complain. The principle of law upon which the defendant rested his defense was fairly and broadly laid down to the jury in such a form, that they must have found a verdict for him had they found the facts to exist upon which alone that principle of law could serve him. When the court once fairly and intelligibly states a principle of law to the jury, it may refuse to repeat it; and when two instructions are asked at the same time, containing the same principle of law, the court may select the one which it thinks expresses it the best and most fairly, and refuse to trouble the jury with the other.

The judgment must be affirmed.

Judgment affirmed.

Albert E. Goodrich *et al.*, Plaintiffs in Error, *v.* The City of Chicago, Defendant in Error.

ERROR TO COOK.

The legislature, by the charter granted to the city of Chicago, authorized the city authorities to remove obstructions, and to widen, deepen and straighten the Chicago river and its branches to their sources, and to extend one mile into Lake Michigan. This grant did not create the obligation to do all these acts; and the city would not be liable to any party in damages for the non-performance of these permitted acts, unless it commences some of them and does them in so improper a manner that injury results therefrom.

If a party receives damage resulting from a sunken hulk in the harbor, he cannot recover of the city, because the city has not exercised the powers conferred upon it, to clear out the harbor.

The demurrer in this case was decided at the April term, 1858.

This was an action on the case for damages sustained by the plaintiffs, by reason of an alleged obstruction of the Chicago river. The plaintiffs in their declaration allege, that the city by its charter was bound to remove all obstructions from the river, and that it had entered upon its duty by the passage of ordinances and levying taxes for that purpose. That the plaintiffs were the owners of a steamboat plying to and from Chicago; and that the defendant suffered the wreck of a vessel to remain in the river at the mouth of the harbor, under water and out of sight, upon which the plaintiffs' steamboat ran and was greatly damaged.

The defendant filed a general demurrer, which was *pro forma* sustained by the court below, and plaintiffs bring the case to this court.

The charter of the city of Chicago provides, that the common council shall have power, by ordinance, to do and perform the several acts following, as is shown by the following extracts:

"To remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten and deepen the same."

"To preserve the harbor; to prevent any use of the same, or any act in relation thereto, inconsistent with or detrimental to the public health, or calculated to render the waters of the same, or any part thereof, impure or offensive, or tending in any degree to fill up or obstruct the same; to prevent and punish the casting or depositing therein any earth, ashes or other substance, filth, logs, or floating matter; *to prevent and remove all obstructions therein, and to punish the authors thereof;* to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and

streets of the city, by steamboats, canal boats, and other craft and vessels, and the disposition of the sails, yards, anchors, and appurtenances thereof, while entering, leaving or abiding in the harbor; and to regulate and prescribe, by such ordinances or through their harbor-master or other authorized officer, such a location of every canal boat, steamboat, or other craft, or vessel, or float, and such changes of station in and use of the harbor as may be necessary to promote order therein, and the safety and equal convenience, as near as may be, of all such boats, vessels, craft and floats; and may impose penalties not exceeding one hundred dollars for any offense against any such ordinance: and by such ordinance charge such penalties, together with such expenses as may be incurred by the city in enforcing this section, upon the steamboat, canal boat, or other vessel, craft or float. The harbor of the city shall include the piers and so much of lake Michigan as lies within the distance of one mile into the lake, and the Chicago river and its branches to their respective sources."

"To make, publish, ordain, amend and repeal all such ordinances, by-laws and police regulations, not contrary to the constitution of this State, for the good government and order of the city and the trade and commerce thereof, as may be necessary or expedient to carry into effect the powers vested in the common council or any officer of said city by this act; and enforce observance of all rules, ordinances, by-laws, and police, and other regulations made in pursuance of this act, by penalties not exceeding one hundred dollars for any offense against the same. The common council may also enforce such rules, ordinances, by-laws and police and other regulations as aforesaid, by punishment of fine or imprisonment, or both, in the county jail, bridewell or house of correction, in the discretion of the magistrate or court before which conviction may be had. Provided, such fine shall not exceed five hundred dollars, nor the imprisonment six months."

"To annually levy and collect taxes, not exceeding three and one-half mills on the dollar, on the assessed value of all real and personal estate in the city made taxable by the laws of this State, to defray the contingent and other expenses of the city not herein otherwise especially provided for; which taxes shall constitute the general fund."

"To abate and remove nuisances, and punish the authors thereof, by penalties, fine and imprisonment, and to define and declare what shall be deemed nuisances, and authorize and direct the summary abatement thereof."

The charter further provides, that "in all cases where expenses may be incurred in the removal of any nuisance, the common

council may cause the same to be assessed against the real estate chargeable therewith, in the manner prescribed in the foregoing section. Such expenses shall be likewise collectable of the owner or occupant of such premises in suit for money expended to his or their use. In case the same should not be chargeable to any real estate, suit may, in like manner, be brought for such expenses against the author of such nuisance, when known, or any person whose duty it may be to remove or abate the same."

ARNOLD, LARNED & LAY, for Plaintiffs in Error.

BECKWITH & MERRICK, for Defendant in Error.

CATON, C. J. By the city charter of Chicago, authority is conferred upon the city to remove obstructions from, and to widen, deepen and straighten the harbor of Chicago; and that harbor is declared to embrace the Chicago river and its branches to their sources, and to extend one mile into the lake. This action is brought for neglecting to exercise the authority here conferred, to remove the hulk of a sunken vessel, near the mouth of the harbor, by reason whereof the plaintiffs had sustained damage. To maintain this action we must hold, that the city is bound to exercise all the authority here conferred, and to do all the acts here authorized. Such, we are satisfied, was not the intention of the legislature. If they were liable to one party for the damage he has sustained by reason of their having neglected to do one of the acts authorized, they are equally liable to another, for the damages which he has sustained, because they omitted to do another of these acts; and so they must do all that is here authorized, or be answerable for all the damages which may be suffered by the omission. The courts cannot discriminate and say, you shall remove this wreck, but you need not remove that sand bar, or deepen the river in another place, or straighten it in another. The law has either left it to the discretion of the common council to say which of these acts the public good requires them to perform, or it is imperative that they shall perform all. Did the legislature ever intend that the municipal authorities should be absolutely bound to remove all obstructions in, and to straighten, widen and deepen the Chicago river and its branches to their sources, extending back as they do for more than twenty miles into the country? The very extent of the powers conferred, and the magnitude and expense of the work which they are authorized to perform, in reference to this harbor, show that it was never the intention of the legislature to impose the absolute obligation upon the city to perform it all, and if not all, then no part was imperative; for no author-

ity is vested anywhere except in the common council of the city, to say what part it is necessary, expedient and proper that they shall perform. It does not follow, that no pecuniary responsibility rests upon the city in connection with the subject. If the city undertakes to do any of the acts authorized by the law, it must do them in a careful and proper manner; and if it does not, whoever suffers for the want of such proper care would be entitled to compensation for the damages he thus sustains. If the city authorities had undertaken to remove this hulk, and in so doing had carelessly left it in an exposed position, by reason whereof the plaintiffs' steamer had run against it and was injured, they might well have claimed damages for such negligence. But until they had assumed the responsibility of removing the wreck, we cannot hold that they were bound to remove it, any more than to remove the sand bar at the mouth of the harbor, or to remove driftwood from the North Branch ten miles above the city. We think the demurrer to the declaration was properly sustained, and the judgment must be affirmed.

Judgment affirmed.

Alexander Ewing, Appellant, *v.* Cornelius Runkle, Appellee.

APPEAL FROM KNOX.

Under the statute of frauds and perjuries, it must be the intent of both parties to a conveyance, in order to render it void, to practice a fraud; that it has the effect to delay and hinder creditors, does not bring it within the statute.

The conveyance to be void, must be contrived of malice, etc.; if it is made by the consent of other creditors besides the grantee, duly acknowledged and recorded, absolute on its face, without any secret trust, it will be good, although the grantee is first to be paid, and the residue of the proceeds of the property is to be divided among other creditors of the grantor.

Where one of several creditors, by consent of others, took a bill of sale from a failing debtor, of certain personal property which was scattered, with the agreement that he was to collect the property, be paid his expenses in doing so, and out of the proceeds pay his whole debt, and divide the surplus among the consenting creditors, the transaction being in good faith, it was held, that the contract was not within the statute of frauds and perjuries, that the taking a judgment by this creditor did not defeat the agreement, and that the consenting creditors were bound by it, and that the property acquired by the bill of sale, before any liens attached, should be protected in the creditor.

Instructions should be so given as not to leave the jurors to conjecture about the truth, but so as to direct their minds to the facts as proved.

This was an action of trespass, commenced in the Knox Circuit Court, to recover the value of two wagons and seven horses, claimed by the plaintiff, and was tried in that court,

THOMPSON, Judge, presiding, before a jury, at October term, 1857. Verdict and judgment for defendant. A motion for a new trial was overruled.

Pleas were filed as follows:

The general issue.

That on the 20th day of August, 1856, seven attachments were issued out of the Circuit Court of Knox county, against Smith A. Brown and Ira Brown, as follows: One in favor of Hugh and Washington Hagey; one in favor of Robert C. Price; one in favor of Thomas P. Benson; one in favor of John Eiker and others; one in favor of Miles Smith; one in favor of Nathan Barboro; one in favor of John Pendegrast. All of which were returnable to the September term, A. D. 1856, of said court.

That said attachments were levied on the property in controversy by defendant, who was then sheriff of said county, on the 20th of August, as the property of Smith A. Brown and Ira Brown, whose property it really was.

That personal service was had on the Browns, and judgment rendered in each of the attachment suits for plaintiff, at the September term, 1856.

That on the 28th day of September, 1856, execution issued in favor of Price, and on the 1st day of October, 1856, executions issued on the judgments in favor of Hagey and Benson.

On the 6th of October, executions issued in favor of Eiker and Smith.

That at the September term, 1856, the plaintiff, Alexander Ewing, recovered a legal judgment against Smith A. and Ira Brown, for the sum of $1,555.40 and costs, and execution issued thereon on the 28th day of September, 1856.

That said executions were delivered to the sheriff as follows: Price, 29th September, 1856; Benson, 4th October, 1856; Eiker, 6th October, 1856; Ewing, 29th September, 1856.

That said executions were levied by the defendant, who was sheriff, on the property sued for, as the property of Brown & Son, on the 20th day of October, 1856, and said property was sold at public auction on the 1st day of November, 1856, by the defendant, as sheriff. The plea then alleges that personal service was had in each of the attachment cases, and that general judgments were rendered therein, and that the executions were levied upon the property as the property of Smith A. and Ira Brown, whose property it really was.

The third plea sets up a license from the plaintiff to the defendant to commit the trespass set forth.

Alleges that Ewing, the plaintiff, did, at the September term, A. D. 1856, of the Knox Circuit Court, recover a legal judg-

ment against Smith A. and Ira Brown, for the sum of $1,555.40 and costs of suit — that execution issued thereon, on the 28th September, 1856, and on the 29th day of the same month, was placed in the defendant's hands (who was then sheriff,) for service, and that the defendant levied said execution upon the property in controversy, for the benefit of the plaintiff.

A demurrer to the fourth plea was sustained by the court.

1. Issue was joined on defendant's first plea.

2. To the second plea, plaintiff replied that no such attachments were issued and placed in the hands of the sheriff, as set forth in said plea.

3. Replication to second plea, that no such judgments were rendered.

4. Special replication to second plea, that no such executions were issued.

5. Special replication to second plea, that said attachments and executions were not levied on the property described in said plea.

6. Special replication to second plea, that said goods and chattels were not the property of Smith A. and Ira Brown, but was the property of plaintiff.

7. Special replication to second plea, that the judgment and execution against Smith A. and Ira Brown, in favor of Ewing, was obtained without the knowledge or consent of plaintiff.

8. Replication to third plea, denying the license.

There was a special rejoinder to plaintiff's seventh special replication, which alleged that the judgment and execution were obtained with the knowledge and consent of Ewing.

Issue was joined to the country on all the replications.

The plaintiff, to sustain the issue on his part, introduced the following bill of sale:

Know all Men by these Presents, That we, Smith A. Brown and Ira Brown, copartners under the name, style and firm of S. A. Brown & Son, have bargained, sold, and by these presents do bargain, sell, transfer and set over and deliver unto Alexander Ewing, of the county of Knox, and State of Illinois, the following property, to wit: One span of horses; one grey, and one bay, with a white face; one span, one bay, and one sorrel, with white face; one span of black horses; one span, one small grey and bay; one cream colored mare, and one roan horse; one sorrel mare, and one sorrel horse; one large bay horse; one small bay horse; one small sorrel horse; one dark bay or brown horse; one span of spotted horses; one small bay, with white stripe in the face, and one glass eye, as it is called; one light grey, with big joint on hind leg; one large black horse, little knee sprung; one dark bay horse, grey hairs intermingled; one span of old horses, one black or brown, and the other dark brown; one bay horse, and one bay or sorrel mare, and one bay mare, in the possession of S. A. Brown; two yoke of oxen, one yoke black and white, and one yoke red and white; fifteen lum-

ber wagons, twelve two-horse plows, fifty scrapers and fifty log chains, four hundred shovels, ten crowbars, fifteen sets double harness, one log wagon, a lot of double trees, whipple trees, clevises and chains; also, one shanty, at Swab Run, in possession of Dennis Burk; one at French Creek, in possession of Roger Mack; one in the possession of Litey Patrick, near O'Selby's; one between Maquon and Haw Creek, occupied by Mooney; one near Dempsey's, in possession of John O'Harren; another close by, put up by Abner Brown; another at Haw Creek, occupied by John Long; a lot of hewed timber, at Haw Creek, and a lot at Galesburg, delivered to S. A. Brown & Son, for the sum of five thousand dollars, duly paid by the said Alexander Ewing to the said S. A. Brown & Son, the receipt of which is hereby acknowledged; to have and to hold all and singular the above described goods, chattels and personal property, to the said Alexander Ewing, his heirs and assigns, forever, as his sole, absolute property, hereby delivering and investing the said Ewing with the possession of said goods, chattels, and effects, and full and ample power to take possession of the same, wherever found, hereby imparting and conveying to said Ewing, complete and absolute control over the said goods, chattels and personal property, as fully and amply as we may have, hereby warranting and defending the title and possession of said goods, chattels and personal property, to and in the said Ewing, his heirs and assigns forever.

In witness whereof, we have hereunto set our hand and seal, this 27th day of August, A. D. 1856.

S. A. BROWN & SON. [SEAL.]

This bill of sale was acknowledged and recorded on the 29th of the same month.

The plaintiff then called *S. A. Brown*, who testified that the bill of sale was made on the day of its date, at Knoxville, for the purpose of securing his indebtedness to the plaintiff Ewing; that Brown & Son were indebted to plaintiff, to secure which they gave Ewing twelve notes, all dated 9th August, 1856, amounting to $1,316.96; that he sold Ewing a span of horses, for $325, which was to be credited on the notes; that some account was made with Ewing after the notes were given; that the bill of sale was given to secure said notes and account, and to pay the same; that at the time of the date of said bill of sale he was in the county of Warren, and came down to Knoxville a day or two afterwards, for the purpose of signing and acknowledging said bill of sale; that at the time of the making of the bill of sale, the property described therein was very much scattered in the counties of Knox, Fulton and Peoria, along the line of the Peoria and Oquawka Railroad, and some of it had been taken out of the State. That he had been contractor on said road, and employed a large number of hands. That he had failed, and was unable to pay them their wages, and some of them had taken some of the property and hid it in the woods, and some of it was buried in the ground. Some of the cattle and horses were levied on by attachment, some of them run

off by workmen, and some hid in the woods. That some of the Irish on the road had threatened personal violence towards him, and that he had left the work and gone home to Warren county, where his family resided.

He further testified, that all the property mentioned in the bill of sale was worth at least $7,000. That the same was sold to Ewing, to pay the indebtedness of S. A. Brown & Son to Ewing, being the notes and the book account. That the notes had never been surrendered, but were still held by Ewing. That they had never received any discharge of their indebtedness to Ewing, excepting the bill of sale. That at the time the bill of sale was made, they (said S. A. Brown & Son) were in failing circumstances, and owed more than they could pay, and had stopped business some days before sale bill was made. Ewing was fully aware of our condition, and wanted to secure his claims against us. When we gave the notes, Ewing wanted security, and proposed two ways—one by taking small notes and a power of attorney to confess judgments before a justice of the peace, and issue executions; the other by taking mortgage on personal property. But this last was objected to, because it might alarm his other creditors. That the first mode was adopted, and judgments were confessed before Sanburn, justice of the peace. I signed the bill of sale because it was the best thing that could be done. Some of the property had been attached in this court and some before Justices' Court, in Maquon. The attachments were issued and levied because people supposed I had gone out of the State; but I had not.

When I gave the notes, plaintiff wanted security. He thought I would break up, but I thought not. I said I would give him any security, but declined giving chattel mortgage, because it would make it public.

I did not sign the bill of sale with intent to hinder or delay creditors. That it was my understanding that Ewing was to gather the property together, and pay himself for his trouble and expenses, then pay my indebtedness to himself, and if there was any left, to divide it among my creditors in equal portions. I agreed to pay Ewing for his time and trouble in looking up and getting together the property. That Ewing was to pay all liens upon the property, where the claims were honest and fair, by advancing the money. That he did advance, to one Thomas Kerns, the sum of fifty dollars, to pay his debt, which was just, said Kerns having attached a span of horses; and also to Jesse Pickrel the sum of fifty dollars, for a similar purpose. That the sale was in good faith, for the purpose of having it gathered together for the benefit of my creditors, after paying Ewing's debt.

The plaintiff then called *Erastus Rice*, who testified, that S. A. Brown wanted him to come to Knoxville and make any arrangement he thought best for his benefit and for the benefit of his creditors. I came up, and, by my advice, Ira Brown came also. This bill of sale was then executed; was then drawn up and executed as far as it then could be. The consideration was, to pay Brown's debts and save the property from being squandered. It was my judgment, and Ewing's, and Brown's, that there was property enough to pay all the debts. Ewing's debt was about a thousand dollars. The intention was, to sell all the property the Browns had on the line of the railroad. Some attachments were then issued at Knoxville, and some at Maquon, on the ground that Brown had left the State. The sale was not made to hinder, or delay, or defraud any one. Ewing was to be paid expenses in collecting the property. If the plaintiff got enough to pay his debt, he was to be paid, and his expenses. The same offer was made to James Price. Ewing took the bill of sale. It was talked that Ewing might have to pay off some small debts. In cases where a small debt was levied on property worth more than the debt, they were to be paid. Nothing was said about paying Ewing for his trouble. Another talk was, that when Ewing got all the property together, all Brown's creditors should meet and bid it off to pay their debts.

Ewing was to gather up all the property, and then it was to be disposed of for the benefit of all the creditors. The talk was, that if not much property was got, that Ewing was to be paid, and his expenses. It was thought there was enough to pay all the debts. Several of the creditors were present—I think Hagey, Armstrong and Price.

H. N. Keightley stated that he drew up bill of sale. Brown would not sign it. Ewing did not know that I went to Warren. Price came the next day, and said the only way Ewing could be safe was to take the bill of sale. The property was scattered and some attached before justices of the peace; some in Knox, some in Fulton and Peoria, as I was told. Armstrong, James Price and Hagey were out and in the office at the time the arrangement was made. Ewing first refused to take a bill of sale; said he had about as soon lose his debt as to gather the property. All appeared to be afraid of the risk. We suggested to Price to take the sale bill. We offered it to James Price and to Hagey. I prevailed on Ewing to take the bill of sale. It was agreed, by all present, for Ewing to take it, and to take out his debt first, if there was not enough to pay all. It was offered to Price and Hagey in the same way. They refused to take it. I offered to transfer the bill of sale to them if they would pay Ewing's debt. The agreement was, that Ewing was

to have his pay and his expenses in getting the property together. There were attachments then pending. I think the attachments were then issued, but not levied. Rice came, and the arrangement was made the 27th of August. Some claims and debts were right and just, and Brown was not willing to let Ewing have sale bill without his agreeing to pay the just debts in suit in Justices' Court. One span spotted horses, in Fulton county, claim on them was fifty dollars, by Carnes. Carnes said, if Ewing would pay the fifty dollars, he might have the horses. Brown said the claim was right, and Carnes said Ewing paid it. Was a claim of fifty dollars, by Pickrel, on a team. Ewing spent twelve or fourteen days gathering up property. I notified the defendant of the bill of sale the very day it was made, and forbid his touching anything further. Don't think he made any particular reply. James Price, Hagey, Grimes, Burtnett and Thompson went along to help find property. Ewing brought home from ten to fourteen horses and two yoke of oxen. The oxen, and two or three horses, and some plows and scrapers were afterwards sold on executions that were prior liens. Ewing got four or five double wagons and two old wagons. One wagon and two horses were replevied by Potter, and retained. Cannot say Ewing gathered the ones replevied. Ewing got some chains.

On the part of the defendant, *George F. Harding*, being sworn, stated: I had a power of attorney, from Brown & Son, to confess judgment in favor of Browns' creditors, against them. I had power to confess in favor of Ewing, for $1,000. Afterwards, $500 was added to this amount. Thinks the $1,000 mentioned in power of attorney was the residue due Ewing on the notes.

He next offered in evidence the writs of attachment before mentioned, which were in due form, and dated 20th August, 1856, with the return of the sheriff as to the levy and sale.

The execution in favor of Hugh D. and Washington Hagey, was issued 1st October, 1856.

The execution in favor of Thomas P. Benson was issued on the 1st day of October, 1856.

The execution in favor of John Eiker and D. M. Eiker was issued on the 6th October, 1856.

The execution in favor of Miles Smith was issued 6th October, 1856.

The execution in favor of Alexander Ewing was issued 28th September, 1856.

On this execution was the following return:

I, Cornelius Runkle, sheriff of Knox county, Illinois, do hereby certify, That, in the following cases in the Circuit Court of said county, commenced by attach-

ments against the parties hereinafter named as defendants, returnable at the September term of said court, A. D. 1856, to wit: Hugh and Washington Hagey *vs.* Smith A. and Ira Brown. Thomas P. Benson *vs.* Smith A. and Ira Brown. John Eiker and others *vs.* Smith A. and Ira Brown. Miles Smith *vs.* Smith A. and Ira Brown. Robert C. Price *vs.* Smith A. and Ira Brown. Nathan Barboro *vs.* Smith A. and Ira Brown. And John Pendegrast *vs.* Smith A. and Ira Brown. In all of which cases general judgment was rendered, except the last two, which were continued. The following property being the same property named in my return written on the attachment issued in said court, was levied upon by me, to wit: seventeen horses, four of which and one set of double harness, and two double wagons I never had in my possession, the same having been levied on by Joshua Lowman, a constable, in attachment from Justices' Court, issued and levied on the same, before the levy in the above causes, which suits are undetermined, and I could not find the property, to sell the same, as it was secreted from me. Also, said attachments were levied by me upon two yoke of oxen and yoke, seven double wagons, and six and a half sets of double harness, and three shanties. Three of said horses, two yoke of oxen and yoke, and two sets of double harness, were sold by M. Smith, constable, upon executions in his hands, which were prior liens as against said attachments, and two and a half sets of harness. Three horses and one wagon were replevied out of my hands by A. S. Potter, which suit is undetermined. The said four horses stated as being in Joshua Lowman's hands, and two wagons and one set of harness, were levied upon by said Lowman, under attachment from Justices' Court, before my levy, which suits in Justices' Court are undetermined. The said shanties were claimed by other parties than the defendants and were removed, so the same could not be sold by me. The remainder or other harness never came to my hands.

And I further certify, That by virtue of execution issued out of the Circuit Court on the judgments as aforesaid recovered, and by virtue of an execution issued out of the same court, in favor of Alexander Ewing *vs.* said Smith A. Brown and Ira Brown, recovered at the same term, I levied upon and sold property as follows, that was attached for the following prices, to wit: which sale was made on the 20th day of October, 1856, excepting as to property sold to B. Booth and W. H. Smith, which was sold on the 1st day of November, 1856:

One double wagon to H. D. Hagey, for	$72.00
One " " to R. Benson, for	79.75
One " " to T. Carnes, for	54.25
One black horse to J. Pendegrast, for	99.00
One " " to J. Smith, for	116.00
One bay " to Casteel, for	63.00
Received from M. Smith, balance on sale of oxen	18.78
One sorrel horse to B. Booth, for	72.00
One grey horse to W. H. Smith, for	30.25

And I further certify, That under said executions, I levied upon the property of Smith A. and Ira Brown, and sold on 1st day of November, 1856, property not attached, as follows:

One spotted horse to Isaac Masten, for	$108.00
One " " to H. D. Hagey, for	102.00
One sorrel " to E. Lotts	96.00
One brown " to E. Patrick	70.00

And I further certify, That one wagon, levied on by the attachment writs by me, was replevied by Alexander Ewing, and has not yet been returned; and that two of the horses attached were run off by one Croucher, and have not been returned.

And I further certify, That the property levied upon as aforesaid by the above named attachments, was, after said levy, attached by me on a writ of attachment issued from Warren Circuit Court, in the case of Armstrong and others *vs.* said Smith A. and Ira Brown.

C. RUNKLE, *Sheriff.*

It was then agreed that Keightley ordered out an execution on the judgment confessed in favor of Ewing, on the day the same was confessed.

It was then agreed that defendant was acting sheriff of Knox county at the time of the levy and sale, and acted as such in so doing.

It was then admitted that the property replevied by the plaintiff, in the suit against Runkle, had since been taken out of his possession, by one Potter, on a writ of replevin, and that Potter held said property, except one wagon.

The plaintiff then asked the court to instruct the jury as follows:

1. Before the jury can find the sale from Brown to Ewing *fraudulent*, they must believe, from the evidence, that Ewing intended to *delay*, hinder or defraud the creditors of Brown.

2. If the sale was made in good faith, for the purpose of gathering the property, and paying Ewing first, and dividing the balance of the property among the creditors, such sale is valid and binding, and passed the title to so much of the property as Ewing was able to reduce to possession.

3. If the creditors knew the object and intention of the bill of sale, and assented thereto, they cannot afterwards insist that it was fraudulent.

4. If the sale was fair and honest at the time it was made, the legal title to so much of the property as Ewing reduced to possession, passed to him; and any effort on the part of the creditors, or of Ewing, to procure judgments afterwards against Brown, would not render the sale void.

5. If the sale was *fair* and *honest* when it was made, the obtaining of a judgment afterwards by Ewing against the Browns, would not render such sale fraudulent or void.

6. If the judgment in favor of Ewing against the Browns was obtained without his knowledge or consent, and if he did not consent to it when informed of its existence, such judgment cannot be used to his injury.

7. A debtor, in failing circumstances, has a right to prefer one creditor over another, and pay him in full, if he chooses to

do so. And he may lawfully assign all his property to pay one creditor, and divide the remainder, after such payment, among his other creditors.

8. Brown had a legal right to defend against the attachments, and to employ counsel for that purpose, and his doing so is of itself no evidence of fraud.

9. If the attachments were illegally issued, and without any cause, everybody interested in the property attached had a right to defend and defeat them, and the doing so is no indication of fraud.

10. The return of the officer upon the attachments and executions in this case, are only *prima facie* evidence for the defendant, and may be disproved or contradicted by parol evidence.

11. If the jury believe, from the evidence, that the attachments from the Circuit Court were *levied* upon the property in controversy, *without seeing it*, and without the property being present when the levy was made, such levy is illegal and void, as against subsequent purchasers in good faith.

12. If the agreement between the Browns and Ewing, with the knowledge and consent of the Browns' other creditors, was that Ewing was to receive the property in controversy, on the bill of sale read in evidence, and to either first pay himself, and the balance to go to the other creditors, or for the property to be divided amongst all the creditors, and he did so receive the possession of the property, then, in either event, Ewing was the legal owner of the property, and held it as trustee for himself and other creditors.

Unless the same was fraudulent in fact.

All of which were given except No. 5, which the court refused, and plaintiff excepted.

The defendant then asked the court to instruct the jury as follows:

1. If the jury believe, from the evidence, that the several writs of attachments issued in favor of Browns' creditors, were duly issued, and levied by the defendant, as sheriff, in the proper discharge of his duties, on the property in controversy in this cause, before the sale of the said property, by the Browns to Ewing, and that this is the only trespass complained of, then they will find for the defendant.

2. If the jury believe, from the evidence, that the sale of the property in controversy, from the Browns to Ewing, was made with the intent to *hinder* or *delay* the other creditors of the Browns, in the collection of their debts, then such sale is void, as to such creditors; and in such case, it makes no difference if Ewing was a creditor of the Browns, and was to have his debt paid by such sale.

3. If the jury believe, from the evidence, that the sale bill to Ewing was only intended to be a security for the payment of Ewing's debt, and that after making such sale bill, either by himself or attorney, with his knowledge and consent, Ewing voluntarily took a judgment in the Circuit Court, against the Browns, for his said debt, in lieu of the said sale bill, then such judgment was an extinguishment of said sale bill, and the property became released therefrom, and liable to be taken on execution or attachment issued against the Browns, notwithstanding the said sale bill.

4. If the jury believe, from the evidence, that a part of the property described in the sale bill was sold to Ewing to *hinder* or *delay* the Browns' creditors, or any of such creditors, in the collection of their demands against the Browns, then the said sale bill is void entirely, and cannot give the plaintiff any right to recover in this action.

5. If the jury believe, from the evidence, that the sale bill to Ewing was made with a private or secret understanding between the parties thereto, that Ewing's debt should first be paid out of the property therein described, and that then the balance should, at *Ewing's discretion*, be applied for the benefit of the Browns' other creditors, then such bill of sale is void, as to all such other creditors as have not assented to such secret understanding. And if this is so, and the said bill of sale is the only foundation and evidence of the plaintiff's title in this case, and the defendant levied legal writs on the property, in the due discharge of his duty, and this is the only trespass proved against the defendant, the jury must find in favor of the defendant.

6. If the jury believe, from the evidence, that at the time of the making of the bill of sale, there was any secret or private trust, injurious to the rights and interests of the other creditors of the Browns, and in regard to the manner in which the property or its proceeds should be applied, and different from that expressed on the face of the bill of sale, then such sale bill is void, as against such other creditors of the Browns, if the carrying out such trust would hinder or delay such creditors in the collection of their debts.

7. If the jury believe, from the evidence, that the sale bill to Ewing was only intended as a payment of Ewing's debt against the Browns, which amounts to only something over one thousand dollars, and that said bill of sale was not intended as an absolute and *bona fide* conveyance of such property, and that said sale bill conveyed property of the value of from five thousand to seven thousand dollars, then such bill of sale is voluntary, as to the excess of the value of such property over Ewing's debt, and as such, void, as against the Browns' other creditors.

8. The sale bill from the Browns to Ewing, is absolute on its face, and if at the time of making the same, there was any secret understanding between the parties to such bill of sale, as to the disposition of the property thereby conveyed, which would be injurious to the rights and interests of the creditors of the Browns, then such sale bill is void as against such creditors' rights and interests; and, therefore, if the jury believe, from the evidence, that the writs given in evidence were duly issued and levied on the property by defendant, and such writs were in favor of such creditors, and that said sale bill shows the only title which the plaintiff had to such property, they will find in favor of defendant, if such levy is the only trespass proved against defendant.

9. If the jury believe, from the evidence, that it was a part of the agreement, upon which the bill of sale from the Browns to Ewing was given, that the attachment suits then pending against the said Browns should be defended, and the plaintiffs in said suits prevented from obtaining judgments, and collecting their just debts, or hindered or delayed in so doing, this renders the said bill of sale void as against such creditors, if the jury believe, from the evidence, that said suits were rightfully brought, and that the plaintiffs were entitled to maintain them.

10. If the jury believe, from the evidence, that it was a part of the understanding or agreement, and that it was secretly made between the Browns and Ewing, upon which the bill of sale was made, that said Ewing should account to the said Browns, or either of them, or to any other person for their benefit, for all of the property mentioned in, or conveyed by said bill of sale, not necessary to pay said Ewing's debt; this secret agreement or understanding would render the bill of sale void, as against the creditors of the Browns, and would not authorize the plaintiff to recover in this suit, so as to injure their rights.

11. If the jury believe the plaintiff, by himself, or attorney, with his knowledge and consent, obtained a judgment against the Browns, for the same debt intended to be secured or paid by the bill of sale, after the execution of such bill of sale, that he caused the execution in his favor, shown in evidence, to be placed in the hands of the defendant, as sheriff, to execute, and that he, or his proper attorney, gave the defendant license to levy the same on the property described in the declaration, and that the defendant levied said execution accordingly, with other executions, and that these levies are the only trespasses proved in this cause, then they will find for the defendant.

12. If the jury believe, from the evidence, that Ewing obtained a judgment, as mentioned in the last instruction, and caused, by himself or attorney, an execution to be issued thereon,

which came duly to the hands of the defendant, as sheriff, to execute, this would be *prima facie* evidence that said Ewing gave the defendant authority to levy such execution on the property of the said Browns, wherever he might find the same, in said defendant's county.

13. The jury is instructed, that if they believe, from the evidence, that the property in controversy, at the commencement of this suit, was the property of Alexander Ewing, John Ewing, and Albert Burdett, and not of the plaintiff alone, and that the property was taken from the possession of the said Alexander Ewing, John Ewing, and Albert Burdett, or from the possession of their agent, they will find for the defendant.

All of which were given, except No. 13.

The plaintiff moved the court for a new trial, which was denied.

WEED & WILLIAMSON, for Appellant.

MANNING & LANDER, for Appellee.

BREESE, J. The principal question in this case, arises out of the instructions given on behalf of the defendant, Runkle, in which a construction was given to our statute of "Frauds and Perjuries," Chap. 44, sec. 2, R. L., 258, to which it seems to us not to be entitled.

The language of that part of this section necessary to be noticed, is as follows: "Every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit of the same, by writing or otherwise; and every bond, suit, judgment or execution, had and made, or contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from thenceforth deemed and taken only as against the person or persons, his, her, or their heirs, successors, executors, administrators or assigns, and every of them, whose debts, suits, demands, estates and interests by such guileful and covinous devices and practices as aforesaid, shall, or might be, in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void;" and, moreover, if the conveyance "be of goods and chattels only, then acknowledged or proved by two witnesses before any court of record, in the county wherein one of the parties live, within eight

months after the execution thereof, or unless possession shall really and *bona fide* remain with the donee."

This section is substantially a transcript of the statute of 13th Eliz., Chap. 5, and is the basis of all American jurisprudence on this subject. It is, however, only declaratory of the common law, whose antipathy to every species of fraud is so well known and understood. 2 Bac. Abr., "Fraud;" 2 Com. Dig., "Covin."

The emphatic words of this section, the test words, by which the validity of voluntary assignments is tried in all our courts, are, "with the intent or purpose to delay, hinder or defraud creditors."

Every conveyance, having the effect to delay or hinder creditors, of their just and lawful actions, suits, debts, etc., is not therefore fraudulent within this statute, for such is the effect of all voluntary assignments, made expressly for the benefit of creditors, and which the courts will always sustain. But the conveyance must be "had and made, or contrived of malice, fraud, covin, collusion, or guile," with that intent, to bring it within the statute, and both parties, grantor and grantee, must have that purpose in view.

Was this conveyance to Ewing of that sort? Where is the evidence of the "malice, fraud, covin, collusion or guile;" words of great meaning and of vast importance, in construing this statute?

The facts of the case show that Brown and Son, who conveyed to Ewing, were broken down railroad contractors, largely indebted, and perhaps of considerable property, valued at about seven thousand dollars, scattered over the country; part of it claimed by other parties, some secreted, some run off, and a large portion of it seized on writs of attachment, and such the state of feeling against the Browns, that it was hazardous for them to search for, and collect the property, or meddle with it.

Ewing, Price, Hagey and Armstrong, creditors of the Browns, Ewing to the extent of one thousand dollars, met and consulted on the subject, when it was agreed that Ewing should take a bill of sale of the property, collect it together, pay himself out of it, and then divide the balance among the creditors of Brown and Son. Ewing, accordingly, took the bill of sale, and at considerable expense, collected a portion of the property, to the value of about fifteen hundred dollars, paid out money to relieve it from claims made on it, and brought it to Knoxville, where, it seems, these other creditors who had made this agreement, were ready, with executions in the hands of the sheriff, to levy upon it, who did seize and sell it, as the prop-

erty of Brown and Son, and which acts are the foundation of this suit.

We think it very clear, that there is no evidence whatever of such fraud as is contemplated by the statute. There must be fraud in the getting up, and setting on foot, the conveyance, and not merely the execution of a conveyance, which may delay or hinder other creditors. A vigilant creditor is entitled to all legal advantages, and can protect himself by a *bona fide* transaction.

The conveyance, to be void, must be made and *contrived* of malice, fraud, covin, collusion or guile, and the intent must be marked by these characters, or some one of them. As Lord MANSFIELD observed, in *Cadogan* v. *Kennett*, Cowper's R. 434, "the question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors." And so, Chief Justice MARSHAL, in the case of the *United States* v. *Hooe*, 3 Cranch R. 88.

This conveyance seems to possess none of these ingredients, and nothing attaches to the transaction, as fully appears from the testimony, calculated to stigmatize it as fraudulent. The debt to Ewing was really due; the deed was not made in secret, but on consultation with, and by the consent of three other creditors; was duly acknowledged and recorded; is absolute on its face, and no secret trust connected with it, but an open and clearly expressed declaration that, the balance of the property, after paying Ewing's debt, and expenses, should be distributed among the creditors of Brown and Son.

In the language of GROSE, Justice, in the case of *Meux et al., qui tam.*, v. *Howell and Atler*, 4 East R. 1: "It makes one shudder to think that persons who appear like the defendants, to have acted most honestly, should have been in any hazard of being subjected to punishment for having endeavored to procure an equal distribution of their debtor's effects among all his creditors. Their conduct was meritorious, and the judgment confessed by Norton was not covinous or feigned, but given *bona fide*, and upon good consideration, for debts due to the defendants and the other creditors."

It is attempted, however, to give a fraudulent color to this transaction, by the fact that after the execution of this conveyance, Brown and Son confessed a judgment in favor of Ewing, for the amount of this same indebtedness. From the testimony, it appears that this confession was made by an attorney of the court, without the knowledge of Ewing, and without his procurement, or that of his attorney, though it appears his attorney had an execution issued upon it. Be this as it may, there is no evidence that the judgment was to stand in place of the

conveyance, and taking judgment could not, independent of any agreement to that effect, release the property covered by the conveyance. Ewing might have a double security, and two distinct remedies for his debt, and avail himself of either; he insisted, however, on his bill of sale.

It is very certain, all the parties who were present at the sale to Ewing, and assented to it, ought to be bound by it, and could have no pretense to levy their executions upon the property after such assent.

As to all others who were not present and assenting, the sale is considered good, as to such property of which Ewing got possession before any liens attached. His vigilance should not go without its reward. He had an undoubted right to secure himself, and get the property in his possession for such purpose.

As to the instructions on behalf of the defendant, the views already presented fully dispose of them. Taking them in their order, the first assumes that the trespass consisted in levying the attachments, whereas, by the record, it appears that four of the horses taken and sold by the defendant, had not been seized by attachment, but had been levied on and sold on executions issued after the sale from Brown and Son to Ewing. It is agreed that such was the fact, and the instruction could not but mislead the jury.

The second instruction is too loose, and is predicated on the idea, that if it was the intention of the Browns to hinder or delay their other creditors, by making the bill of sale, it is therefore void as to such creditors. Both parties must conspire to hinder and delay, the grantee as well as the grantor, and must be made with malice, fraud, covin, etc., on the part of both. And it excludes the fact from the consideration of the jury, that certain other creditors assented to the sale.

As to the third instruction, we have already said that taking the judgment was not, of itself, an extinguishment of the bill of sale. The fourth instruction is liable to the same objections as the second. It considers the sale void as to all persons, however honest Ewing's intent may have been. It would not be just that he should suffer, if he acted honestly and with no evil intent. He must have been a knowing party to the criminal transaction, and joined in the fraud, covin and guile, and a party to all the fraudulent and covinous intents and purposes.

As to the fifth instruction, it will be perceived, there is no evidence on which to base it. *Coughlin* v. *The People*, 18 Ill. R. 266. There is no proof that after Ewing's debt was paid, he was, at his *discretion*, to pay the balance over to the other creditors. There is no proof of any secret trust or understanding, but the only trust reserved is open and patent, and is for

the benefit of the creditors generally, and which they could enforce in a court of chancery. Had there been a benefit or advantage reserved, secret or otherwise, to the Browns, it would have avoided the deed; but there is none such, nor pretense of any. After Ewing's debt was paid, the creditors were to participate in the balance.

All the property was devoted, by the Browns, to the payment of their debts, and they seem to have acted, throughout, with the most honest intentions. The sale was as well for the benefit of the creditors, generally, as for Ewing's benefit, and much credit is due to him for his exertions in collecting it together, scattered as it was, in three or four counties, and under embarrassments of no ordinary character. He may be considered the trustee for the creditors, of the balance remaining after his debt is paid. The same remarks will apply to the sixth instruction. There is no proof on which to raise an inference of a secret trust, and in the absence of it, there is a manifest impropriety in directing the attention of the jury to that which is not in the case, and call upon them to tax their imagination, to supply the want of facts. The same is the case with regard to the seventh and eighth instructions.

As to the ninth instruction, that is calculated to mislead. It was the undoubted right and duty of Ewing, acting for himself, and as trustee for the other creditors, to defend all suits not properly instituted, whether by attachment or otherwise, and whether they were "rightfully" brought or not, was no question for the jury.

The tenth instruction, has not any evidence on which to base it, and the court should not send the jury out into the broad field of conjecture, but confine them to the facts as proven, on which, alone, instructions can be properly raised.

The objection to the eleventh instruction is as to the form. The jury are instructed, "If they believe the plaintiff, &c." Juries should be permitted to believe nothing, except that belief be occasioned by the evidence, and their minds should always be directed to that, and to that only, as the ground of their belief. To the substance of this, and of the twelfth instruction, there can be no objection.

The Circuit Court having entertained views and opinions inconsistent with this opinion, the judgment is reversed, the cause remanded, and a *venire de novo* awarded.

Judgment reversed.

BURTON AYRES, Appellant, *v.* FINDRE CLINEFELTER, Appellee.

APPEAL FROM LA SALLE.

The granting of letters testamentary, under the act of 4th March, 1837, which provides for the election of probate justices of the peace, was a ministerial act; and it is competent to prove, by other than record evidence, that some of the persons named in the letters testamentary, refused to act as executors.

THIS was an action of ejectment, originally commenced in the Circuit Court of La Salle county, at the November term, 1852, by Henry Clinefelter and Mary Clinefelter, his wife, against Burton Ayres. The declaration was in the usual form, claiming one undivided ninth part of a certain tract of land, being a part of the north-west quarter of sec. 14, T. 33 N., R. 1 E., 3rd P. M., bounded as follows: "Commencing at a point on a line dividing sections fourteen and fifteen of said township, nine hundred and twenty-eight feet north of the south-west corner of said section fourteen; thence north seven rods and a half; thence east three hundred and sixty feet; thence south seven rods and a half, (to the north-east corner of lot one, block two, of Lapsley's addition to La Salle); thence west to the place of beginning; which said plaintiffs claimed in fee, as the property of the said Mary Clinefelter."

The second count claimed one undivided eighth part of the same premises.

The defendant Ayres pleaded the general issue.

At the November term, A. D. 1853, of the La Salle Circuit Court, the cause was tried, and a verdict and judgment rendered for the defendant. The case was brought to the Supreme Court, and argued at the June term, 1854, and the judgment reversed, and the cause remanded. The case is reported in 16th Ill. R., page 329.

"STATE OF ILLINOIS, *La Salle County:* In the Circuit Court thereof—Vacation after the May term, A. D. 1855:

"The declaration of Findre Clinefelter, filed by leave of the court, by way of amendment to the original declaration, in suit in ejectment in said court, entitled, *Henry Clinefelter and Mary Clinefelter, his wife*, v. *Burton Ayres;* said Mary Clinefelter having deceased, and said Findre Clinefelter, being the son and heir at law of said Henry and Mary Clinefelter. And now comes the said Findre Clinefelter, by E. S. Holbrook, his attorney, and by leave of the court first obtained, and according to the statutes in such case provided, the death of the plaintiff, Mary Clinefelter, having been suggested, substitutes his own name as plaintiff, in the place of the said Henry and Mary

Clinefelter, as the son of the said Mary Clinefelter, and heir at law of one-sixth of the real estate of which said Mary Clinefelter died seized; and as such heir, successor to the title of said plaintiff, as to the one undivided sixth thereof, of the premises described in the original declaration, filed in said cause, and the several counts thereof."

At the February special term of the La Salle Circuit Court, 1857, the cause came on for trial; a jury was waived, and the cause submitted to Hollister, Judge of said court.

The plaintiff offered in evidence an agreed state of facts, as follows:

That both parties claim title from Samuel Lapsley, now deceased, who died in said county, June 21, 1839, seized of the premises sued for.

That Findre Clinefelter is one of the heirs at law of Lapsley, and as such, had Lapsley died intestate, would have been entitled to one undivided forty-eighth part of said premises, by descent; and that the defendant Ayres was in possession, claiming title at the time of the service of declaration and notice in this cause.

That Lapsley, prior to his death, and while of sound mind, executed, published and declared, as his last will and testament, the following, viz:

"I, Samuel Lapsley, of the county of La Salle, and State of Illinois, do make and publish this my last will and testament, hereby revoking and making void all prior wills by me at any time heretofore made.

"First, I direct that all my debts and funeral expenses be paid as soon after my decease as possible, out of the first moneys that shall come into the hands of my executors, from any portion of my estate, real or personal.

"Also; I give and bequeath to Benjamin Faughander, Julia Ann Faughander, and Emily Faughander, children of John Faughander, of said county of La Salle, the sum of one thousand dollars each, to be paid to them respectively, at their respective ages of twenty-one years, or days of marriage, which shall first happen; the same to be kept out to interest, at the discretion of my executors, and the interest accruing thereon to be applied to their education and maintainance, respectively, until their said respective ages or marriages; and if either of them shall die before the age of twenty-one or marriage, then I give the share of the one so dying, unto the survivors of them.

"Also; I give and bequeath unto Julius C. Coe, the sum of one thousand dollars, as well for the respect which I bear toward him, as for his kindness and attention to me during sickness.

"Also; I give and bequeath to Martha Clinefelter, Margaret

Clinefelter, Findre Clinefelter, Eliza J. Clinefelter, and Lucinda Clinefelter, children of my sister, Mary Clinefelter, the sum of one thousand dollars, each, to be paid to them, respectively, at their respective ages of twenty-one years, or days of marriage, which shall first happen; the same to be put out to interest, at the discretion of my executors, and the interest accruing thereby to be applied to their education and maintainance, respectively, until their said respective ages or marriages; and if either of them shall die before the age of twenty-one years or marriage, then I give the share of the one so dying, unto the survivors of them.

"Also; I direct my executors to sell and dispose of, as soon as may be, after my decease, all my personal property, for good current money; and that all the real estate of which I die seized or possessed, shall be sold by my executors, at any time when they may think proper, for its reasonable value, for like current money, or on such credit as they may think proper; and the amount thereof secured in such manner as is usual in like cases, to insure the full and punctual payment thereof; and to effectuate this my intention, I hereby vest in my executors full power and authority to dispose of my real estate, in fee simple, or for a term of years, or otherwise, in as full and large a manner, in every respect, as I could myself do if living.

"And I do hereby make and ordain my friends, Burton Ayres, John Faughander and William Waddingham, executors of this my last will and testament."

Signed and sealed, March 26, 1839, and witnessed by Lorenzo Leland and Aaron Gun.

And that Lapsley never afterwards revoked or in any manner altered said will.

That said will was duly proven, and recorded in the office of the Probate Court of La Salle county, on the 28th day of June, 1839.

That Ayres and Waddingham, two of the persons named as executors in said will, never took out letters testamentary on said will; and that letters were issued by the Probate Court of said county, to John Faughander, the other person named as executor in said will; that Faughander was qualified as sole executor; and that Ayres and Waddingham were both alive at the time of the issuing of said letters to Faughander, and at the time of the conveyance by Faughander, hereinafter stated; and that they [Ayres and Waddingham] were in no wise legally disqualified from acting as executors.

That on October 2nd, 1841, and after Faughander had been qualified as executor, and while he held that office, he, as such executor, executed, acknowledged and delivered to John and Mary Swanson, a deed of the premises in controversy, and that afterwards, sometime in the year 1846, John and Mary Swanson

duly conveyed by deed to Burton Ayres, whatever title they obtained by the deed from Faughander to them.

The defendant then offered in evidence the will of Lapsley, above set out, and the probate thereof.

The defendant called *Samuel W. Raymond*, as a witness, who testified that he was county clerk, and keeper of the records of the probate office of La Salle county. A book was shown witness, which he testified was the record book, or book of entries, of the Probate Court of La Salle county, for 1839. The defendant then offered in evidence an entry in said book, as follows:

"*September 6th*, 1839.

"John Faughander, Executor of the last Will and Testament of Samuel Lapsley, deceased. } *Application for Letters.*

"This day came the said John Faughander, one of the executors named in the will of the said Samuel Lapsley, deceased, heretofore proven and admitted to record, and made application for letters testamentary. It appearing that the said Lapsley is dead; that the other persons named in said will, as executors, decline acting; and that the said applicant is entitled to letters, as sole executor of said will; and that the said applicant having filed in this office the requisite bond, with satisfactory security, letters testamentary are therefore granted to the said John Faughander."

The plaintiff, by his counsel, objected to the introduction of said order, but the court admitted the same, subject to be either considered or excluded, as the court might determine, on full consideration.

The defendant then gave in evidence the bond of Faughander, as executor.

The defendant then called *John V. A. Hoes*, as a witness, who testified that he was probate justice of La Salle county, in 1839, and that the entry of Sept. 6, 1839, above set out, was in his handwriting. A written memorandum, which had been previously proven by the witness Raymond, to be on file in the probate office, among the papers relating to Lapsley's estate, was here shown to witness Hoes, which memorandum is as follows:

"Letters testamentary—copy of will—
with letters—
refuse
other executors named in will fail to qualify.
John Faughander sole executor.

ZACHARIAH MERRITT,
DANIEL DIMMICK,
MICHAEL LEONARD, } Appraisers."

This memorandum was indorsed as follows: "Mem. Sept. 6th, 1839."

The witness Hoes, after examining the memorandum, testified that it was in his handwriting; that the will of Lapsley was indorsed in his handwriting; also, the affidavit attached thereto; that he was acquainted with Burton Ayres and Faughander. Hoes also testified, that it was his best impression that Ayres and Waddingham did refuse to qualify, as executors of Lapsley's will; that this was his best recollection, gathered from the papers and memoranda made by himself, and from his general recollection of the transaction, and what occurred before letters were issued to Faughander.

Hoes further testified, that the general and usual practice of doing business in the Probate Court, in 1839, was this: When executors, administrators, or others, appeared before that court to transact business, the papers on file in the particular estate were taken down, and it was ascertained what was to be done, and a written memorandum made; and the memorandum was placed among the files, with the date of the transaction indorsed on it. The memorandum, with the files, were then tied together and laid away, to be entered on the record at leisure; and they were entered according to the dates. The memorandum, above set out, was such a memorandum of what was done in the matter of the Lapsley estate, on the 6th Sept., 1839. The memorandum above set out was then offered in evidence by defendant. Plaintiff objected; the court sustained the objection, and defendant excepted.

The witness Hoes also testified that his recollection was, that the personal estate of Lapsley was insufficient to pay the debts of the estate and the legacies. The inventory of said estate was shown the witness Hoes, and he testified that the words "good," "desperate," and "doubtful," on the margin of the inventory, were in his handwriting. He also testified that Faughander did pay some of the debts of the estate.

On cross-examination, Hoes testified that he derived his impression that Ayres and Waddingham refused to qualify, from the papers, and his general recollection of the transaction and his course of business as probate justice; that he may have been told by Ayres at the time, that he [Ayres] refused to act; that he did not recollect Waddingham; that he [Hoes] had reliable information of Ayres' and Waddingham's refusal to act, at the time he issued letters to Faughander, but could not now say how he received such information.

On direct examination resumed, Hoes testified that he had no doubt about the fact that he did receive his information of Ayres' and Waddingham's refusal to act from some other source

than from Faughander; that he should be inclined to think that they [Ayres and Waddingham] appeared before him in person; in that case no other memorandum would have been made than the one above set out.

Philo Lindley was then called, as a witness for defendant, and testified that he knew Lapsley, Ayres, Faughander, and had seen Waddingham. After Lapsley's death, witness was talking with Ayres, and told him he thought he ought to qualify as executor; Ayres replied that Lapsley's business was so mixed up that Lapsley himself knew nothing about it, and he [Ayres] would not have anything to do with it. This was in 1839 or 1840, witness could not say which; that he had a dozen conversations with Ayres on the subject, and he never heard Ayres express any different determination than that he would not serve as executor. Lindley further testified, that he had lived in the neighborhood where Lapsley lived and died, ever since 1836. The defendant's counsel asked Lindley "whether there was any general rumor in the neighborhood as to whether Ayres and Waddingham have refused to qualify as executors of Lapsley's will?" Plaintiff's counsel objected to the question; the court sustained the objection, and defendant excepted.

On cross-examination, Lindley testified that Waddingham was engaged in packing pork, and had some connection with a brick yard in St. Louis. He married Lapsley's sister, as witness understood. Mrs. Clinefelter, wife of Henry Clinefelter, was a sister of Lapsley's. Findre Clinefelter was a son of Mrs. Clinefelter.

Lorenzo Leland was then called, by defendant, and testified that in 1839 he practiced law in Ottawa; was acquainted with Lapsley, who lived near Peru, and with Faughander and Ayres. He [witness] drew Lapsley's will, and was one of the witnesses thereto. He acted as attorney for Faughander, as executor. Thinks Ayres was at Lapsley's house when the will was drawn. His impression was, that there was not sufficient personal property belonging to Lapsley's estate to pay his debts; that he was attorney for Lapsley three or four years previous to his death, and got his impression of Lapsley's personal estate and debts, from Lapsley himself, and from what he knew of the condition of the estate after Lapsley's death.

Witness was clerk of Circuit Court, and knew the fact; was certain there was not sufficient of Lapsley's personal estate to pay the debts and legacies; witness thought Ayres knew he was to be one of the executors when the will was drawn.

The defendant, after proving the identity of the papers next offered in evidence, by the witness Raymond, then offered in evidence:

1st. The inventory of the estate of Lapsley, showing debts due the estate to the amount of $3,770.33; the same above referred to in connection with Hoes' testimony.

2nd. An appraisement bill of said estate, showing personal property and real estate amounting to $353.50.

3rd. An account current, rendered by Faughander, as executor, to the Probate Court, in 1847, showing money received by him, (including the amount the land in controversy was sold for,) amounting to $2,249.70, and payments made by the executor, amounting to $1,438.81; showing a balance of $810.89 in the hands of the executor.

4th. An entry in the records of the Probate Court of said county, showing an approval of said account rendered, by the said Probate Court, May 13, 1847.

The defendant then offered in evidence, the deposition of John Faughander; the plaintiff objected, because Faughander was interested; but no exceptions having been taken to said deposition before trial, the court overruled the objection. Said deposition was then read in evidence, in which Faughander testifies, in substance, that both Ayres and Waddingham did refuse to act as executors of Lapsley's will.

The defendant then gave in evidence, the letters testamentary issued to Faughander.

The defendant then proved by the witness Raymond, that there was no evidence on the records of the Probate Court, that either Ayres or Waddingham ever applied for letters testamentary.

The defendant then gave in evidence, the deed from Faughander, as executor, to John and Mary Swanson, which is made a part of the agreed state of facts.

The plaintiff's counsel objected to all the oral testimony, or testimony of acts in *in pais*, as incompetent to show a refusal by Ayres and Waddingham to act as executors; but the court admitted the same, subject to be either considered or rejected by the court, on full consideration.

The defendant here rested his case.

The plaintiff then called said Raymond, who testified that he had examined the records of the probate office, and found no evidence that any citation ever issued to Ayres and Waddingham, to appear and qualify as executors. He further testified, that there was nothing on record to show that Faughander had ever paid the legacies, and that he left the country in the spring or summer of 1848.

The court below decided that it was incompetent to prove that Ayres and Waddingham refused to act as executors, by any other than record evidence, or by a citation having issued to

them, or by their having renounced in writing; and on motion of plaintiff, the court excluded all the evidence of the witnesses, Hoes, Lindley, Leland, Raymond, Quigley and Faughander, on that subject; to which defendant excepted. The court also held, that the entry on the probate record, dated Sept. 6, 1839, did not show such refusal; and thereupon the court found the issues for the plaintiff.

The defendant moved the court for a new trial; which motion was overruled, and the defendant excepted.

The defendant then moved in arrest of judgment; which motion the court overruled, and defendant excepted.

The court then rendered judgment for plaintiff, that he recover one-forty-eighth part of the premises, describing them by metes and bounds; to which the defendant excepted.

Dickey & Wallace, for Appellant.

E. S. Holbrook, for Appellee.

Breese, J. By the act entitled "An act to provide for the election of Probate Justices of the Peace," approved March 4, 1837, (Laws of 1837, page 176,) it is provided in the first section, that from and after the first Monday of August next, so much of an act, entitled "An act relating to Courts of Probate," approved Jan. 2, 1829, as relates to the establishment of courts of probate in the several counties, be repealed. Section 2, provides for an election to be held on the first Monday of August next, after the passage of the act, and on the first Monday of August, 1839, and every fourth year thereafter, for the purpose of electing one additional justice of the peace, for each county, to be styled, by way of eminence and distinction, the probate justice of the peace, of their respective counties. Section 3, gives them the same jurisdiction in civil cases as possessed by ordinary justices of the peace, allowing appeals and writs of certiorari from their proceedings. By section 4, jurisdiction is conferred upon them in all cases of debt and assumpsit, express or implied, when executors or administrators are parties, when the amount claimed on either side shall not exceed one thousand dollars.

By section 5, it is provided that in addition to these judicial powers, "they shall have, possess, and exercise, within their respective counties, the following ministerial powers, to wit: Power to administer all oaths or affirmations, concerning any matter or thing before them; to issue and grant letters of administration, letters testamentary, and letters of guardianship, and repeal the same; to take probate of wills, and record the

same; to determine the person or persons entitled to letters of administration, or to letters testamentary, and in general, to do and perform all things concerning the granting of letters testamentary, or of administration or of guardianship, which the judge of probate may do by the existing laws; to receive and file and record inventories, appraisement bills and sale bills, as is required by existing laws; to require executors, administrators and guardians to exhibit and settle their accounts, and to settle for the estates and property in their hands, and for that purpose, may issue citations and attachments into every county in the State, to be executed by the sheriff, etc.; and, finally, to do and perform all other acts of a ministerial character, which judges of probate could then perform in their respective counties.

The 6th section provides the mode by which their proceedings can be made matters of record, and the 7th vests them with all the judicial powers theretofore exercised by the judges of probate; but in all cases of the exercise of such judicial powers, they were required to report their proceedings to the next term of the Circuit Court of their respective counties, for their approval or rejection, and if approved by the Circuit Court, they were then to be considered as matters of record in the Circuit Court.

The court, and the profession generally, throughout the State, always regarded this law, on account of the mongrel character bestowed upon the probate justice, and the incongruities and anomalies of the act, as entitled to very little regard, and it was soon after repealed, being condemned by the common judgment of the country.

It is evident from this act, which was in force at the time the letters testamentary were granted in this case, that granting such letters shall be a ministerial act, and nothing more. Though the justice had important questions to consider before he could decide upon such applications, in many cases requiring a high exercise of the judgment, his decision is, nevertheless, a ministerial act, and so to be considered; and though no reference to this law is made by the court, in the opinion delivered in 16 Ill. R. 329, it might have been cited as controlling authority.

If then, granting the letters in this case was a mere ministerial act, it was, as such, open to the country, and all the facts and circumstances attending the granting thereof should have been admitted in evidence.

If it was a judicial act, the parties are concluded by the decision of the probate; if ministerial, then the evidence of Mr. Hoes and the others, except Faughander, who was interested,

having executed a conveyance with full covenants, should have been admitted.

The judgment of the court below is reversed, and the cause remanded, with instructions that it is competent to prove that Ayres and Waddingham refused to act as executors, by competent evidence other than record evidence, or by a citation having issued to them, or by their having renounced in writing, and that the testimony of Hoes, Lindley, Leland, Raymond and Quigley should not have been excluded.

Judgment reversed.

The People, on the relation of Joseph N. Kies *et al.*, Appellants, *v.* Richard Brewer, Appellee.

APPEAL FROM BUREAU.

A poll-book which shows the election of a school trustee for a town, by name, may be good, by proving that the town named and the congressional town were the same territory, and that the former trustees had, before the election, ordered that the school business of the township should be done under the particular name stated in the poll-book.

The postponement of an election of a school trustee is wrong. If within the time required by law a sufficient number of qualified voters organized and held an election, the person so elected will hold his office, notwithstanding an adjournment of the election at another hour in the day.

It will be intended that the election was in the proper county, if the returns were made to the school commissioner of the county, although the oath of the officer does not in the jurat or elsewhere show the name of the county.

The facts of this case are detailed in the agreed statement of the facts, as follows, to wit: This was an information in the nature of a *quo warranto* against the defendant, for usurping and intruding into, and unlawfully holding and executing the office of "trustees of schools of township sixteen north, of range ten east, of the fourth principal meridian."

Pleas: not guilty and justification—that the said defendant was legally elected to said office on the 9th day of November, A. D. 1857, and had been legally qualified.

Issues of fact were taken by the People upon both pleas, and a jury empanneled to try the issues.

The defendant admitted that he was in said office.

The questions which arose on the trial of the cause, and which were all decided by the court, Ballou, Judge, in favor of the defendant, were as follows, to wit:

1. That the poll-book of the election under which the defendant claimed, showed the returns for an election for "trustees

of schools of the *town* of Selby." The People objected to the admission of said poll-book; but upon the defendant showing that the said "town of Selby" and the aforesaid township sixteen were the same territorially, and that the said township was called the "town of Selby," and that the former trustees of said township had, before said election, ordered that the school business of said township should be done in the name of said "town of Selby," the said poll-book was admitted in evidence to the jury; to which the People excepted.

2. That on the day when said defendant professed to have been elected, a number of the voters of the aforesaid township met at the proper place for holding an election for "trustees of schools of said township sixteen," and having waited until half past two o'clock in the afternoon of said day, and there being only six voters present, one of whom was a trustee of said township, and the voters present desiring it, without having organized into a board of election, it was moved that the said election be postponed until the next Monday, and at the same place and hour; and the said trustee (acting as chairman) having proposed said motion, and all the voters present having voted for a postponement of said election as aforesaid, the election was postponed and the voters present dispersed. No notice of said postponement was posted on the door of the school-house, (the place for holding said election), nor were the proceedings of said voters reduced to writing. That about an hour after said postponement, a number of voters assembled, and being verbally informed of said postponement, but claiming that such postponement was illegal, organized a board of election and held an election, at which twenty-four votes were polled, of which said defendant received twenty-two; that said judges of said election delivered the poll-book of said election to the school commissioner of the county of Bureau aforesaid; that the said defendant took and subscribed an oath of office and the anti-dueling oath, and an oath to support the constitution of the United States and of this State, but the affidavit did not in any part of it contain the words "Bureau county" or "State of Illinois;" said affidavit was made before a magistrate who was justice of the peace of said Bureau county, but it was not so stated in the body of the affidavit nor in the jurat to the same.

An election was subsequently held at the time and place fixed by the aforesaid postponement, and the three first mentioned relators were elected to said offices, receiving each thirty-two votes; of which last election the poll-book was delivered to the aforesaid school commissioner, and the said three relators were duly qualified by taking the prescribed oaths.

The court, upon the motion of the defendant, instructed the jury that the said postponement was illegal; that a postponement could not be had without a prior organization of a board of election; that a legal election could afterwards be had on the same day, in case no such prior organization was entered into; and that the trustees or judges could alone order an adjournment if desired by the voters present; to all which the People excepted.

The court overruled and refused to give an instruction offered by the People, "that the law did not require that notice of said postponement should be posted upon the door of said school-house, or that the postponement should be in writing;" to which the People then and there excepted.

The jury found for the defendant, and the court rendered judgment against the relators for costs, to which the People excepted, and an appeal was prayed for and allowed to said relators.

The errors assigned are,

1st. In admitting in evidence the poll-book of defendant's pretended election.

2nd. In instructing the jury that the postponement of the election on the 9th of November, A. D. 1857, was illegal, and that a legal election could be held afterwards on the same day.

3rd. In refusing to give the People's instruction, "that no notice of the said postponement need be posted on the door of the said school-house, and that said postponement need not be in writing."

4th. In not holding that the affidavit made by said defendant to qualify was insufficient.

5th. In rendering judgment in favor of the defendant, and against said relators for costs.

Wherefore the People, by said relators, pray that the said judgment be reversed and said defendant ousted from said office.

Gibons & Peters, for Relators.

Taylor & Ide, for Appellee.

Breese, J. This was an information in the nature of a *quo warranto* against Brewer, to show cause why he had presumed to exercise the office of school trustee for township sixteen north, of range ten east of the fourth principal meridian.

The defendant justified under an election, and in his plea alleged that he was legally elected to that office on the ninth day of November, 1857, and had been legally qualified.

Issue was taken on this fact, and the cause tried by a jury.

To sustain the issue on his part, the poll-book of the election under which the defendant claimed, was offered in evidence, which showed the returns of an election for trustees of schools of the town of Selby. On objection made by relators, the defendant proved that the town of Selby and township sixteen north, range ten east, were the same territory, and that the township was called "the town of Selby," and that the former trustees of that township had, before defendant's election, ordered that the school business of that township should be done in the name of the "town of Selby." The poll-book was admitted.

We think it was properly admitted, the former trustees having required it, and there being nothing in the law to prohibit it.

The postponement of the election at the first meeting of the inhabitants, to the next Monday, amounts to nothing. The facts show that within the time required by law, on that day, a sufficient number of inhabitants, qualified to vote, organized a regular board of election, the result of which was the election of the defendant. The returns were duly made to the school commissioner of Bureau county, and all the oaths required by law administered to the defendant by a magistrate of that county. The objection that it does not appear from the body of the affidavit or the jurat to the same, that it was in Bureau county, State of Illinois, is not important. It will be intended it was in the proper county, as the returns were made to the school commissioner of the proper county.

The subsequent election at which the relators were elected, was invalid, the power of voters in this regard having been exhausted at the regular election at which the defendant was duly elected; so that we are of opinion that the Circuit Court did not err in admitting the poll-book in evidence, nor in instructing the jury that the postponement of the election on the 9th of November, 1857, was illegal, and that a legal election could be held afterwards on the same day by the qualified voters then and there assembled, nor in holding that the act of qualifying by said defendant was sufficient, nor in rendering judgment in his favor.

The judgment is affirmed.

Judgment affirmed.

The Galena and Chicago Union Railroad Company, Appellant, *v.* Frederick Jacobs, who sues by his next friend, Appellee.

APPEAL FROM COOK.

An instruction, unless it be upon an abstract proposition of law, must have some evidence for its foundation, and must spring out naturally from such evidence.

The Circuit Court is not limited to the instructions asked for, but may supply by its own suggestions any omission of counsel.

A permission to employees of a railroad company to occupy land within the inclosure of the road of the company, is a permission to special persons, not to be extended to those not in this relation to the company.

Instructions may be modified, but error may be assigned on the refusal of the court to give them as asked for.

A party should cross a railroad track at the usual crossing. The track is the exclusive property of the company, on which an unauthorized person cannot go except at his own hazard, unless it be under certain qualifications.

To maintain an action for negligence, there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff.

In proportion to the negligence of one party should be measured the degree of care required of the other. Where there are faults on both sides, the plaintiff may recover; his fault is to be measured by the negligence of the defendant, and the plaintiff need not be wholly without fault. The relative degrees of negligence of the parties may be measured and considered.

This was an action on the case for the use of Frederick Jacobs, for injuries sustained by being run over by a locomotive owned by the appellant. The damages were laid at $15,000. There was a trial, and a verdict and judgment for $2,000, from which the defendant below appealed.

The first count in the declaration avers that the plaintiff in the court below, was being in and passing along a certain public and common way, which was crossed by the railroad track of the appellant, upon which a locomotive and tender was running; and that by the carelessness of the servants of the appellant, the appellee was run over and injured.

The second count is like the first, but avers that the appellant did not ring a bell or blow a whistle, and that appellee was run over and injured, and lost his arm.

The third count avers that appellee was upon the railroad track of appellant, and was run over by a locomotive, etc.

The fourth count avers the injury to have happened to appellee while he was standing on the railroad of appellant, near to and by a certain public road or street, where the said road was crossed by the railroad on the same level, and that appellant had not caused any sign or board to be placed across the highway, giving warning, and did not ring a bell or blow a whistle, etc.

There is no averment in the declaration that the appellee was himself without fault.

To this declaration there was filed the general issue, and three special pleas.

The second plea avers that the appellant was running its locomotive, etc., along its road, as it lawfully might do, in pursuit of its ordinary business, and that the appellee negligently, carelessly, and improperly remained in and upon the railroad track of appellant without its consent, and without being seen, and that if he was injured, it was caused by his own fault in remaining upon the railroad track, and not by any default of the appellant or its servants.

The third plea avers that appellee went upon and carelessly, negligently, etc., remained on the railroad track of the appellant, and if injured, it was by accident, and without any default on the part of the appellant, but by and through the want of due care on the part of the appellee.

The fourth plea, after averring that appellee was on the railroad of appellant, etc., says if he sustained any injury, it was in part caused by, and resulted from the said carelessness and fault of the appellee, and not by the sole default and negligence of the appellant.

There was an answer to each of these pleas, denying them, and an issue to the country. The appellant filed a motion for a new trial, which was overruled; and an appeal was then prayed and allowed.

The bill of exceptions states, among other, the following proofs.

The plaintiff introduced as a witness, *Mrs. Kell*, who testified as follows:

I know the plaintiff. At the time of the accident in May, 1856, I was living on the Geneva road inside the railroad fence. There were five shanties there. I lived in the fifth one, that is the one farthest west. I lived with my husband; he was at work at the depot for the railroad company. Irish families lived in the other shanties. Dempsy lived in the second house towards the cattle guard. The other men living in those shanties worked for the company. Those families had children then. At the time of the accident I was acquainted with Mr. Jacob's family. I had been at their house two days before the accident. I had taken the little boys to my house twice before the accident, once two days before, and once about a week before. They were the same children who were run over; their names were Frederick and William.

The counsel for the plaintiff here put the question, "how did people living inside the railroad inclosure get backwards and forwards?" To which the defendant's counsel then and there

objected, but the court overruled the objection and admitted the evidence.

Answer. Along the track. It was rather difficult walking there. They walked on the timbers when they crossed the cattle guard.

Cross-examined. These children never went on the track there alone. They had been to my house twice; I went with them. Mr. and Mrs. Jacobs both knew that the children went to my house. I have two children, the oldest about twelve, and the other about eight. I don't allow them to go on the railroad track. I keep watch of them to see that they do not go on the track. I don't think it safe to allow them to go on the track. Mr. Jacobs did not object to my taking his children to my house. He insisted on my coming back with them. I did come back with them. There is only one fence between my house and Jacob's; there is one fence around Mr. Jacob's house, and one about the railroad. The children, to get to my house, had to get through or over these fences. When the people went from these shanties to the junction, they always went along the railroad. When I first went for the children, I did not climb over the railroad fence, but went along the track. When I took the children home, I went along the track. I never took the children over the fence. I took the children along the railroad. I did not take them through the guard. I do not go over any fence. I went to the nearest point on the railroad and then went along it, part of the time on the track, and part of the time at the side of it. The tallest boy walked over the cattle guard, and I carried the smallest one all of the way.

The defendant admitted that the plaintiff was four and a half years of age when the accident happened.

The plaintiff's counsel admitted that there was no pretense that the injury complained of was willful or intentional.

The defendant then introduced as a witness, *Charles Watson*, who testified as follows:

I live at the Junction. At the time of the accident to the plaintiff, Mr. Jacobs lived in my house. I am well acquainted with the premises. The Galena & Chicago Union Railroad Company own the land inside of the railroad fence, and also that outside up to the highway which is open. I own the land next north of this open place. That is my barn north from the cattle guard. The people who live inside of the railroad fence, used to annoy me, by pulling down my fence and coming through there with teams to get to their shanties, and I opened a place at the corner next to the railroad fence, for them to pass through. The cattle guard is not the same now as it was then; then they were laid with the corners or edges of the joists up. Some of

the people nailed slats across the guard to walk over on. People usually passed that way. The cattle guard was made with two by four joists or scantling laid cornerwise, that is, with the edges up. At the time the accident happened, that way around was open. I had opened that space for the people living in the shanties to use with teams. It was the only way for them to go with teams to the shanties. There were eight or ten trains a day passed that place. There were about thirty-five or forty arrived and departed from the Junction daily.

Those people living in the shanties inside of the railroad, when on foot, went through the cattle guard. It was the usual way for them to go.

The plaintiff, by his attorney, requested the court to instruct the jury as follows:

"The plaintiff was not a trespasser, if he was on the land of the defendant, by the permission of the defendant either express or implied."

Which instruction the court refused to give as asked, but added to it, and gave the instruction as follows:

"The plaintiff was not a trespasser if he was on the land of the defendant by the permission of the defendant, either express or implied—*and it is for the jury to determine, from the evidence, whether such permission was expressly given, or can be implied from the circumstances and facts in proof.*"

The plaintiff, by his attorney, then asked the court to instruct the jury as follows; which instructions were given by the court as asked for:

2nd. "If the jury shall find, from the evidence, that at the time of the accident, by the permission of the defendant, persons were living within the inclosure of the track near where the accident occurred, and were permitted by the defendant to come and go over the same, and that at the time of the accident, the plaintiff was, by the express or implied permission of the defendant, at the place where the injury occurred, then it was the duty of the defendant to use due care and diligence in running their trains over the place in question.

3rd. "If the jury shall find, from the evidence, that the plaintiff was lawfully in the place where the injury occurred, either by the express or implied permission of the defendant, and that the injury was solely the result of the negligence of the defendant, without any negligence on the part of the plaintiff or his parents, then the plaintiff is entitled to a verdict."

The defendant requested the court to instruct the jury as follows:

1st. "A party seeking to recover damages for a loss which he alleges has been caused by the negligence or misconduct of another, must show to the jury that his own negligence or

misconduct has not in any way contributed in producing the injury complained of.

2nd. "The burthen of proof is on the plaintiff, to show not only that the defendant was guilty of negligence, but that the plaintiff exercised proper care and circumspection in his own conduct; and if he was of insufficient age to exercise care and circumspection, then he must show that those who were bound to take care of him, did not by their negligence suffer the plaintiff to expose himself to the injury.

3rd. "If the jury shall believe, from the evidence, that the plaintiff was of such tender years as would be likely to make him inconsiderate or imprudent, and that he therefore required the control and oversight of his parents; then they should find that his parents were exercising such care and prudence over the plaintiff as judicious and careful parents ought to have done, at the time the injury was received, or the law is with the defendant, and the plaintiff cannot recover."

All of which instructions were given by the court, as asked for by the defendant. The fourth instruction asked for by the defendant, was as follows:

4th. "If the jury believe, from the evidence, that the plaintiff or his parents knew that there was a railroad at the place where the injury occurred, upon which locomotives and cars were frequently running, and that if the plaintiff wandered thereon that he would be exposed to injury and danger, then plaintiff was on the railroad of defendant at his own peril, and the plaintiff and his parents were guilty of such negligence as should prevent a recovery in this case."

Which fourth instruction the court refused to give as asked for by the defendant, but gave it altered and modified as follows:

"If the jury believe, from the evidence, that the plaintiff or his parents knew that there was a railroad at the place where the injury occurred, upon which locomotives and cars were frequently running, and that if the plaintiff wandered thereon, that he would be exposed to injury and danger, *and that notwithstanding the plaintiff was permitted negligently to wander thereon*, then plaintiff was on the railroad of defendant at his own peril, and the plaintiff and his parents were guilty of such neglect as should prevent a recovery in this case."

To which refusal of the court to give said fourth instruction as asked for, and to which alterations and qualifications of said fourth instruction, the defendant excepted.

The defendant then asked the court to instruct the jury as follows:

5th. "Under the issue raised by the pleadings in this case, if the jury believe, from the evidence, that the plaintiff was guilty of

any negligence on his part by going upon and remaining upon the railroad track of the defendant, at the time when the accident complained of happened, then the law is with the defendant, and the plaintiff cannot recover.

6th. "If the jury believe, from the evidence, that both plaintiff and defendant were in fault, then the defendant cannot recover.

7th. "The plaintiff must show that he was without fault, by going and being upon the railroad track at the time the injury happened, or he cannot recover; although it may appear that the defendant was also guilty of negligence."

Which instructions were given by the court as asked. The defendant asked the court to instruct the jury as follows:

8th. "If the jury believe, from the evidence, that the defendant has exercised ordinary care in fencing the railroad, and in running trains thereon, then the law is with the defendant, and the plaintiff ought not to recover."

Which said instruction the court refused to give, to which refusal the defendant excepted.

The defendant requested the court to instruct the jury as follows:

9th. "If the jury believe, from the evidence, that the land where the injury occurred was owned by the defendant, and was in the use of the defendant, the plaintiff was a trespasser thereon, and if he was on said grounds without permission of the defendant, and not for any necessary purpose, he was there in his own wrong and at his own risk, and the law is for the defendant, and the plaintiff cannot recover, unless the jury believe, from the evidence, that the defendant willfully injured the plaintiff."

Which said ninth instruction the court refused to give as asked for, but having altered and qualified it, gave it to the jury as follows:

"If the jury believe, from the evidence, that the land where the injury occurred, was owned by the defendant, and was in the use of the defendant, the plaintiff was a trespasser thereon, *unless there by the express or implied permission of the defendant*, and if he was on said grounds without permission of defendant, and not for any necessary purpose, he was there in his own wrong and at his own risk, and the law is for the defendant, and the plaintiff cannot recover, unless the jury believe, from the evidence, that the defendant *was guilty of gross* negligence, and willfully injured the plaintiff."

To which refusal to give said ninth instruction as asked for, and to which alterations and qualifications of said instruction, the defendant excepted. The defendant then requested the court to instruct the jury as follows:

10th. "That the defendant was not required by the statutes of this State to ring a bell to warn persons against danger upon its own premises; that such a warning is designed for persons upon and at road crossings, and unless defendant was injured at a road crossing, the omission to ring a bell, unless it was a willful omission, does not in such case show that the defendant was negligent.

11th. "If the jury believe, from the evidence, that the plaintiff was injured on the premises of the defendant, and not at a road crossing, then the omission to ring a bell or blow a whistle is not *prima facie* evidence of negligence on the part of the defendant.

12th. "If the jury believe, from the evidence, that the plaintiff had not sufficient discretion or knowledge to have the care of himself, and was suffered to wander on the premises of the defendant, by the negligence or want of care of his parents, he was there in his own wrong and at his own risk, and the law is for the defendant, unless the jury believe that the defendant willfully caused the injury complained of."

Which said tenth, eleventh and twelfth instructions were given as asked for.

13th. "If the evidence in this case shows that the injury complained of happened on the ground or right of way used and occupied by the defendant, and that the plaintiff had no right to be where he was, then the defendant was not answerable for the injury unless it was done willfully, because the defendant in the use of the road is not bound to keep a look out on its own ground, as against those having no lawful right on the road, but may use the same for its own purposes in its own way, and any person going upon the track without permission (*express or implied*) at such place is there at his own peril and in his own wrong, and therefore if he is injured he cannot recover, because his own neglect or carelessness has contributed thereto."

Which said thirteenth instruction the court refused to give as asked for, but altered and qualified it by inserting the words *express or implied*, between the words *permission* and *at* in the concluding sentence. To which refusal to give said thirteenth instruction as asked for, and to which alteration and qualification of said thirteenth instruction, the defendant excepted.

The defendant then requested the court to instruct the jury as follows:

14th. "Persons not in privity with a railroad company, wishing to cross its track, are bound to cross at a public crossing, or take the consequences of any accident which may happen in consequence of any collision with the cars, not occasioned by the willful and reckless act of the servants of the defendant."

Which said fourteenth instruction was given as asked for.

There was a finding for the plaintiff, and damages were assessed at two thousand dollars.

The errors assigned are—

1st. The court below gave improper instructions to the jury on the part of the plaintiff.

2nd. The court below refused to give proper instructions, as asked, on the part of the defendant, in that court.

3rd. The court below improperly altered the instructions asked for on the part of the defendant below.

4th. The court below gave instructions on the part of the plaintiff below, which were calculated to mislead, and did mislead the jury.

5th. The court below admitted improper evidence on the part of the plaintiff.

6th. The court below improperly overruled the motion for a new trial, and gave judgment for the plaintiff in that court.

E. Peck, for Appellant.

Goodrich & Farwell, for Appellee.

Breese, J. Without recapitulating the facts of this case as they appear on the record, we will consider the instructions upon them as given and refused by the court below.

It is a case of negligence against a railroad company, the plaintiff being, at the time of the injury, but four and a half years of age.

The first instruction asked by the plaintiff below, was clearly objectionable, as it makes no reference to the evidence; as modified by the court it does, but in other respects is not essentially different, but still remains objectionable.

We hold in all cases, an instruction, unless it be upon an abstract proposition of law, which the court may grant or refuse at its discretion, must have some evidence on which to base it, and spring out naturally from such evidence. *Coughlin* v. *The People*, 18 Ill. R. 266; *Ewing* v. *Runkle*, 20 Ill. R. 448.

In scanning the testimony in this case, after a critical and searching examination, we find no one witness deposing to one single fact or circumstance, giving any color to a permission to the plaintiff to be on the land of the defendant for any purpose whatever. There are no facts or circumstances sworn to from which such an inference can be rationally deduced, but, if we understand them, quite the contrary. All the instructions on behalf of the plaintiff are put by the court, on the ground of this express or implied permission on the part of the defendant to

the plaintiff to be on their land, which was in their hourly and constant use, and as the case turns upon this, it requires a careful examination.

The evidence shows that Jacobs lived outside of the railroad grounds, at some considerable distance from the point where the injury took place, and to reach which point the plaintiff would have to climb over or creep through three fences. Other persons, Irish, with their families, employees of the company, lived in shanties inside of the railroad inclosure—as many as five families—the head of one of them, Mrs. Kell, sworn for plaintiff, says she lived in the fifth shanty, that is, the one farthest west; Irish families lived in the other shanties; Dempsy lived in the second towards the cattle guard; those families had children there; was acquainted with Mr. Dempsy's family; had been at their house two days before the accident; had taken the little boys to her house twice before the accident, once two days before and once about a week before—the same children that were run over; their names are Frederick and William; showed them at her house something to make music, an instrument for children to play on. To this question of the plaintiff, "how did people living inside of the railroad inclosure get backwards and forwards," she answers, "along the track; it was rather difficult walking there, they walked on the timber when they crossed the cattle guard."

On her cross-examination she says, these children never went on the track there alone; they had been to her house twice; she went with them; the parents both knew that the children went to her house; has two children herself, the oldest about twelve and the other about eight; don't allow them to go on the railroad track; keeps watch of them to see they do not; don't think it safe to allow them; Mr. Jacobs (the father) did not object to her taking his children to her house; he insisted that she should come back with them, and she did come back with them.

Among the mass of testimony in the case, this is all that has the slightest allusion or most remote reference to the fact that this child, the plaintiff, was ever on the railroad track at any time before he met with the injury, and how, from this, it can be inferred that the company or their agent knew it, and knowing it and not forbidding it, they therefore permitted it, when unattended, we cannot discover. It seems to us, as he was never on the track before without a prudent and cautious woman for his protector, both going and returning, the inference would be directly the other way; that a permission can only be implied that he might be there with a competent protector, not by himself. There does not seem to be anything on which to base the theory of implied permission. It surely cannot be drawn

from the two occasions spoken of by Mrs. Kell, for the legitimate inference from them, and it should so have been put to the jury, is, that the child having never been on the track without a competent attendant, could not rightfully be upon it unattended.

But the court told the jury that they might infer a permission by the company to be on their track, from facts which establish its opposite; for going on the track with a careful and watchful attendant is the opposite, when done by a child not five years of age, of going there unattended.

This testimony shows too, that the father of the child, before he would permit him to go with Mrs. Kell, insisted that she should return with him, which she did.

These instructions, placing the case upon an implied permission of the defendant, in the absence of any evidence on which to base it, were erroneous. They must have controlled the finding of the jury, or contributed largely to it, for the idea of an implied permission being excluded, it is not probable such a verdict would have been rendered.

A court does not sit to see injustice done, or to permit it, nor is it restricted, in communicating with the jury, to the instructions asked on either side. It is the province of the court—their undisputed realm, in which to exert to the fullest extent this power—to impart instructions as to the law of the case, on the facts as the jury may find them to exist, and for that purpose, supply, by its own suggestions, any omission or want of observation of the counsel.

The plaintiff can derive no support or advantage from the fact that the employees of the railroad, with their families and children residing within the inclosure, were permitted by the company free ingress, egress and regress in and upon their track and land. This was a permission to special persons, for the benefit and necessities of the road, and cannot be extended to those not in this relation to the company.

Jacobs and his family lived outside of the railroad inclosure, and some distance from the switch and the cattle guard, and the cabins or shanties where Mrs. Kell lived. He was not an employee of the company, but was a baker and kept a grocery, and could claim no such privilege for himself or children as the company awarded to their employees. Did he or any of his family have occasion to visit these shanties, it would have been his and their duty to go the way open and free to the public, and not use the track at any other place than at the usual crossing, and then only for the purpose of crossing. The railroad track is the exclusive property of the company, on which no unauthorized person has a right to be for any pur-

pose; if there, it is at his own peril, under certain qualifications, which we will consider as we proceed.

As to the instructions asked by the defendant, some of which were modified and then given, we can only say that we have always considered the court was at liberty to modify an instruction, for the error could be assigned on refusing to give it as originally proposed. What we have said as to the plaintiff's instructions apply to the fourth and thirteenth of defendant's instructions, as modified, and in their modified form are objectionable.

As this case will be remanded and a new trial had, it becomes necessary for the court to submit some considerations on the question of negligence, and the principles which should govern it.

The question has been considered at great length by this court, heretofore, in the following cases: *The Aurora Branch Railroad Co.* v. *Grimes*, 13 Ill. R. 585; in which the court say: "The degree of care which the plaintiff is bound to exercise, will be found to depend upon the relative rights or position of the parties in relation to the rights exercised, or position enjoyed by the plaintiff at the time the injury complained of happened. As growing out of these relative positions of right, two classes of cases will be found.

Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care and diligence in endeavoring to avoid it, or that by the exercise of ordinary care he could not have avoided it." The court cite and approve the principle of the case of *Butterfield* v. *Forrester*, 11 East R. 60, as expressed by Lord ELLENBOROUGH: "Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care on the part of the plaintiff."

In the case of *Dyer*, impleaded, etc., v. *Talcott*, 16 Ill. R. 300, the court refer to this rule in Grimes' case, as maintaining "that the burthen of proof is on the plaintiff, to show that he exercised due care and caution, or that his own negligence did not contribute to produce the injury complained of, as well as that the injury was produced by the negligence of the defendant."

In the case of the *Chicago & Mississippi Railroad Co.* v. *Patchin*, ib. 198, the court say, "Railroads may and ought to be liable for malicious mischief or willful injuries; nor should the scrutiny be too critical in cases of convictions for that gross negligence which indicates the absence of the lowest degree of care and attention. Railroads may not omit all care, prudence or skill, and ground themselves upon an immunity from all

responsibility because they are lawfully pursuing their own business upon their own land. They are ever under the strictest duty of care, and liable for slight neglect, while there are passengers or freights to be endangered by experiments in running on stock. Yet even without this, they may not with impunity, wantonly or willfully, nor with such total or gross negligence as evidences willfulness, run upon and injure persons or stock trespassing upon the road.

In the *Galena and Chicago Union Railroad Co.* v. *Fay*, ib. 559, the court say, page 570: "It is enough in law to constitute a defense, that the negligence or carelessness (of plaintiff) caused or contributed to the injury complained of."

In the *Great Western Railroad Company* v. *Thompson*, 17 Ill. R. 131, the court reconsider and approve the decision in Patchin's case.

In the *Central Military Tract Railroad Co.* v. *Rockafellow*, ib. 541, the court again refer approvingly to Patchin's case, and say, "The evidence clearly fails to show gross negligence in plaintiff (railroad company) in killing the ox, and the jury was erroneously instructed as to the degree of diligence 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 & Jones on Bailments. Negligence is similarly divided, and made or defined to be the counterparts or opposites of each degree. 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."

In the case of the *Illinois Central Railroad Co.* v. *Reedy*, ib. 580, the court, at page 582, refers with approbation to Patchin's case, and further say, "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." "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, 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 the 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 nowhere 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."

In the case of the *City of Chicago* v. *Major*, 18 Ill., at page 361, the court say, "In this, as in all other cases, it must be left to the jury to determine whether the parents of the child have been guilty of negligence, in suffering the child to be in the streets; on this point the court justly instructed the jury in the last instruction. The jury were there told that they must believe, from the evidence, that the defendant was guilty of negligence which produced the injury in not keeping the tank in repair, and also that its parents were not guilty of negligence; and in another part of the charge they were told that the burden of proof rested on the plaintiff to show not only negligence on the part of the city, but also, that the parents were not negligent."

The rulings of other courts, British and American, do not essentially differ from these, as will be perceived by reference to them as cited by the court.

In addition to the cases cited, reference may with propriety be made to 2nd Chipman Vt. R. 128; 2 Pickering R. 621; 12 ib. 177; 6 Cowen R. 189; 4 Mass. R. 422; 2 Taunton R. 314; all proceeding on the ground not only that the defendant was guilty of negligence, but that the plaintiff exercised ordinary care, and throwing the *onus* in each aspect upon the plaintiff. In 2 Taunton, it is held, "if the *proximate* cause of damage be the plaintiff's unskillfulness, although the *primary* cause be the misfeasance of the defendant, the plaintiff cannot recover."

The earliest case we have cared to find, in which this priciple was declared, is that of *Blyth* v. *Topham*, Croke's James, 158, and is as follows: "Action upon the case:—for that he digg'd a pit in such a common, by occasion whereof, his mare being straying there, fell into the said pit and perished. The defendant pleaded not guilty, and found for him. And now the plaintiff, to save costs, moved in arrest of judgment upon the verdict that the declaration was not good, for when the mare was straying, and he shows not any right why his mare should be in the said common, the digging of the pit is lawful as against him; and although his mare fell therein, he had not any remedy, for it is *damnum absque injuria*, wherefore an action lies not by him; and of that opinion was the whole court. Wherefore it was adjudged upon the declaration that the bill should abate; and not upon the verdict."

This, and all the cases subsequent to which we have referred,

have one common basis, and that is found in the old law maxim that, "no man shall take advantage of his own wrong or negligence" in his prosecution or defense against another. *Sheppard* v. *Hees*, 12 Johns. R. 434; *Bush* v. *Brainerd*, 1 Cowen R. 78. All the cases upon this subject, proceed on this maxim. The leading case of *Butterfield* v. *Forrester*, 11 East R. 60, is of that character, in which Lord ELLENBOROUGH gives the rule referred to by this court in Grimes' case. To state it more at length than is there to be found, the following presents it in substance. A party repairing his house, had put a pole across the road adjacent to the building, leaving a free passage on the other side. The plaintiff set out from an inn not far distant from the pole about candlelighting, and while the obstruction could be seen for one hundred yards. He, however, riding violently, did not observe it, but rode against it, fell with his horse, and was injured. BAILEY, J., directed the jury, that if a person riding with reasonable and ordinary care, could have seen and avoided the obstruction, and if they were satisfied the plaintiff was riding along the street extremely hard and without ordinary care, they should find a verdict for the defendant; which they accordingly did. On a motion for a new trial, Lord ELLENBOROUGH, C. J., said: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault, will not dispense with another using ordinary care for himself. Two things must concur to support this action; an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. Rule refused."

So in the case of *Pluckwell* v. *Wilson*, 5 Carr. & Payne R. 375, which was for an injury to the plaintiff's chaise by a carriage of the defendant, driven by his servant, the court left it to the jury to say, whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself, for that if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to a verdict; and so, if it was altogether an accident.

In the case of *Woolf* v. *Beard*, 8 ib. 435, which was an action on the case for the negligent driving of a cab by the defendant's servant, the court said: "If the plaintiff has contributed to the accident by her own neglect, she cannot recover in this action. No one has a right of action if he meets with an accident which

by ordinary care he might have avoided. If the plaintiff took reasonable and proper care, and it was on account of the extraordinary speed of the cab—nine or ten miles an hour—that she could not save herself, and thus met with the accident, she is entitled to your verdict; but if she, by her own negligence or want of care, contributed to the accident, she cannot recover, even though you should think the driver of the cab was driving too fast, and was therefore guilty of negligence as well as the plaintiff." It was argued in this case, that the accident happened by the plaintiff's own want of caution in stepping off the curb stone when a cab was coming up, and that the man who drove it was not at all to blame.

In *Sills* v. *Brown*, 9 ib. 245, the question was, whether the plaintiff, by his negligence or improper conduct, *substantially* contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its *occurrence*. Therefore where a brig was carrying her anchor in a position contrary to the by-laws of the river Thames, at the time she came in collision with a barge, it was held that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although but for the position of the anchor the collision would not have produced the injury complained of. The court say emphatically, the position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants, substantially contributed to the *occurrence* of the injury; *not to its amount*, but to *the occurrence of it.*

In *Raisin* v. *Mitchell*, ib. 252, which was for negligence in running defendant's brig against the plaintiff's sloop, at anchor in the river Thames, the damages claimed were five hundred pounds. TINDAL, C. J., in summing up, said, "The question is, whether the plaintiff has made out a case to entitle him to damages. You must be satisfied that the injury was occasioned by the want of care or the improper conduct of the defendant, and was not imputable in any degree to any want of care or any improper conduct on the part of the plaintiff." The jury found for the plaintiff, damages two hundred and fifty pounds.

TINDAL, C. J., asked the jury how they made up their verdict. The foreman answered that there were faults on both sides. C. J. "Then you have considered the whole matter?" The foreman answered in the affirmative.

The counsel for defendant submitted to his lordship, that the fact which the foreman of the jury had stated, entitled the defendant to the verdict. C. J. "No; there may be faults to a certain extent." Counsel requested a note might be made of

the objection. The Chief Justice assented, and the verdict was entered by the associate, for two hundred and fifty pounds.

The reporter says in a note: "The verdict in this case, as well as the opinion of the learned Chief Justice, seem to be quite correct, and sustainable in point of law, according to the most modern authorities," and refers to several cases, among them, *Bridge* v. *The Grand Junction Railway Co.* 3 Meeson & Welsby, 244. This was an action on the case for the negligent management of a train of railway carriages, in which PARKE, Baron, said, "The question is, whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it, that the plaintiff, or they under whose guidance he was, was guilty of negligence, and the defendant also; and yet that the plaintiff is entitled to recover. All the facts alleged in it may be true; there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect clearness in the case of *Butterfield* v. *Forrester*, and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule, as to the exercise of ordinary care, is applicable to questions of this kind."

In *Marriott* v. *Stanley*, 1 Scott R. (New Cases) 392, it was held that in an action to recover compensation in damages for an injury occasioned by an obstruction of the highway, it was not a misdirection on the part of the judge to leave it to the jury to say, "whether or not the plaintiff was himself in any degree *the cause of the injury;* whether *he* had acted with such a want of reasonable and ordinary *care* as to *disentitle* him to recover?" In this case, *Smith* v. *Pelah*, 2 Strange R. 1263, is cited. This was that case: The chief justice ruled, that if a dog once bit a man, and the owner having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person treading on the dog's toes, for it was owing to his not hanging the dog on the first notice; and the safety of the king's subjects ought not afterwards to be endangered.

So, in *Bird* v. *Holbrook*, 15 Eng. C. L. R. 91, where the defendant, for the protection of his property, some of which had been stolen, set a spring gun, without notice, in a walled garden at a distance from his house; the plaintiff, who climbed the wall

in pursuit of a stray fowl, having been shot, it was held that the defendant was liable in damages.

In *Davies* v. *Man*, 10 Meeson & Welsby, 545, the general rule of law in respect to negligence was held to be, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. Therefore, where the defendant negligently drove his horses and wagon against and killed an ass which had been left in the highway, fettered in the fore feet, and thus unable to get out of the way of the defendant's wagon, which was going at a smartish pace along the road down a slight descent, the driver of the wagon being some little distance behind the horses, PARKE, Baron, said, "that the jury were properly directed, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass on the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

In *Lynch* v. *Nurdin*, 41 Eng. C. L. R. 422, where the defendant negligently left his cart and horse unattended in a thronged street, the plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. The court, Lord DENMAN, C. J., held, that the defendant was liable in an action on the case, though the plaintiff was a trespasser and contributed to the mischief by his own act; that though he was a co-operating cause of his own misfortune by doing an unlawful act, he is not deprived of his remedy. And that it was properly left to the jury, whether defendant's conduct was negligent and the injury caused by the negligence.

The learned judge, in his elaborate comments on the case, concludes by saying, "his, the child's, misconduct bears no proportion to that of the defendant, which produced it."

The cases referred to above are principally cases decided by the English courts, some of them going considerable length be-

yond those of our own courts. We will refer to a few of those cases in which the difference is apparent.

In *Simpson et al.* v. *Hand et al.*, 6 Wheaton R. 311, GIBSON, C. J., says, "It is an undoubted rule, that for a loss from mutual negligence, neither party can recover in a court of law; and so general is it, that it was applied, in *Hill* v. *Warne*, 14 Eng. C. L. R. 391, to the negligence of agents respectively appointed by the parties to superintend the taking down of a party wall."

In *Rathbun and West* v. *Payne et al.*, 19 Wend. R. 399, BRONSON, J., says, "When both parties are equally in the wrong, neither can maintain an action against the other. Indeed, it has been said, that a plaintiff suing for negligence must be *wholly* without fault."

In *Barnes* v. *Cole and Fitzhugh*, 21 ib., the same judge says, "The verdict was also, I think, plainly against the weight of evidence. I do not see how the plaintiff could escape the charge of having, *to some extent*, contributed to bring the misfortune on himself, by leaving his boat in an improper situation."

In *Hartfield* v. *Roper and Newell*, ib. 615, where a child two years of age was permitted by its parents to be in a public highway without any one to guard him, and was there run over by a person traveling in a sleigh, and injured, it was held, that neither trespass or case would lie against the traveler, in the absence of proof that the injury was voluntary, or arose from culpable negligence on his part. In an action for such injury, if there is negligence on the part of the plaintiff, there cannot be a recovery; and although a child, by reason of his tender age, is incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child, as would its omission on the part of an adult plaintiff. To allow small children to resort to a common highway alone, is a criminal neglect; and although that confers no right upon travelers to commit a *voluntary injury* upon either, neither does it warrant gross neglect; and to make them liable for anything short of that, would be contrary to law. COWEN, J., further says, "The child has a right to the road for the purposes of travel, attended by a proper escort. But at the tender age of two or three years, or even more, the infant cannot personally exercise that degree of discretion which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect

to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. It is a mistake to suppose that, because the party injured is incapable of personal discretion, he is therefore above all law."

"It therefore seems to me," he says, "that here was a good defense established at the trial, on the ground that the defendant being free from gross neglect, and the plaintiff being guilty of great neglect on his part,—indeed, being unnecessarily, not to say illegally, occupying the road, having no right there,—for he does not appear to be traveling, nor even on the land which belonged to his family,—the injury was a consequence of his own neglect, at least such neglect as the law must impute to him through others."

This case was questioned on the argument by the counsel for the appellee in no mild terms, and it may be, as he insisted, that it carries the law to the extreme verge, but it has been referred to by this court in two cases—*Grimes'* case, 13 Ill. R. 585, and *Patchin's* case, 16 ib. 202—certainly not with marked disapprobation. In the last case the court refer to it as opposed to the principle declared in *Lynch* v. *Nurdin*, and it has received the sanction of the highest New York courts, as will be seen by reference to *Brownell* v. *Flagler*, 5 Hill R. 282, *Brown* v. *Maxwell*, 6 ib. 592, and *Munger* v. *Tonawanda R. R. Co.*, 4 Comstock R. 359.

We do not question the correctness of many of the legal principles affirmed by it, but as authority in this case it is not admitted, since the decision in *Major's* case, 18 Ill. R. 361, and as not in conformity with the principles we affirm in this case.

It will be seen, from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it very perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin* v. *Mitchell* and *Lynch* v. *Nurdin*.

We say then, that in this, as in all like cases, the degrees of negligence must be measured and considered; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action.

The judgment of the Circuit Court is reversed, the cause remanded and a *venire facias de novo* awarded for further proceedings not inconsistent with this opinion.

Judgment reversed.

William H. Stow, Plaintiff in Error, *v.* John Yarwood *et al.*, Defendants in Error.

ERROR TO COOK.

Where a party received an engine for repairs and retained a portion of it, and before action was brought against him, had made an assignment in bankruptcy under the general bankrupt law and obtained his discharge; *held*, that he could recoup his claim for work done on the repairs.

All claims due to the bankrupt pass to his assignee, but pass to him subject to all equities and defenses of every description which existed against them in the hands of the bankrupt.

If at the time of the assignment mutual demands exist, arising out of a contract which by the ordinary rules of law might be set off, such right of set-off or recoupment would remain unaffected by the bankrupt's assignment. And the bankrupt, as well as the assignee, can avail himself of such set-off or recoupment.

This was an action commenced in the Cook County Circuit Court, Manniere, Judge, by Yarwood and others against Stow. The evidence in the case shows the following facts: In 1839, the plaintiffs below bought a steam engine of one Allen, which was at the time at Stow's foundry, and contracted with Stow to repair it.

Stow repaired the engine and a portion of it was delivered to plaintiffs below, but again taken away by Stow and part replevied back by plaintiffs, Stow always retaining portions of the engine in his own possession, which he converted to his own use.

Stow made an assignment in bankruptcy under the general bankrupt law; petition filed January 17th, 1843. In the schedule of his effects was the following item: "*John Yarwood & Co. Unsettled account*, $700. *From the above I claim the right to deduct certain portions of an engine now in my possession.*"

Final decree and order of discharge was made September 29th, 1843.

The introduction of the copy of the record of proceedings in Stow's bankruptcy was objected to on the ground that it was no

bar to the right of recoupment. The objection was overruled, and exception taken by defendant below. The defendant asked the court to instruct the jury, "That if the jury believe, from the evidence, that plaintiffs were indebted to defendant for repairs made to the steam engine property, the subject of this action and of evidence, at the time this action was commenced, they must allow the claim or the repairs to be *recouped* against plaintiff's claim for damages." Which instruction the court refused as asked for, but gave it, having qualified it by adding, "But if the jury shall find, that subsequent to the accruing of such account for repairs, the defendant took the benefit of the bankrupt law of the United States, and was decreed a bankrupt, then such claim was by that act transferred to the assignee in bankruptcy, and defendant cannot interpose such claim in this suit by way of recoupment or otherwise. After such decree, the plaintiffs became liable to the assignee for the value of the repairs."

Exception taken by defendant to this refusal and qualification.

Verdict of the jury for plaintiffs, $800.

The defendant below brings the case to this court by writ of error.

A. W. Windett, for Plaintiff in Error.

Hoyne & Miller, for Defendants in Error.

Caton, C. J. This case has been here before, and is reported in 14 Ill. R. 424. The facts are substantially now as there stated, except that it now appears, that after the cause for which this action was brought, and the claim which we then decided might be set up in recoupment of the damages, had accrued, Stow, who offers to recoup his claim for work done on the engine, in reduction of the damages to which Yarwood is entitled for the conversion, has made an assignment in bankruptcy, under the general bankrupt law, and obtained his discharge. This, the court below held, transferred Stow's claim for repairs to his assignee in bankruptcy, to whom alone Yarwood is bound to make satisfaction for those repairs, and that it cannot now be used in reduction of the plaintiff's damages. In this we think the court erred. It is true, that everything that was due to Stow, from Yarwood and all others, passed to his assignee; but they passed to him subject to all equities and defenses of every description which existed against them in the hands of Stow. This is a principle recognized everywhere. What, then, was the legal and equitable position of this claim which is now offered in recoupment, at the time the legal title

to it passed to the assignee? It was, in equity, paid and satisfied, or at least liable to be extinguished by reason of the claim for damages which Yarwood then had against Stow, for the conversion of the engine for the repairs of which the claim originated. Had the assignee sued Yarwood for these repairs, the latter could have set up the damages which had accrued to him by reason of the conversion of the engine by Stow, and this right of recoupment must be reciprocal. If this right of set-off or recoupment existed in one, it necessarily existed in the other. And as the assignee in bankruptcy is but a volunteer, it is in no respect changed by the assignment. It would hardly be denied, that if, at the time of the assignment, mutual demands had existed, arising out of contract, which by the ordinary rules of law might be set off, one against the other, such right of set-off would remain unaffected by the bankrupt's assignment. It is none the less so in this case. The recoupment is allowed on the principle of an equitable set-off. It is an equitable right recognized by and enforced in a court of law. And, as before remarked, all equities remain unaffected by the assignment.

We think the court should have allowed the recoupment, notwithstanding the assignment in bankruptcy.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Francis K. Dunshee, Appellant, *v.* Harmon Hill, Appellee.

APPEAL FROM WINNEBAGO COUNTY COURT.

Where the evidence is sufficient to warrant the finding of the jury, and the instructions fairly state the law of the case, the judgment will be affirmed.

Where a special contract to deliver stone is entered into between two parties, and they agree that a third party may perform the contract, that third party may sue as on an original undertaking.

This suit was commenced before a justice of the peace in Winnebago county, and taken by appeal to the County Court, where it was tried before Miller, Judge, and a jury.

The decision does not require a further statement of the case.

Lathrop & Brown, for Appellant.

L. F. Warner, for Appellee.

BREESE, J. The questions in this cause arise out of the instructions given for the plaintiff, and the refusal to give the instructions asked on behalf of the defendant.

We have looked carefully into the instructions given and refused, and can perceive no error in the ruling of the court in regard to them.

The plaintiff's instructions place the law of the case, on the facts proved, fairly before the jury. A special contract to deliver the stone was set up, between the defendant, Dunshee, and Pennock, Sterling & Co., which Hill, by arrangement between all the parties, performed. All parties agreeing that Hill should finish the contract, he can sue as on an original undertaking by himself.

The evidence in the case fully sustains the finding of the jury.

This being the view we entertain of the case, the defendant's instructions were properly refused. The judgment is affirmed.

Judgment affirmed.

JAMES E. MCINTIRE, Assignee of Joseph C. Tiffany, Appellant, *v.* FRANCIS H. BENSON, JAMES S. BEACH and FAYETTE S. BUCKLEY, Appellees.

APPEAL FROM COOK.

A clause in a deed of assignment, that the assignee covenants and agrees to execute the trust faithfully, according to the stipulations therein contained, being responsible only for his actual receipts and willful defaults, makes the deed fraudulent and void.

THIS was an action commenced in the Cook County Court of Common Pleas by the appellant, plaintiff below.

Declaration filed December 11th, 1856, alleging that said defendants, in November last, seized and took certain personal property, consisting of bricks, lumber and horses, and the implements for making brick, of the value of four thousand two hundred and seventy-seven dollars and thirty-two cents, of the said plaintiff, as assignee, and converted and disposed of them to their own use.

Pleas—First, the general issue; second, defendants, in several amended pleas, recite three several judgments rendered in said court against Joseph C. Tiffany; that executions were issued upon these judgments, and levied by the defendants, Beach and Buckley, upon the property described in the declaration, as sheriff and deputy sheriff of Cook county, and allege that the

property set forth in the declaration is not the property of the plaintiff, but is the property of the said Joseph C. Tiffany.

General replication filed, alleging that the property described in the declaration and pleas is the property of said plaintiff, and concluding to the country.

Issue came on to be tried March 12th, 1857, before J. M. Wilson, Judge of said court, and a jury. It was admitted by the counsel on both sides that the judgments mentioned in the amended pleas were properly rendered, executions properly issued, and levied by the defendants Beach and Buckley, the then acting sheriff and deputy sheriff of said county, upon the property mentioned in the declaration, and taken into their possession.

The assignment of Joseph C. Tiffany, for the benefit of his creditors, to James E. McIntire, with schedules "A" and "B," was offered in evidence by plaintiff and objected to by defendants, on the ground that it was void *per se*, by reason of its containing this clause: "And the said party of the second part hereby covenants and agrees to execute said trust faithfully, according to the stipulations herein contained, being responsible only for his actual receipts and willful defaults." This objection was sustained by the court, the assignment excluded and exceptions taken.

Verdict rendered for defendants, under the instructions of the court.

D. P. Wilder, for Appellant.

D. L. Eastman, for Appellees.

Breese, J. The only question presented for our consideration by this record is, as to the effect, in a voluntary deed of assignment, of the following clause, viz:

"And the said party of the second part hereby covenants and agrees to execute said trust faithfully, according to the stipulations herein contained, being responsible only for his actual receipts and willful defaults."

We think this clause makes the deed fraudulent and void, for these reasons: that as trustee, the assignee is bound to manage the trust property for the benefit of the creditors with all the care and caution and diligence of a prudent owner, and, so far is this rule extended, that however fully a discretionary power of management may have been given, yet if the trustee omits doing what would be plainly beneficial, he will be answerable. Willis on Trustees, 8 Law Lib. 125—169.

And he should exercise the same care and solicitude that a prudent person or a man of reasonable or ordinary diligence would use for himself, and consequently, he ought to be liable for every loss sustained by reason of his negligence, want of caution or mistake, as well as for positive or willful misconduct, or by omitting to do what is plainly beneficial for the estate; for notwithstanding the utmost latitude is given them for conducting the trust, they would still be liable for a breach of trust. Ib. 172, 173, 174; 2 Kent's Com. 230.

The principle is a sound and a safe one, that every provision in a deed of assignment exempting the assignee from any liability he is by law subject to as assignee, is, of itself, a badge of fraud.

The exemption in this clause is too broad, and not qualified by the stipulation that he will faithfully execute the trust, for this covenant precedes the exemption—the exemption really qualifying the undertaking to discharge the trust faithfully, "being responsible only for his actual receipts and willful defaults."

Being bound by law for more than this, he attempts an exemption from the full measure of the liability which the law attaches to the office of trustee. It is not an absolute, unconditional and unqualified surrender and appropriation of the debtor's property for the payment of his debts, for on its face it protects the assignee in a degree of negligence which would certainly delay and defraud creditors, and might greatly benefit the debtor. It is the policy of the law to hold the assignee personally liable, and he must be able to respond. If he is exempted from personal liability, the creditors are exposed to loss. The law binds him to due diligence, and he cannot stipulate that he shall be responsible only for willful defaults, which is no more nor less than gross negligence.

The effect of the assignment being to withdraw the property from the reach of creditors pursuing their legal remedies, and to place it in the hands of an assignee of the debtor's own selection, where it may be wasted and lost unless he chooses to exercise a much greater degree of diligence than he has undertaken to bestow upon it, shows the impropriety of such a provision. He is exonerated from the principal legal liabilities of a trustee, and such is the practical operation of the assignment as expressed on its face, and plainly discloses an intent to hinder and delay creditors; or why the stipulation? If losses happen for the want of proper diligence, it must fall on the creditors, and a failing debtor cannot be permitted to put at hazard the trust fund which justly belongs to his creditors by authorizing the trustee to manage it without due prudence and caution. *Litchfield* v. *White*, 3 Selden R. 445.

The covenant that he will discharge the trust "faithfully, according to the stipulations herein contained," is qualified and controlled by that which immediately follows, "being responsible only for his actual receipts and willful defaults," and which exonerates him from the liability the law imposes on him as trustee.

We have been referred to the case of *Jacobs* v. *Allen*, 18 Barbour R. 549, as a later decision than that of *Litchfield* v. *White*, and as in conflict with it. The last case is not referred to in *Jacobs* v. *Allen*. In this case we prefer the reasoning in the dissenting opinion of the court, but it has in no view any authority with this court. Besides, it differs very considerably from this case. In that case the covenant that he would faithfully execute the trust follows the exemption claimed—that notwithstanding I shall not be responsible except for willful default, yet I will nevertheless faithfully execute the trust according to the law governing such an office. In this case the covenant faithfully to perform precedes the exemption claimed, and the exemption destroys the covenant—thus, I will faithfully execute the trust, but I will not be responsible except for willful defaults; or, I will faithfully execute the trust, on condition that I shall be liable for gross negligence only.

We have examined all the authorities cited on both sides. Comments on them are unnecessary.

To make such a deed valid, the debtor's property must be unconditionally and without restriction transferred to the assignee, with a general authority to him to receive, hold and dispose of it for the equal benefit of all the creditors. He then becomes a trustee for such creditors, and is bound by all the rules that govern trustees, from the operation of which an exemption cannot be stipulated.

To hold this clause valid, would be to say in effect that the assignment need not be unconditional. This we cannot say.

A proper regard for safety suggests the propriety of as few special clauses in deeds of this kind as possible. If they are unusual, they are regarded with great suspicion. Fraud is supposed to be concealed in their provisions, and with that taint upon them they must die.

The great and indispensable requisite in all voluntary assignments by debtors, is *good faith;* the great and fatal objection, *fraud*, or the intent to defraud creditors.

The judgment of the court below is affirmed.

Judgment affirmed.

JACOB CLAYPOOL *et al.*, Appellants, *v.* ARCHIBALD MCALLISTER *et al.*, Appellees.

APPEAL FROM WILL.

Where a party who had been keeping a ferry near to another ferry, leased his boat to be used by the person keeping the other ferry, he will not be held liable for an accident occurring on the boat while in the use of another.

Nor will the party who owned the boat be liable for not maintaining a ferry, in an action on the case for an injury to animals, while the boat was in the use of another ferry keeper.

A ferryman has the absolute right to direct what position each person shall take on the boat, without reference to priority of arrival at the ferry. If a party shall not be ferried in proper time, he must seek his remedy by action.

THIS was an action on the case brought by appellees against appellant.

The plaintiffs allege, that on the first day of November, 1854, they delivered to the defendants, being then and there the owners, duly licensed, of a certain ferry across the Illinois river, at Morris, and common carriers, and defendants, as such owners and occupants of said ferry, and common carriers, received from the plaintiffs upon the ferry boat of defendants, a span of horses, harness, and wagon loaded with stoves, to be by defendants ferried across the Illinois river at Morris, for reward; and the defendants so being such ferrymen and common carriers, and their servants and agents, so carelessly behaved and conducted themselves in the premises, that by and through the carelessness, negligence and default of defendants and their servants and agents in the premises, the said horses, harness, wagon, etc., were wholly lost.

That on the 14th day of Nov., 1850, the defendants obtained a license to keep a ferry across the Illinois river, at a point between the S. frac. of the N. E. ¼ of Sec. No. 9, R. 7, and the E. ½ of block 17 of the canal addition to Morris, for five years from the 27th day of Feb., 1851, provided the defendants should enter into a bond to keep said ferry in all respects in accordance with the statute, and should pay a certain tax named in said order; that defendants complied with the requisitions aforesaid, and accepted the powers and franchises so granted, and afterwards, to wit, on the first day of April, 1851, at the place mentioned in said license, did establish the ferry across the Illinois river.

And plaintiffs aver, that by reason of the acceptance by the defendants of said powers and franchises, it became and was the duty of defendants to be furnished and provided at that place with good tight boat or boats, of sufficient number, dimen-

sions, etc., for the transportation of all passengers, teams, etc., and with men of sufficient number, skill and strength to manage the same.

And plaintiffs aver that on the first day of Nov., 1854, at the place of the ferry aforesaid, upon the ferry boat so as aforesaid furnished by said defendants, they delivered one span of horses, wagon, etc., to be ferried across the river for certain toll in that behalf.

That on the day aforesaid, and previously, the defendants neglected and omitted to provide themselves with a good tight boat or boats, but the boats furnished were old and leaky, without sufficient rigging or implements, and did neglect and omit to furnish suitable small craft, and did neglect and omit to furnish said boats with men of sufficient number, strength and skill to manage the same, and by reason of such insufficiency of said boat, rigging and implements, and the carelessness and indiscretion of the men upon the same, and the insufficiency of the number of the men, and the omission to furnish any small craft, etc., the horses, wagon, and other property of the plaintiffs, were thrown into the river, and the horses were drowned and the other property damaged.

Plea, general issue.

There was a change of venue to Will county on petition of plaintiffs.

There was proof that defendants established a ferry at Morris in the spring of 1851, under a license for five years.

Evan Roberts testified, that he drove the team that was drowned; the property belonged to plaintiffs; that they went on to a ferry boat at Morris, in Grundy county; that they went overboard from the ferry boat into the river, and the horses were drowned and the property damaged; that the cause of the accident was a want of sufficient bars or chains across the ends of the ferry boat, and there was no sufficient small craft to assist in saving the horses after they went over. The ferry was at Morris; there were two ferry boats connected together; the boat farthest from shore, and from which the team went off, was called the Claypool boat, and that the man who directed him what place to take upon the boat was called Slyter.

John McCrary showed, that the team of the plaintiffs was drowned and their property injured, at a ferry in Morris, and showed the amount of the loss, and that the boats were deficient in not having chains or bars at the end, and that the ferriage was paid. There was no other ferry at that time near that; I know the boat the team went off from was the Claypool boat; Slyter had the boat at that time, and was working it; Slyter was running the ferry at that time; know that he had charge of

the ferry sometime before the accident; did not see either of the Claypools about the ferry that summer, except when crossing as passengers.

C. M. Gould testified. I reside at Morris; have resided there twelve years; William E. Armstrong originally run a ferry at Morris; Mr. Claypool run a ferry at Morris after Armstrong did; a free ferry company also run a boat there; Mr. Clapp was the ferryman for the free company; a part of the time he run the boat for whatever he could get; a Mr. Slyter run the same ferry after him in 1854; Slyter was running the ferry; Clapp used the boat that Claypool had run when he, Clapp, was running under the free ferry company; Slyter used it after he had got the ferry of Clapp. Claypools commenced running their ferry in the year 1850 or 1851; Claypools had two boats then; they charged and received ferriage; two boats were attached together in the summer, or early in the fall of 1854; one of the boats belonged to the Claypools, the other to the free ferry company; I knew the Claypool boat from the time it was first put on; I never knew any chains or bars across the end of it; the ferriage was done by the Claypool ferry for any one except for the members of the free ferry company; Clapp and Anderson made an agreement with the free ferry company for their boat, and then hired the Claypool boat; Clapp and Anderson then let Slyter have both boats, who afterwards run the ferry.

Alonzo Keith testified. I was at the ferry in Morris at the time plaintiffs' horses were drowned; Slyter had charge of and was running the ferry; the driver disobeyed Slyter's instructions.

Curtis Cobler testified, that he was present at the time of the accident, and that the boats were in good repair; Mr. Slyter had charge of that ferry at the time of the accident.

Isaac N. Fitch. The testimony of this witness tended to show that he was present when the team was drowned; that the driver of the team disobeyed the orders of the ferryman; that the team was drowned from his neglect. A man by the name of Slyter had charge of the ferry at that time.

Andrew Ober. Deposition read by defendants.

The testimony of this witness tended to show that the accident was occasioned by the fault of the driver of the team, in disobeying the instructions of the ferryman; that Mr. Slyter was running the ferry, and gave directions as to the teamster about placing his team on the boat.

Jos. James testified, that he was present at the time the team was drowned; that the accident happened solely from the fault of the driver of the team. Mr. Slyter was on the ferry at that

time; think he had charge of it; seemed to have most to say about it; Mr. Slyter gave directions to the drivers of the teams in relation to their order of coming on the boat.

Allan W. Slyter testified as follows: One of the boats was owned by the Claypools, and the other by the Morris Free Ferry Company; I controlled the boats at the time, and received the money for the ferriage, or my hands did for me, for my own use; the ferry had been erected by William Clapp, and put by him into the hands of Smith, Clapp & Anderson, and I gave them a stipulated price for what I could make out of it, to the expiration of their time; the agreement between myself, Smith, Clapp & Anderson, was, that I was to pay them a stipulated price for the use of the ferry during the balance of their term, and they were to deliver the ferry to me clear and free from all incumbrance, and in good running order; the accident happened while I was running the ferry.

The jury found a verdict for the plaintiffs for $479.

The defendants moved for a new trial. The court overruled the motion, and the defendants appealed.

GLOVER & COOK, for Appellants.

W. K. MCALLISTER, for Appellees.

CATON, C. J. This action was brought against the defendants, as ferrymen, for the loss of property from their ferry boat. The evidence shows that the defendants had a license to run a ferry at Morris, and under that license they established a ferry, and for a time run the boat from which the team was lost. That they subsequently leased this boat to other parties who were running a rival ferry near by, and that while the boat was in the possession of, and being run as a ferry by those other parties, the team was received on the boat by the parties who had thus rented the boat, and while it was being ferried over the river was lost. It may be inferred that the defendants had ceased to run a ferry under their license. Under this state of facts the court instructed the jury that the defendants were liable for the loss to the plaintiffs.

In this case it is unnecessary to say whether the ferry license of the defendants could be assigned or not. Slyter did not profess to run the ferry under the defendants' license. The only connection the defendants had with this ferry was that they had leased one of the boats, which was used for that ferry. This created no greater obligation against them for losses which might occur from its bad management or the carelessness of the ferryman, than as if they had sold the boat absolutely. They

sold its use for one year, and were to receive a compensation at the rate of ten dollars per month for such use. As well might the owner of the rope used, who had leased it to Slyter, be held responsible for its improper or negligent use. Indeed, there would be as much propriety in holding the man who built the boat to the same responsibility.

Nor could the defendants be held responsible for this loss because they neglected to keep up their ferry, as they were bound to do under their license. Whatever liability they incurred for such neglect was in another form of action. As well might the railroad company which neglects, or refuses to furnish passage for a man, be held responsible for his death, when, being thus compelled to start on foot, he falls down and breaks his neck. No such liability attaches to such violation of legal duty.

There is one other instruction which we deem it proper to notice. It is this: "That all persons had a right to be received upon the ferry boat and conveyed across the river in question, according to their arrival, or first coming to the ferry, and if the team in question arrived first at the said ferry, the driver thereof had the legal right to go upon the said boat on its first passage over the river." The evidence showed that the ferryman directed the plaintiffs' driver to take a different position on the boat, and allow another team to go on first, and that the driver refused to obey his orders. A witness also swore that if the plaintiffs' team had taken the position assigned it by the ferryman, the accident, most probably, would not have happened. As was held by this court, in the case of *Fisher* v. *Clisbee*, 12 Ill. R. 344, the ferryman must be the captain of the ferry boat, and must have the absolute right to assign to each one his position on the boat. He best knows the capacity of his boat, and is supposed to be most skilled in its management. At any rate, there must be a head,—a controlling power to a ferry, as well as anything else that is safely and successfully conducted. If the ferryman abuses his powers, and refuses to to take a passenger or a load on the first trip, when he could safely do so, he would be liable to an action for damages; but still, the safety of all requires that he must be permitted to determine when and how he can safely take a passenger, a team, or a load. But of all others, the claim here set up by the driver, was the most groundless. What difference, in point of right, whether he was put in the middle of the boat instead of the end? The instruction was improperly given.

The judgment must be reversed and the cause remanded.

Judgment reversed.

James McFadden, Appellant, *v.* Bartholomew Fortier, Appellee.

APPEAL FROM PEORIA.

A proceeding by *scire facias* to foreclose a mortgage, is a proceeding *in rem*, and the writ is both process and declaration, and defects therein can be reached by demurrer.

A "*scire facias*" should, like other process, run in the name of the people, etc.; if not, it is void on its face, and may be reached by general demurrer, though a motion to quash would be more proper.

If a party withdraws his demurrer and pleads over, it is a waiver of the error.

A *scire facias*, not running in the name of the people, may be amended.

If a *scire facias* sets out a mortgage not under seal, a mortgage under seal is not admissible in evidence under it.

A demurrer to an amended plea may be carried back to a *scire facias* or declaration, if judgment under them could be arrested for defects in them, but not in a case where appearance and pleading has cured the error.

Upon a *scire facias* to foreclose a mortgage given for the purchase money of land, a plea, which avers that the vendor represented himself to be the owner of the land in fee simple, which he was not, etc., and that the vendee has since acquired the legal title from the real owners, etc., is defective, unless it also avers that the vendee relied upon such representations, and was thereby induced to take the conveyance.

In applying payments, the interest is first to be satisfied, and if the payment exceeds the interest, the balance is to be applied in diminution of the principal. If the payment falls short of the interest due, the balance of interest is not to be added to the principal, but remains as interest, to be satisfied by the next adequate payment. The interest is first to be paid.

The writ issued in this case was in the words and figures following:

State of Illinois, } ss.
County of Peoria, }

To the Sheriff of Peoria county, in the State of Illinois, Greeting:

Whereas, on the 14th day of August, A. D. 1854, Bartholomew Fortier filed in the office of the Circuit Court of said county, a precipe in substance as follows, to wit:

Bartholomew Fortier } In Peoria Circuit Court. To Sept. Term, A. D. 1854.
vs.
James McFadden. }

The clerk of said court will please issue writ of *scire facias* to foreclose mortgage herewith filed in the above entitled cause, returnable to said term.

[Signed] MANNING & MERRIMAN,
Attorneys for Plaintiff.

And whereas, also, on the same day was filed in said office a mortgage, in substance as follows, to wit:

This Deed, made this seventeenth day of April, in the year of our Lord one thousand eight hundred and forty-nine, between James McFadden, of Peoria, in the county of Peoria, and State of Illinois, of the first part, and Bartholomew Fortier, of the county of St. Clair, in the State aforesaid, of the second part, wit-

nesseth: That the said party of the first part, for and in consideration of the sum of five thousand dollars, paid by the said party of the second part, the receipt of which is hereby acknowledged, doth by these presents grant, bargain and sell unto the said party of the second part, his heirs and assigns, a certain tract or parcel of land, containing fifty-four thousand eight hundred and ninety-eight square feet and fourteen-hundredths of a square foot, surveyed and designated as covered by claims one, eleven, forty-one and forty-two, in the south-east fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, in Illinois, according to the survey approved 1st Sept., 1840, by the surveyor of the public lands in the States of Illinois and Missouri, in which said lots are particularly described in a certain patent from the President of the United States to the legal representatives of Francis Welette, and their heirs, dated the 28th day of August, A. D. 1845. To have and to hold the said premises as above described, together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, to the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, for himself and his heirs, executors, and administrators, doth hereby covenant to and with the said party of the second part, his heirs and assigns, that he is well seized of the premises above conveyed, as of good and indefeasible estate in fee simple, and has good right to sell and convey the same in manner and form as aforesaid; that they are free from all incumbrance, and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs or assigns, against the claims of all persons whomsoever, he will forever warrant and defend. Provided, nevertheless, that if the said party of the first part, his heirs, executors or administrators, shall well and truly pay to the said party of the second part, his heirs, administrators or assigns, the just and full sum of five thousand dollars, in manner specified as follows: That is to say, six hundred dollars cash down, four hundred dollars 1st of November, 1849, and the residue in equal annual payments of one thousand dollars each, as specified in certain promissory notes bearing even date herewith, then this deed, as also certain notes bearing even date with this indenture, given by the said party of the first part to the said party of the second part, conditioned to pay the said sum of money at the time aforesaid, shall be void; otherwise to remain in full force and virtue.

In testimony whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered in presence of H. J. Rugg. } JAMES McFADDEN.

Upon which mortgage is a certificate of Jacob Gale, clerk of the Circuit Court within and for the county of Peoria, an officer authorized by law to take acknowledgments of deeds, of the acknowledgment of the execution of said mortgage, by said James McFadden, the maker thereof, which certificate is in substance as follows, to wit:

STATE OF ILLINOIS, PEORIA COUNTY, } I, Jacob Gale, Clerk of the Circuit Court within and for said county, do certify that on this day personally appeared before me, James McFadden, whose name appears subscribed to the foregoing deed of con-

veyance, as having executed the same, and who is personally known to me to be the real person who and in whose name the acknowledgment is proposed to be made, and acknowledged the execution thereof as his voluntary act and deed for the uses and purposes therein expressed.

Given under my hand and seal of said court at Peoria, this seventeenth day of April, eighteen hundred and forty-nine.

[L. S.] JACOB GALE, *Clerk.*

Which said mortgage was duly executed and recorded in the recorder's office of Peoria county, and the whole of the money secured to be paid by the same, has become due and payable.

And the said plaintiff further avers that the said promissory notes in the mortgage referred to, are in substance as follows:

$1,000.—On the first day of November, 1850, I promise to pay Bartholomew Fortier, one thousand dollars, with six per cent. interest.

April 17, 1849. JAMES McFADDEN.

$1,000.—On the first day of November, 1851, I promise to pay Bartholomew Fortier one thousand dollars, with six per cent. interest.

April 17, 1849. JAMES McFADDEN.

$1,000.—On the first day of November, 1852, I promise to pay Bartholomew Fortier one thousand dollars, with six per cent. interest.

April 17, 1849. JAMES McFADDEN.

$1,000.—On the first day of November, 1853, I promise to pay Bartholomew Fortier one thousand dollars, with six per cent. interest.

April 17, 1849. JAMES McFADDEN.

And for that whereas the said plaintiff avers that the said defendant, although often requested so to do, hath not paid the said sums of money mentioned in said notes referred to in said mortgage, and secured to be paid by said mortgage, with interest according to the tenor of said notes, or any part thereof, or the accruing interest thereon, to the said plaintiff, nor hath any person paid the same or any part thereof to the said plaintiff, for the said defendant, but that the said sum of five thousand dollars, being the amount of the notes secured to be paid by the said mortgage, with interest thereon from maturity of said notes, still remains due and unpaid.

You are therefore commanded to summon the said James McFadden, if he be found in your county, to be and appear before the Circuit Court of Peoria county, on the first day of the next term thereof, to be holden at Peoria, in and for said county, on the second Monday of September next, to show cause, if any he has, why judgment should not be rendered for such sum of money as may be found to be due by virtue of said mortgage,

and a special writ of *fieri facias* requiring the property mortgaged to be sold to satisfy such judgment.

Witness, Jacob Gale, Clerk of said county, and the [SEAL.] seal thereof, at Peoria, this 14th day of August, A.D. 1854. JACOB GALE, *Clerk.*

The defendant demurred to the writ, which was overruled. The defendant then filed three pleas, to the first and second of which the plaintiff replied.

1st. That the mortgage was not his.

2nd. Payment.

3rd. Fraud, etc. The plea is in substance as follows: And for further plea in this behalf, the said defendant says *actio non*, because he says that the said mortgage was, with said notes, given to secure the payment of the purchase money for the land therein described, and that on the same day of the making and execution of said notes and mortgage, to wit, on the 17th day of April, A. D. 1849, and as constituting a part and parcel of the same contract, and as a consideration for the same, the said Bartholomew Fortier and Angelica his wife, made, executed and delivered to the defendant, a deed for the said land in said mortgage described, in substance as follows:

THIS INDENTURE, made this seventeenth day of April, A. D. 1849, between Bartholomew Fortier and Angelica his wife, of St. Clair county, in the State of Illinois, of the first part, and James McFadden, of Peoria, in the county of Peoria and State of Illinois, of the second part, *Witnesseth*, That the said parties of the first part, for and in consideration of the sum of five thousand dollars to them paid and secured to be paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part, and to his heirs and assigns forever, in fee simple, the following described lots or tract of land, that is to say, the lot or lots containing fifty-four thousand eight hundred and ninety-eight square feet and fourteen-hundredths of a square foot, surveyed and designated as covered by claims numbered one, eleven, forty-one and forty-two, in the south-east fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, in Illinois, according to the survey approved September 1, 1840, by the surveyor of the public lands in the States of Illinois and Missouri, which said lots are particularly described in a certain patent from the President of the United States to the legal representatives of Francis Wilitte and their heirs, dated the 28th day of August, A. D. 1845, to which, for greater certainty, reference is hereby made.

To have and to hold the premises aforesaid to the said party of the second part, and to his heirs and assigns forever. And the said parties of the first part do, for themselves and their heirs, covenant and agree with the said party of the second part, that the said Angelica, wife of the said Bartholomew Fortier, is the sole heir and legal representative of Francis Wilitte, mentioned and described in the patent

aforesaid, and that they will warrant and defend the title to the said premises against all persons claiming the same from, by or through the said parties of the first part.

Witness our hands and seals the day and year above written.

his
BARTHOLOMEW X FORTIER. [SEAL.]
mark.

her
ANGELICA X FORTIER. [SEAL.]
mark.

Witness: H. J. RUDD.

Witnesses to the signature of Mrs. Fortier, JOHN ENGLEMAN, D. W. HOPKINS, ANDREW GRIMES.

And the said defendant avers, that the said premises in the said deed and in the said mortgage described, are one and the same premises, and not other or different.

And the said defendant further avers, that at the time of the making and execution of the deed aforesaid, the said Angelica, wife of the said plaintiff, was not the sole heir and legal representative of the said Francis Wilitte; and that as to the land purported to be conveyed by said deed, she was not the heir or legal representative of the said Wilitte, and that neither she nor the said plaintiff had, at the time aforesaid, any interest in or title to said real estate, nor any part thereof, either in possession, remainder, reversion, or otherwise however; and this he is ready to verify. Wherefore he prays judgment, etc.

The plaintiff below interposed a demurrer to the third plea. Demurrer was sustained, and leave was given to amend.

The following amendment to the third plea was filed:

BARTHOLOMEW FORTIER, *vs.* JAMES MCFADDEN. } In the Circuit Court of Peoria county. Sci. Fa. on Mortgage. Amendment to third plea.

And the said defendant further avers, that at the time of making and executing the said deed in said plea mentioned, the said plaintiff falsely and fraudulently represented to the said defendant that the said Angelica, wife of the said plaintiff, was the owner in fee simple of said land in said deed and mortgage described; and the defendant avers that the said Angelica was not the owner in fee simple of said land, nor any part thereof, neither had she, at the time, any interest in the same, either in possession, remainder or reversion; and that since the execution of said mortgage, said defendant has purchased the legal title and acquired possession of the said land from the real owners of the same.

To the plea, as amended, the plaintiff demurred, and the court sustained the demurrer.

On the trial there was a verdict for plaintiff. The defendant entered a motion for a new trial.

The plaintiff offered in evidence a mortgage dated April 17, 1849, which was the same as that set out in writ, except that the word "in" is omitted, and that it had a seal.

The plaintiff offered four notes in evidence.

Plaintiff admitted payments amounting to five hundred and ten dollars.

The plaintiff asked the following instructions, which were given:

1. The rule of counting interest, where payments have been made, in this case is, that the payments shall be first applied in the payment of interest. The payment is to be deducted from the amount of principal and interest then due, and the remainder is to constitute the principal on which interest is to be calculated until the next payment, and so on.

2. If the payment does not amount to the interest at the time of its being made, then the principal, as then due, is to be constituted the principal on which interest is to be calculated, until the payment or payments exceed the amount of interest, when the amount of the payment is to be deducted from the sum of interest and principal and interest as above stated, and the remainder is to form the principal on which interest is to be calculated—following these rules until the computation of interest is ended. If the payments at any time do not exceed the amount of interest then due, no interest is to be calculated upon the payments up to that time.

The defendant entered a motion for a new trial, which was overruled, and the defendant excepted.

The defendant appealed.

The plaintiff now assigns the following errors on the record:

The court below erred in overruling the demurrer to the writ.

The court erred in sustaining the demurrer to the third plea of the defendant below.

The court erred in not extending the demurrer to the writ.

The court admitted improper evidence on the part of the plaintiff.

The court gave improper instructions on the part of the plaintiff.

The court erred in the rule laid down computing interest.

The court erred in overruling the motion for a new trial.

H. Grove, for Appellant.

Manning & Merriman, for Appellee.

BREESE, J. This is a proceeding by *scire facias* to foreclose a mortgage. To the writ a general demurrer was filed, which the court overruled, and leave was given to withdraw the demurrer and plead.

The defendant then filed three pleas, and to one of them, the third, there was a demurrer, which was sustained, and leave given to amend; and to this amended plea there was also a demurrer, which was also sustained.

The errors assigned question the correctness of these decisions.

The proceeding by *scire facias* to foreclose a mortgage, is a proceeding *in rem*, and the writ is considered both as process and declaration, and defects therein can be reached by demurrer. *Marshal* v. *Maury*, 1 Scam. R. 231.

The defect in the writ is very apparent. It does not run in the name of "the People of the State of Illinois," as the constitution declares all writs and process shall run. The writ is void on its face, and the objection can be raised by general demurrer, though it would be more proper to reach it by motion to quash.

This court has decided that a fee-bill, which by law has the force and effect of an execution, is void, if it does not run in the name of the People of the State of Illinois. *Reddick* v. *Cloud's Adm'r*, 2 Gilm. R. 678; *Ferris* v. *Crow*, 5 ib. 100; and cases there cited. So in a criminal case, if the indictment does not contain the words "in the name and by the authority of the People of the State of Illinois." Breese R. 4.

The court should have sustained the demurrer to this *scire facias*. But as the party withdrew the demurrer and pleaded over, he cannot assign this as error, for by pleading, the demurrer is waived. *Buckmaster* v. *Grundy*, 1 Scam. R.; *Gilbert* v. *Haggard*, ib. 471. It has, however, been decided by this court, (*the President and Directors of the State Bank* v. *N. Buckmaster*, Breese R. 133,) in precisely such a case as this, that the omission of these words in a writ of *sci. fa.* is a mere misprision of the clerk, and is amendable after a motion is made to dismiss, on account of the omission. Here no motion was made to amend.

On the trial, the mortgage was introduced as evidence, which showed an instrument under seal. That set out in the *scire facias*, is not under seal. The variance is apparent, and the mortgage therefore should have been excluded.

It is urged by the appellant that the demurrer to the amended plea should be carried back to the declaration, although a demurrer had been overruled as to the *scire facias*.

As a general rule, when the declaration or *scire facias* is so defective that the judgment would be arrested, the demurrer

would be carried back to it, and judgment given against the party committing the first error. But in this case the judgment would not be arrested on account of the imperfection of the writ, for appearance and pleading cures the defect; and this is the rule even in the case of void process like this. *Easton* v. *Altum*, 1 Scam. R. 250.

The demurrer was properly sustained to the third plea amended, because it does not allege that he confided in and relied upon the representations of the plaintiff as set out in the plea. It is not shown they were the causes which induced the execution of the deed.

The rule adopted for computing the interest was correct.

The rule is now nearly universal, that in casting interest on notes, bonds, etc., upon which partial payments have been made, every payment is to be first applied to keep down the interest, but the interest is never allowed to form a part of the principal so as to carry interest.

The correct rule in general is to calculate interest whenever a payment is made; to this interest the payment is first to be applied, and if it exceeds the interest due, the balance is to be applied to diminish the principal. If the payment falls short of the interest, the balance of interest is not to be added to the principal so as to produce interest, but is to be set apart, to be extinguished, together with the accumulated interest, by the next payment, and so on until final payment or judgment, the principle of the rule being that interest is to be first paid.

There is great uniformity in the courts of the different States on the propriety of this rule. *Lightfoot* v. *Price*, 4 Hen. & Mun. R. 431; *Smith* v. *Shaw's Adm'r*, 2 Wash. C. C. R. 167; *Penrose* v. *Hart*, 1 Dallas R. 379; 8 Serg. & R. 458; 1 Pick. R. 194; 17 Mass. R. 417.

For the variance, however, between the mortgage set out in the *sci. fa.* and the one offered in evidence, the judgment is reversed and the cause remanded.

Judgment reversed.

Daniel W. Corbin, Plaintiff in Error, *v.* Samuel E. Turrill *et al.*, Defendants in Error.

ERROR TO COOK COUNTY COURT OF COMMON PLEAS.

Where a case is brought to a trial term of the Common Pleas Court, and there is no evidence that a declaration with a rule to plead has been served, and if, before any step is taken, a plea with affidavit of merits is filed, the defendant is in time and his plea should not be stricken from the files, and a default entered—the defendant is entitled to a trial on the merits.

This action was commenced to the February term, 1856, but service was not made at that term. Alias summons was made returnable to the April term; was served 31st March. On the 4th day of June, the general issue was filed by leave of the court, and an affidavit of merits.

No further order was taken until the 10th day of September, when the plea was stricken from the file and a default entered, and on the 12th day of September the damages were assessed by the court, and judgment rendered for $149, or thereabouts.

W. B. Scates, for Plaintiff in Error.

Hooper & Clements, for Defendants in Error.

Breese, J. Taking judgment by default in this case was irregular. The action was brought to a regular trial term of the Common Pleas of Cook county, and is, of course, governed by the provisions of the act, to regulate the practice in that court, approved February 12th, 1853. 1 Purple's Stat. 322.

By section three of that act, it is provided that any party having commenced suit in said court, "shall be entitled to a default at any vacation term, upon proof of due service of process upon the defendant, and a copy of the declaration with a rule to plead at least ten days before such term, unless such defendant or the attorney of such defendant, if such defendant be a resident of such county, shall, before the expiration of said ten days, if the suit be founded on a contract, file a plea to said action, and also an affidavit setting forth that he believes he has a good defense to said suit upon the merits."

The record does not show that the provisions of this act were in any respect complied with by the plaintiff below, prior to his obtaining the default, except the proof of due service of the process. No copy of the declaration with a rule to plead was served on the defendant.

Before any step whatever was taken in the cause by the plaintiff, the defendant had filed his plea with an affidavit of merits. He was in time before any movement by the plaintiff. Sec. 14.

The court should not, under such circumstances, strike a plea, accompanied by an affidavit of merits, from the files, and default the party. *Castle et al.* v. *Judson et al.*, 17 Ill. 381.

The judgment of the Court of Common Pleas is reversed and the case remanded, with instructions to set aside the default, to restore the plea to the files and award a *venire*, or otherwise try the issue that may be presented, according to the rules and practice of that court, and the laws of this State.

Judgment reversed.

George Curtis, Plaintiff in Error, *v.* Anson Root and Thomas Avery, Defendants in Error.

ERROR TO KENDALL.

A, on the 5th of March, 1845, being the owner of certain premises, by an article of agreement, granted, bargained, sold, aliened, conveyed and confirmed, etc., the same unto B, for which B agreed to pay three thousand dollars in installments, etc., upon the payment of one of which, B was to take possession. On full payment, A was to give full deeds to B. Upon failure to pay any of the installments, the contract was to be void at the election of A, who might reënter and re-possess, etc. B took possession and commenced building, and continued in possession fourteen months. B borrowed of A two sums of money, and executed mortgages on the same premises to secure the payment of them. A and B afterwards agreed, that on failure by B to pay any installment, A might reënter by force, which he subsequently did, and held open possession. A foreclosed his senior mortgage by *scire facias*, and obtained execution, upon which the premises were sold, and A was the purchaser. At the same term, C, a creditor of B, obtained a judgment against B, upon which execution issued, upon which C, in proper form, etc., redeemed from A, who took the money. The sheriff then advertised on the execution in favor of C, and sold to D, and D conveyed to E, all proceedings being regular. E brought ejectment against A, who all along held possession; *held*, that the first contract from A to B was a mere agreement to sell, it appearing from the contract and circumstances that such was the intention of the parties; *held further*, that B had such an interest in the premises as authorized him to mortgage them, and that A was not estopped from asserting his title as the original vendor of the premises, by any act or omission of his, and that E was, by the levy, redemption and purchase under D, placed in the same position in which B stood by his relation and contracts with A.

The doctrine of estoppel considered and examined.

This was an action of ejectment, by plaintiff, against defendant, commenced in the Kane Circuit Court, Nov. 18, 1850, and afterwards taken by change of venue to Kendall county.

Prior to the 5th of March, 1845, Root, (defendant), was the owner in fee of the property described in the declaration.

That on that day Root sold the property to Ruel Ambrose, by an article of agreement, which states that Root, in consideration, etc., "has *granted*, *bargained*, sold, *aliened*, *conveyed*, and confirmed, and by these presents *doth grant*, *bargain*, sell, etc.," the property to Ambrose—this agreement was under seal.

For which Ambrose agreed to pay Root, three thousand dollars, in six equal annual installments, except $40, which was to be paid on the 23rd of May then next, and to apply on the first installment of interest, etc., and Ambrose was then to have possession, and the first installment was to be paid in one year from the 23rd of May then next.

Root covenanted to give full deeds when Ambrose complied.

It was further agreed, that upon non-compliance by Ambrose by payment, etc., Root might, at his election, declare it void, and re-enter and possess the premises.

The $40 was paid at the time agreed; but no more was paid by Ambrose on it. Ambrose entered into possession of the premises, and commenced building a mill, and continued in possession until July, 1846.

In July, 1845, Ambrose borrowed of Root, about $670, and executed a mortgage to Root, to secure its payment, on the premises; this was payable in June, 1846.

In August, 1845, Ambrose borrowed of Root the further sum of $1,568, and to secure this sum executed to Root another mortgage on the same premises, payable September 1st, 1846. The last mortgage has not been paid, or foreclosed, but is still held by Root.

On the 20th day of May, 1846, Root and Ambrose entered into another agreement, by which Root extended the time of payment, of the first installment, until the 23rd of July then next, and Ambrose covenanted that if he did not pay the installment by that time, Root might put him out of possession by force. In pursuance of this agreement, Root took possession of the premises in July, 1846, and has been in possession ever since, Avery being in possession with him.

On the 30th of July, 1846, Root commenced suit by *sci. fa.* to foreclose the first mortgage, and on the 31st of August, 1846, he obtained judgment of foreclosure.

On the 24th of December, 1846, the premises were sold by virtue of a special execution on said judgment of foreclosure, to Root, for the amount of his judgment, and cost, etc., and a certificate of sale was issued to him.

At the same August term of court, 1846, one Thaddeus Spencer obtained a judgment against Ambrose, for the sum of $3,786.75 and costs, which judgment was afterwards assigned to one Jonathan Haven.

On this judgment, execution issued, and in proper time and form, Haven, in Spencer's name, redeemed from Root's sale, by paying Root the amount of his bid, and ten per cent. interest, which was received by Root. The premises were advertised by the sheriff on Spencer's execution, and sold on the 5th of April, 1848, to said Haven, all in due form.

That afterwards Haven conveyed the premises to the plaintiff, February 12, 1850.

The court found for the defendants, and plaintiff excepted, and assigned for error, the finding of the court.

B. S. Morris, and Farnsworth & Burgess, for Plaintiff in Error.

B. C. Cook, and W. B. Plato, for Defendants in Error.

BREESE, J. This is an action of ejectment brought by Curtis against Root and Avery in the Kane Circuit Court, and by change of venue tried in the Kendall Circuit Court, for a certain lot of land and mill, in the town of Elgin. The cause was tried by the court without a jury. The facts, as agreed, are as follows:

That on and prior to the 5th day of March, 1845, the defendant Root was the owner in fee of the property described in the declaration. On that day he sold the property to one Ruel Ambrose, by an article of agreement which states that Root, in consideration, etc., "has granted, bargained, sold, aliened, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, convey and confirm" unto the said Ambrose, the property in controversy, for which Ambrose agreed to pay Root three thousand dollars, in six equal annual installments, with eight per cent. interest annually, except the sum of forty dollars, which was to be paid on the 23rd of May then next, and to apply on the first accruing interest, and Ambrose was then to have possession, and the first installment was to be paid in one year from the said 23rd of May. Root covenanted to give full deeds on full payment by Ambrose. It was further agreed that upon failure by Ambrose to pay any of the installments, the contract was to be void, at Root's election, and he might re-enter and repossess himself of the premises. The forty dollars was paid at the time and indorsed on the agreement, but no more was paid at any time by Ambrose.

Ambrose entered into possession of the premises and commenced building a flouring mill thereon about the 23rd of May, 1845, and continued in possession until July, 1846.

On the 23rd of July, 1845, Ambrose borrowed of Root six hundred and seventy dollars, to be paid in June, 1846, and executed a mortgage on these premises to secure the payment, which was duly acknowledged and recorded.

On the 5th of August, 1845, Ambrose borrowed of Root the further sum of $1,568, and executed to Root a like mortgage on the premises to secure its payment, which was filed and recorded at the same time with the first mortgage. This last mortgage has not been paid, or foreclosed, but is yet held by Root.

On the 20th of May, 1846, Root and Ambrose entered into another agreement, by which Root extended the time of payment of the first installment to the 23rd of July, 1846, and covenanted if he failed to pay it then, Root might put him out of possession by force and enter himself into possession.

In pursuance of this agreement, Root entered and took possession of the premises about the last of July, 1846, and has been

in possession ever since, Avery being then in possession with him.

On the 30th of July, 1846, Root commenced suit by *scire facias* to foreclose the first mortgage of July, 1845, and on the 31st of August, 1846, he obtained judgment and a special execution.

On the 24th of December, 1846, the premises were sold by virtue of said special execution to Root for the amount of his judgment, and costs, and a certificate of sale delivered to him.

At the same August term, one Thaddeus Spencer obtained a judgment against Ambrose for the sum of $3,786.75 and costs, which judgment he afterwards assigned to one Jonathan Haven, who, in Spencer's name, took out execution thereon in proper time and in proper form. This execution he delivered to the sheriff, together with a sufficient amount of money to redeem the premises from the sale made to Root under his first mortgage judgment, which was done in proper time and form, and the redemption money paid to Root by the sheriff and by him received. The premises were then advertised by the sheriff on Spencer's execution, and sold on the 5th of April, 1848, to Haven, all in due form. Haven, February 12th, 1850, conveyed the premises to the plaintiff.

On these facts the court found for the defendant, and plaintiff excepted, and assigns for error here this finding of the court.

The first question which presents itself is, what is the character and effect of the agreement of March 5th, 1845? The plaintiff insists that the legal title passed to Ambrose by it, and that it is, to all intents and purposes, a deed conveying the legal title. The defendant insists that it was a mere agreement to sell.

To determine this question, the intention of the parties is to be regarded, in this, as in all other cases, and that is to be ascertained from the instrument itself, and concurring circumstances.

The instrument does not purport to be a deed, but "Articles of Agreement made and concluded" on the day of their date, with a covenant, that on payment of the money as agreed, Root, "the party of the first part, shall and will without delay, immediately, well and faithfully execute and deliver in person a good and sufficient full covenant deed, or deeds, and *thereby* assign and convey to the said party of the second part, his heirs and assigns, a good, perfect and unincumbered title in fee simple to the above described premises, with their appurtenances." This is the language of the instrument, as to the covenant on the part of Root.

But there is a mutual covenant, also, to be considered in arriving at the intention of the parties, and this is it:

"And it is mutually covenanted and agreed between the parties hereto, that in case default shall be made in any of the

payments, principal and interest, at the time or any of the times above specified for the payment thereof, then this agreement and all the preceding provisions hereof shall be null and void and no longer binding, at the option of the party of the first part, his representatives or assigns."

We have then, but to look at the instrument to determine its character. It speaks for itself, and is a mere agreement to convey, so understood and accepted by Ambrose, and not an absolute conveyance, or intended so to be.

The next question is, had Ambrose, by this contract, such an interest in the premises, as authorized him to mortgage them ?

The doctrine is understood to be that every thing which may be considered as property, whether in the technical language of the law denominated real or personal property, may be the subject of mortgage, as advowsons, rectories, tithes. Reversions and remainders being capable of grant from man to man, and possibilities also being assignable, are mortgageable, a mortgage of them being only a conditionable assignment. Rents, also, and franchises may be made the subject of mortgage. 1 Powel on Mort. 17, 18.

By the agreement in this case, Root had a right to re-enter at his option, if the payments were not made at the time fixed, and time was thereby of the essence of this contract, and to save the contract, who can doubt the power of Ambrose to pledge his interest in the land, to raise the money for such purpose ? Who can doubt his power to sell and assign the contract ? His power to mortgage it to Root, is unquestionable. Besides, the case shows that the mortgagor had built a mill on the property with money borrowed of Root, and with Root's knowledge, and had paid a portion of the purchase money, all which makes a mortgageable interest. 2 Story Eq. Juris., sec. 1021. Under our statute, Ambrose's interest could be sold on execution, and would pass to his heirs, so that he had a mortgageable estate.

The next question is, is Root, by the acceptance of this mortgage, estopped from asserting his title as the original vendor of the premises, and did he admit thereby, that the interest thus disposed of by Ambrose was paramount to his own as holder of the legal title ?

This question need only to be stated to be answered. It answers itself. It is an admission by Root, that he recognized such an equitable interest in the premises in Ambrose, as would secure him in his advances of money to be expended on it, and in which a court of equity, under all circumstances, would protect him. Had Ambrose paid the mortgage, he would only have

been remitted to the agreement of March 5th, for the sale and conveyance, and Root to his position as vendor.

It follows, therefore, that Ambrose having a mortgageable interest, and Root a right to take the mortgage on it, he had a right to pursue it, and foreclose on condition broken, and sell under it. Having a right to sell, he had the right to purchase all such interest as Ambrose had, and purchasing, he placed himself in the position all purchasers of land under a *fi. fa.*, special or otherwise, are placed by the law, that is, to have such rights as they may have acquired by their purchase taken from them, by returning to them their money, with ten per cent., and nothing more. He could not be deprived, by accepting such moneys, of any rights he owned outside of, and beyond, and independent of those acquired by the sheriff's sale and purchase. Such is not the the meaning or policy of the law. Suppose Ambrose, himself, had redeemed from this sale, in what position would the parties be then? Why, precisely in *statu quo*, in the very same position they were before the judgment on the *sci. fa.* and sale,—Ambrose remitted to his rights under the contract to convey, and Root to his under the same contract, as owner of the fee.

The judgment creditor, Haven, having redeemed, he is remitted to Ambrose's equities, and nothing more. He is placed in Ambrose's shoes, and as by the record he is notified of the subsequent mortgage to Root, and by the open and visible possession by Root, of the premises, that he, being in Ambrose's position, must go on and perfect Ambrose's contract.

With what propriety can it be urged, that Root is estopped by any of these acts done, from falling back on his original title? Estoppels are not to be favored because the truth may be excluded; therefore, no party ought to be precluded from making out his case according to its truth, unless by force of some positive principle of law.

Do the facts as they appear, as done by Root, amount to an estoppel? If they operate at all, it must be as an equitable estoppel, arising from these matters *in pais*. These estoppels are rather favored in modern days, as tending to prevent or punish frauds.

It seems there must be some affirmative act done, or some declaration or admission made by one party, which if acted on by the other party, would, by deceiving him, subject him to loss and injury. Estoppels were once accounted odious in law, and not allowed, unless very plainly and clearly made out. *Sampson* v. *Cooke*, 7 Eng. C. L. R. 205.

There must be something said or done which amounts to a fraud in fact. *Stephens* v. *Baird*, 9 Cowen R. 274; *Presbyterian Congregation of Salem* v. *Williams*, 9 Wendell R. 147.

Where one, by his word or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded, estopped, from averring against the latter, a different state of things as existing at the same time.

As expressed by Justice COWEN, in the case of *Degell* v. *Odell*, 3 Hill R. 219: "An admission by the defendant intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cast off from the power of retraction,—this I understand to be the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission conclusive."

Instances in illustration are innumerable, as where a party stands by at the sale of his property, though under a void authority, and *encourages* purchasers to bid, he is guilty of a direct fraud. So, if one at a sheriff's sale of his lands, declares a certain tract to be included in the levy, and thereby the purchaser was induced to purchase, it gives him an equity which a court of chancery will enforce.

And the effect is the same, if one, seeing another acting under a delusion, stands quietly by, without giving notice of his superior right. *Epley* v. *Witherow*, 7 Watts R. (Penn.) 168.

It is quite apparent from these cases and many others which might be cited, there can be no fraud, where the purchaser or other actor was, or ought to have been, acquainted with the matter in which he was engaged, or even had the means of knowledge and neglected to avail himself of them, or where the party was not influenced to act on the faith of the false suggestion or silence of one bound to speak. And it is a rule if an act can be referred to an honest motive the party will not be estopped, although upon one construction his conduct may be inconsistent with the right which he afterwards sets up. *Heare* v. *Rogers*, 17 Eng. C. L. R. 450.

Testing this case by these principles, it will readily be perceived this doctrine cannot apply to Root. In the first place, he did not induce Haven to redeem the land as a judgment creditor. In the next place, Haven had the means of knowing Root held another mortgage, for it was on record; and Root was in open, visible possession, under the terms of that very mortgage. This would be notice of his right to hold it as the original owner of the fee. In redeeming, Haven acted at his own peril, and wholly on his own advice and responsibility, and Root had a perfect right to receive the money, as well from Haven as from Ambrose himself. All that Haven could well

claim on redeeming, is the privilege of performing Ambrose's contract, and there is no proof to show that he did not know well the rights he acquired by redeeming. It is clear, therefore, that the act of Root in receiving the redemption money, can have a construction consistent with honesty and good faith, and that is, to let Haven in to perform Ambrose's contract, which under the circumstances, as the money had been used in improving the land, and the land rising in value, might have been a very desirable object.

A case quite analogous to this is reported in 13 Johns. R. 463, *Jackson ex dem. Whitlock* v. *Mills*. Where land was purchased under a junior judgment by an agent, who took a deed from the sheriff to himself and then conveyed the land to his principal, the agent is not thereby estopped from levying on the same land, under a senior judgment, and purchasing it himself.

It is urged, however, that the fee which Root possessed in the premises was merged in this mortgage. An estate in fee can hardly be merged in one of much less dimensions—into a conditional estate, subject to be defeated.

Merger, too, is a question of intention. *Jarvis et al.* v. *Frink*, 14 Ill. R. 396. No one fact in this case shows that Root intended, by proceeding on the first mortgage, to give up his second mortgage or his original fee in the land. On the contrary, all the facts go to show he did not so intend, for, in accordance with the agreement, after condition broken, he took possession of the land and remained in possession until the commencement of this suit. He resumed his position as owner of the fee.

Seeing no error in the finding of the court, we accordingly affirm the judgment.

Judgment affirmed.

The Board of School Inspectors of the City of Peoria, Plaintiffs in Error, *v.* The People of the State of Illinois, on the relation of Henry Grove, Defendants in Error.

ERROR TO PEORIA COUNTY COURT.

The Peoria County Court has not power to award a writ of mandamus.

In construing grants of power to inferior courts, nothing is to be held as granted by implication, save only what is necessary to a full exercise of their general powers.

School Inspectors of Peoria *v.* The People ex rel. Grove.

Courts vested with the power to issue the writ of mandamus, are all of them superior courts of unlimited jurisdiction.

A writ of mandamus should show that the relator has no other remedy. It is only granted in extraordinary cases, where, without it, there would be a failure of justice. If the party has sought, or may seek, other means of redress, this writ should be denied.

The courts will not interfere with the discretion vested in the School Inspectors, unless they attempt a plain violation of the law.

On the 7th day of January, 1858, Henry Grove filed his petition in the County Court of Peoria county, for a mandamus to issue out of said court, against the "Board of School Inspectors of the city of Peoria."

Petition states that said Grove is a free white citizen of the United States, a resident householder and taxpayer in said city, and has a child named Clara Priscilla Grove, aged about fourteen years, residing with him, whom he wishes to send to and have instructed in the public schools in said city. That there are five large school-houses in said city, in each of which, schools are taught under the control of said board. That the houses in the second and third districts of said city are most convenient to petitioner, and there is room enough in them for his child, to the school taught in one of which, he claims the right to send her. That he has demanded admittance for her into one of them and been refused by the board. That he knows of no valid reason why she should be excluded therefrom. Prayer of petition: That a mandamus issue to the board, requiring them to receive and instruct said child in some one of the schools in said second or third districts.

On filing which petition, said court ordered that the defendants show cause on the next day, at 10 o'clock A. M., why the prayer of the petition should not be granted, a copy of which order was served on the same day.

On the 8th day of January the defendants moved to dismiss the said petition, upon affidavit filed, setting forth that the subject matter of the petition has been already fully adjudicated in the Circuit Court of Peoria county. Which motion was overruled by the court, and said court thereupon ordered that an alternative writ of mandamus issue to said board, returnable to the February term of said court, requiring said board to receive said Clara into one of the schools of the second or third districts of said city, or show cause to the contrary, and that said writ be served on Jacob Gale, Esq., Superintendent of Public Schools for said city.

January 14, 1858, alternative writ issued. Return thereto filed by said Gale, February 1st, 1858: that he is not a member of said board, nor a party defendant to said suit; that he has no control over said board, nor authority to appear and answer

for them, and submitting that no proceeding can be had against him therein.

February 2nd, 1858, order of court directing an alias alternative writ to issue in said cause, and to be served on the President and Secretary of said Board; which said alias writ issued the same day, and sets out: That it having been, on the 7th day of January, 1858, represented to said court that Henry Grove is a citizen, etc., of said city of Peoria, and hath a child whom he has a right to have received and instructed in one of the public schools in said city, adjacent to his residence. That said board have laid off a school district in said city, in which there is no public school-house or school within the city limits, and in which district said Grove resides. That there are two public school-houses in said city—one in district No. 2, and one in district No. 3—both of which are adjacent to the residence of said Grove. That these are the only public school-houses within said city adjacent or convenient to him. That there is no sufficient reason why said Clara should not be received and instructed in one of them, and that said board, without reasonable cause, refuse to admit her into either. Said writ then commands said board to admit said Clara into one or other of said schools, or show cause to the contrary by the 5th of February instant.

February 5th, 1858, defendants moved to quash said alias writ: 1st, Because it is returnable within ten days; 2nd, Because it should have been returnable to the next term of court; 3rd, Because it does not show the relator entitled to the relief sought; 4th, Because defendants are not required by law to receive said Clara into the schools of either said second or third districts; 5th, Because it does not appear that said relator has no other specific legal remedy; 6th, For want of jurisdiction; 7th, Said writ is otherwise informal and insufficient.

Which said motion was overruled by the court, and defendants excepted.

The defendants then filed their return to said alias alternative writ, in substance as follows: That it is true said Henry Grove is a resident, etc., of said city, and hath a child, whom, in common with other children in said city, and on the same terms, etc., and not otherwise, he hath a right to send to and have instructed in some one of the public schools of said city, but deny his right to send her to either of the schools in said second or third districts, or to the relief claimed. That said relator is not, nor was he when said writ was issued, a resident of either of said districts, and that by law and the regulations of the board, a resident of one school district is not entitled, against the consent of the board, to send his child to the public schools of another district. That the residents of each school district,

who apply in due season, are entitled to have their children received and taught in the public schools of the district where they respectively reside, and before children from outside any such district are admitted into such school. That at the time when, etc., all the public schools in said second and third districts were full to overflowing with the children and pupils resident in said districts respectively, and so that Clara could not have been received into either, without first turning out some one already admitted, and who had a prior and better right therein than herself. Defendants admit that said board refused to admit said Clara into either of said schools, but deny that in so doing they acted without reasonable cause. That said board is by law vested with authority over the public schools of said city; to make rules and regulations therefor; to lay off and district the city for school purposes, and in their discretion to alter the same. That before the grievance complained of they had districted said city, making six school districts, which said districts, as then formed, still exist; that the relator resides within district No. 5. That there is no school-house, nor any public school in said district No. 5, within the corporate limits, but at the time when, etc., there was, and still is, a public school established and kept by the board for said district, upon the same terms, as to residents within the city, as other public schools of said city, which school is kept in a house comfortable and commodious, and convenient to the residence of the relator and all the inhabitants of said district No. 5, but is situate about one hundred feet outside the city limits. That said house was built before the organization of the board, and said school established, and still kept therein, at the request of all the people of said district except the relator; and that to discontinue it would operate a hardship upon said inhabitants, as there is no school-house within the district, and said board have not the means speedily to erect a suitable one. That the location of said house a few feet outside of the corporate limits is not, of itself, a legal impediment to establishing and keeping a school therein by said board. That the child of the relator might at all proper times have been sent to and instructed in said school; that at the time when, etc., the relator was besides offered the privilege of sending said child to either of the schools in the fourth and sixth districts in said city, said schools not being full, and said board being willing to accommodate as far as in their power. Defendants aver that the relator has not been prevented from sending his child to the public schools of said city, as assumed in said writ; that he hath not sustained injury as charged, etc.

On the 2nd day of March, 1858, the relator filed his motion to quash said return, and for a peremptory mandamus, for the reason that said return is uncertain, argumentative, irregular, non-issuable and insufficient. Which said motion was sustained by the court, and said return ordered to be quashed. Thereupon said defendants moved for leave to amend their said return, which the court refused to grant, and then and there ordered that a peremptory writ of mandamus do issue against said defendants, commanding them to receive said Clara Priscilla Grove into the schools of said second or third districts, and instruct her therein, and said court then and there rendered judgment against said defendants for costs. To all of which said defendants excepted, and prayed an appeal to this court.

Appellants assign the following errors upon said record.

Error in overruling motion to dismiss petition herein, and in awarding an alternative writ of mandamus thereon.

In directing the service of said writ upon the Superintendent of Schools of said city.

In directing an alias alternative writ to issue.

In overruling motion to quash said alias writ.

In sustaining motion to quash return, and in quashing the same.

In refusing leave to amend the return.

In ordering a peremptory writ of mandamus to issue, and rendering judgment against defendants for costs.

Said judgments, orders and proceedings are against law, in contravention of the just authority, powers and duties of appellants, and beyond the jurisdiction of said court.

JONA. K. COOPER, for Appellants.

H. GROVE, for Appellees.

BREESE, J. This was an application for a mandamus to the County Court of Peoria county, against the Board of School Inspectors of that county, to compel them to admit the child of the relator, Henry Grove, to one of two public schools, in the city of Peoria; and the first question presented is, has the County Court power to award such writ?

This is an important question in some respects, chiefly, however, confined to these courts, not affecting, materially, the public at large.

By the Constitution, Art. V, Sec. 18, the jurisdiction of said court shall extend to all probate and such other jurisdiction as the General Assembly may confer in *civil* cases, and such crimi-

nal cases as may be prescribed by law, where the punishment is by fine only, not exceeding one hundred dollars.

The General Assembly, conferring power upon the County Court of Peoria county, provided, by the Act of Feb. 9, 1855, page 194, "that its jurisdiction is hereby so extended, that said court shall have jurisdiction with the Circuit Courts in this State, of all matters, suits and proceedings at common law or by statute, in civil cases, except actions in ejectment, within said county, and shall have concurrent jurisdiction of all misdemeanors punishable by fine only, not exceeding one hundred dollars, commenced otherwise than by indictment." Sec. 3 provides that appeals and writs of error may be directly prosecuted from that court to the Supreme Court.

In civil cases then, it has jurisdiction over all subjects and suits, except in actions of ejectment, co-extensive with the Circuit Court.

On the Circuit Court, R. L. 1845, Ch. 67, title "Mandamus," is conferred the power to issue writs of *mandamus*, and, by Ch. 86, of *quo warranto*.

The question then arises, are the cases in which these writs issue, civil cases? The plaintiff in such writ is the people, on the information of some one claiming an interest in the subject matter to which the writ relates. The writ of mandamus is a prerogative writ, and issues to compel the performance of a public duty by a public functionary, in a case in which the public have a right to complain of neglect of that particular duty. Courts vested with the power to issue this writ, by direct grant of the legislature, are all of them superior courts, of unlimited jurisdiction. It has never been conferred upon inferior courts expressly, whose powers and jurisdiction are limited, and even if conferred, it would extend only to their inferiors.

For the ordinary conduct of business in civil cases in the County Court, we see no necessity of giving it the power to issue such a writ. It has not been given in express terms, and in construing grants of power to inferior courts, nothing is to be held by implication, as granted, unless absolutely necessary to a full exercise of its granted powers.

Something may be gathered of the views the legislature entertained in enacting this law. It may be safely inferred from the known condition of the business in the Circuit Court of that county, having within it one of the most flourishing cities in the State, that the main design in extending the jurisdiction of the County Court, in civil cases and in small misdemeanors, was to relieve the Circuit Court from a great pressure, a pressure so great as to amount, in ordinary civil cases of small or large amount, to a great delay of justice. It was for this kind of

business their power was extended, the important action of ejectment being withheld from their cognizance, and in criminal cases, all indictable offenses, and all offenses where the fine to be imposed exceeded one hundred dollars. Here will be seen great care and caution on the part of the legislature, in extending the jurisdiction of this court, and we think it would be going too far to admit they have, by implication, the vast and formidable power now claimed in this case.

This case goes far to show the impropriety of implying such a power, for we are informed by it, that the relator in two different proceedings before the Circuit Court, in both of which he failed, endeavored to accomplish the same object contemplated by this application for a mandamus. Admitting, then, the power of the County Court in the premises, it amounts to an appeal, in another form, from the Circuit Court to the County Court. This is the consequence, and it will be so in all similar cases.

We do not think the County Court had jurisdiction to award this writ. It is not expressly given by statute, and not being necessary to carry into full effect the jurisdiction granted, it cannot be implied.

But the writ itself is defective in not alleging that the relator had no other remedy. He had previously, as the record shows, attempted to attain his object by certiorari and bill in chancery in the Circuit Court, in which latter proceeding full and complete justice could be done, and the parties were heard on bill, answer, replication and testimony, and the bill was dismissed, and we have affirmed that decree. This was alleged in support of the motion to dismiss the petition for this writ, and the court should have allowed the motion, for the relator having chosen his forum, and the decision being against him, his proper remedy was by appeal or writ of error, on dismissing the bill.

There are a few cases in which a party can pursue several remedies at the same time, but this, as situated, does not seem to be one of those cases.

Nor does the petition show a clear legal right to the remedy asked. 12 Ill. R. 254. This writ is of such a nature that courts will grant it only in an extraordinary case, where otherwise there would be a failure of justice, which cannot be pretended here.

The return to the writ should not have been quashed. It is full and complete, is issuable and triable, and in bar of the remedy sought.

The board of inspectors are vested with a large discretion in the performance of their important duties, and courts will

not attempt to control its exercise except in a palpable case, where a plain violation of the law is manifested.

In this case the board seem to have discharged their very onerous and responsible office, with every regard to the public interest, and with no disposition to deprive the relator of any of his rights. The deprivation of which he complains, is chargeable rather to his unfavorable position in the city for school advantages for his children, than to maladministration on the part of the board. What we have said in the chancery case between these parties, is applicable here, and we can add nothing to it. The judgment of the court refusing to dismiss the application for a mandamus was erroneous. It should have been dismissed.

The judgment is reversed.

Judgment reversed.

Henry Grove, Plaintiff in Error, *v.* The Board of School Inspectors of the City of Peoria, Defendants in Error, a Chancery proceeding, and

The Same *v.* The Same, a proceeding by *certiorari.*

ERROR TO PEORIA.

The School Inspectors of Peoria are authorized to district the city, as to them may seem best; and they may also establish such rules for the admission of pupils as they judge proper; and these duties will not be interfered with, except in extreme cases.

They may also sustain a school in a house outside of the city, and pay for repairs, for the use of children living within it.

The plaintiff in error presented his bill in chancery for an injunction against the defendants in error, at the November term, A. D. 1857, of the Peoria Circuit Court.

The bill sets forth in substance, that by the Act of the General Assembly, approved Feb. 14, 1855, and by the Act approved Jan. 29, 1857, the voters of the city of Peoria were authorized to elect a Board of School Inspectors for said city of Peoria.

That under the acts aforesaid, inspectors were elected, and proceeded to organize, and took upon themselves the duties of their office.

That said board was required to perfect a good system of schools in said city.

That said board has full authority and power, and abundance of means to furnish, provide and maintain sufficient schools for all the children in said city.

That there is in said city, five large, commodious school-houses, capable of accommodating all the scholars in said city, if the board would district the city with reference to the location of the school-houses, and if said board would prevent scholars residing out of the city limits, from attending said schools.

That complainant owns lots 21 and 22 in Ashael Hale's addition to the city of Peoria, and lots 1, 2 and 22, in Coleman's subdivision of lot 20, of said Ashael Hale's addition to Peoria, all in said city of Peoria.

That he is a resident tax-payer of said city, and resides with his family in his dwelling-house on said lots 21 and 22, and has resided thereon for six years.

That his family consists of himself, his wife and two children. That the eldest of said children is over twelve and under fifteen years of age. That said child is anxious and willing to attend the public schools in the city of Peoria, under such reasonable rules as said board might prescribe.

That complainant is also anxious to send his child to said schools, but is prevented from so doing by said board.

That said child is a free white child, and complainant knows of no valid objection to her attending said schools.

That said board have so districted the city, as to locate complainant in district No. 5.

That there is no school-house within the city in district No. 5.

That said board has received, and is now instructing in said schools, several scholars who do not reside within the city.

That the school-house intended for use of district No. 5, is outside the corporation limits of the city.

That said board has fitted up, at the expense of the city, a one-story school-house, outside of the city limits, to compel scholars in that vicinity, residing in district No. 5, to attend the same.

That said board has received two scholars residing outside of the city limits, to attend said school.

That on the 11th of December, 1857, complainant presented petition for *certiorari*. That writ was allowed, issued and returned, and same is made part of bill.

That said board adopted a rule requiring each scholar to pay $1 per term, for tuition fees.

That complainant tendered amount last term and present term, but was refused.

That said board has divided the city into six districts. That in each, except No. 5, there is a good substantial school-house, fitted up with seats, maps, etc.

That complainant resides in district No. 5.

That said board has issued an order, prohibiting a scholar residing in one district from attending a school in another district, except by leave of the superintendent.

That superintendent has adopted a rule, that he will not permit scholars residing in one district from attending school in another, unless such scholar is sufficiently advanced to be admitted to a higher school.

That complainant's right to send to the public schools does not depend upon such advancement.

That said board sometimes pretend that complainant's child cannot be received in said schools, because the schools are full. That the pretense is not true. That if true, said child has rights equal with other scholars.

That if said board would discharge scholars attending said schools, residing without the city, there would be abundant room.

That school taught in second district, is most convenient for said child to attend, and most contiguous to complainant's residence. That said child did attend said school. That the City Council constructed a plank walk from said school-house to, and terminating on the bluff, in dictrict No. 5, for convenience of scholars residing therein.

That there is room in said school-house for additional seats. That complainant proposed, at his own expense, to put up seats.

That said board has no right to admit foreign scholars to said schools, to the exclusion of scholars of resident citizens, tax-payers of the city.

That said board expended five hundred and twenty-three dollars and fifty-five cents, on said school-house outside of the city limits, during the year ending August 31, 1858.

That said board intend, and threaten to expend further and larger sums on said school-house, for repairs, tuition, etc.

That said board has no right to appropriate the school funds collected out of tax-payers in the city, to keep up a school outside of the city limits.

That said board has no right to compel scholars of district No. 5, to attend said school.

That said school-house contains but one room, and is unfitted for grading the scholars therein; the number of which does not exceed thirty scholars.

That complainant has no adequate remedy at law. That complainant sued one of the teachers of said school No. 2, for refusing to receive and instruct said child.

That said suit is now pending in the Circuit Court of Peoria County, on the law side thereof, undetermined, having been brought on by an appeal from the decision of a justice of the peace.

That complainant filed his petition for a writ of *certiorari*, for the purpose of reversing, annulling and setting aside the various orders, entries and lines made by said board, on their maps, records, etc., prohibiting said child from attending said school.

That complainant has no adequate redress; as said return does not show that said board is receiving foreign scholars into said public schools, and appropriating the school funds to furnish and maintain said school outside of the city limits.

That if complainant is compelled to prosecute said board for every refusal to admit said child to school, complainant will be involved in an endless and ruinous litigation.

That complainant called personally on several members of said board, and requested them to rescind their orders, prohibiting said child from attending said school, which they refused to do.

That the acts and doings of said board are intended to vex, harrass and aggrieve complainant.

The answers admit passage of acts, and organization of board. Insist that said board have powers of trustees of schools within township, and have organized as such. There are no directors in district five outside of the city, and that part of district five outside of city cannot be attached to any other district.

Admit their duty to provide schools for all scholars in the city, but deny that they have sufficient means for that purpose.

That there are 4,000 children in the city, and only have accommodations for 1,150, and submit they have done all they can do.

Admit report to be true.

Admit that there are five school-houses, one in each of the first, second, third, fourth, and sixth districts, but that they would not hold all if fifth district was admitted.

Admit that complainant owns the property and has the right to send, but deny that he has been prevented from sending to the public schools in said city.

Admit that complainant has been prevented from sending out of his district unless with permission of superintendent.

Admit there is no school-house in district five within the city.

Admit that complainant owned stock in third district, and that he consented to sell with the understanding that the house would be used for the benefit of children within the city, and insists that he was not disappointed.

Admit that the only school-house for district five is outside of city, and that two scholars attend from outside. That it is one story high.

Deny that school-house has been fitted up at expense of tax-payers of city. Deny that school is kept therein to compel complainant to send there, but that the school is kept there to accommodate scholars in said district.

That prior to act of 1855, district five had built the school-house, had elected directors, voted a tax—house cost $1,200—and kept a school therein. In March, 1856, one Smith applied to board to keep a school in said house, which was done, and defendants have kept school therein under same regulations as other schools. Said school-house stands one hundred feet outside of city limits, and scholars outside pay $2.50 per scholar per term, and those inside $1.00 per term; and said house is convenient to complainant. That most all the inhabitants of district five desire school to continue, and refer to return made to writ of *certiorari*.

Complainant never has been prevented from sending to said school in No. 5.

Admit issuing of writ and return thereto.

Admit that complainant offered to pay the tuition for second district only.

Admit division of city into six districts, and that in each there is a school-house except in No. 5.

Answers insist that they are not confined to city limits in location of school-houses.

They intend to continue said school, and support it out of public funds in their hands.

Said school-house is a small one and not so well calculated to grade the school; but inconvenience is remedied by power vested in superintendent to allow advanced scholars to attend schools in other districts when he thinks best, which discretion has been and will continue to be wisely exercised.

Do not admit having prohibited complainant from sending his child to the public schools in the city, but in districting the city they have prevented him from sending to the second district.

Know of no rule of superintendent prohibiting a scholar in one district from attending school in another only when sufficiently advanced, except in case of high school.

Learn from superintendent that complainant might have sent

to fourth or sixth district if he had applied during first three days, those schools then not being full.

No persons residing in the city excluded from the schools by reason of the admission of scholars out of the city.

When schools in the city are not full, scholars from outside are admitted on paying $3.50 per term.

That of scholars attending the schools in the city and who reside outside of the city, three attend in third district, five in fourth district, two in fifth district, six in sixth district—sixteen in all.

All the schools in the city are graded.

School in fifth district will seat forty scholars, and not adapted to a graded school. Average attendance about thirty.

Complainant filed replication.

The court refused to grant an injunction and dismissed the bill, and complainant excepted.

The plaintiff in error assigns the following errors upon the record:

The court below erred in overruling the plaintiff's motion for a new trial.

The court erred in dismissing the bill, and in refusing to allow an injunction as prayed in the bill.

The petition and proceedings upon the *certiorari* are as follows:

The plaintiff in error sued out of the Circuit Court of Peoria county a writ of *certiorari*, directed to the Board of School Inspectors of the city of Peoria. The writ followed the petition in substance.

The petition was as follows:

To the Hon. Elihu N. Powell, Judge of the Circuit Court of Peoria county, in the State of Illinois:—

Your Petitioner, Henry Grove, of the city and county of Peoria, and State of Illinois, respectfully represents that he is now, and for the six years last past has been a citizen, a resident householder and tax-payer in the said city of Peoria; that he is the owner of lots twenty-one and twenty-two in Ashael Hale's addition to the city of Peoria, in said city, with the improvements thereon. That he has a family, consisting of a wife and two children; that he, with his said family, has resided on said lots during the said six years last past; that he and his said children are free white inhabitants of the United States of America, and were all born within the United States. That the eldest of his children, named Clara Priscilla Grove, is now over twelve years of age, and less than fifteen years. That he desires

to educate his said child, and claims the legal and moral right to send his child to the public schools in said city of Peoria. That said Clara Priscilla Grove is also desirous and wishes to attend said public schools in said city of Peoria, but is now and has been prevented and hindered from so doing by the direction, order and action of the Board of School Inspectors in the city of Peoria.

He further states, that to the best of his knowledge, information and belief, he knows of no legal, valid or moral objection to his said child attending and receiving instruction in the public schools in said city of Peoria.

He further states, that some months since, as he is informed and verily believes, the Board of School Inspectors in the city of Peoria, passed an order, direction, resolve or decree, and spread the same on the maps, plats and records of their proceedings, forbidding and prohibiting your petitioner from sending his said child to the public schools in said city of Peoria. That the name of your petitioner and of his said child is not probably mentioned in said order; but the premises in which your petitioner resides, is marked on said record and map as being excluded from any and all the several school districts in said city.

That your petitioner has sent his said child to one of the public schools in said city, since the passage of said order, and requested admittance to said public schools, in said city; she was prohibited by the teachers, under said order, from entering or receiving instruction in said school.

He further states, that he cannot state the precise terms of said order, nor of the marks on their said maps or plats, but he states, that said orders, and the entry on said maps or plats so made by said Peoria School Inspectors, is unjust, oppressive, illegal, tyrannical, irregular and beyond the jurisdiction of said Board of School Inspectors.

That in the adoption and passage of said order, said Board of School Inspectors, as he verily believes, exceeded their lawful power and jurisdiction, and thereby excluded his said child from said schools.

He further states, that so far as his knowledge extends, the law does not provide for an appeal from said order, and he has no remedy to have the same set aside, cancelled or reversed, except by the order of your Honor to allow a writ of *certiorari* to be issued in due form of law, directed to said school inspectors, directing and commanding them to certify and bring the said record of their proceedings in that behalf, and their said marks and lines on their said maps and plats, before the Honor-

able the Circuit Court of Peoria county, that said order and entries may be reversed, set aside, and wholly for naught esteemed; which he prays may be granted.

To this writ the defendants made return,

1. That the board had adopted a rule that a scholar residing in one district, shall not attend a school in any other district, without authority from the superintendent.

2. That one Ira Smith, from the fifth district, had presented a petition praying that the board might maintain a school outside of the city limits, for the accommodation of the scholars in the fifth district, which was done, the school established, and a teacher employed.

3. Giving boundaries of districts, accompanied by a map with districts and boundaries marked.

4. Showing that there is no school-house in the fifth district, being the district in which petitioner resides.

On the filing of the return, the petitioner entered a motion. That the court order, direct and decree that all the entries, marks, lines or records made, rendered or placed by the defendants on their records, books, maps, or plats, prohibiting petitioner from sending his child to the public schools in said city of Peoria, be reversed, set aside, cancelled and wholly for naught esteemed. And that the court vacate, reserve, set aside and cancel all orders, entries, marks, or lines made by said defendants in their records, maps or plats, compelling him to send his child outside of the city limits.

The court overruled the motion and dismissed the petition, and plaintiff excepted.

The plaintiff now assigns the following errors upon the record:

1. The court erred in overruling the motion of the plaintiff.

2. The court erred in dismissing the petition.

3. The court should have sustained the motion made by plaintiff below.

H. Grove, in proper person.

J. K. Cooper, for Defendants in Error.

Breese, J. The scope and prayer of the bill in this case is threefold. The complainant prays,

First, That the Board of School Inspectors be enjoined from receiving into the public schools of the city of Peoria, scholars not resident within the city limits, to the exclusion of the child of the complainant, who is such resident.

Second, That they be restrained from preventing and hinder-

ing the complainant from sending his child to the public schools in the city, and receiving instruction therein.

Third, That they be restrained from using and appropriating any of the moneys raised and received by them out of the taxes, or credit or moneys of the tax-payers of the city of Peoria, for school purposes, to the repairs or furnishing the school-house outside of the corporate limits of that city, or to maintain or support a school therein.

As to the first proposition, it does not appear that the board have, at any time, received into the public schools of the city, scholars residing or belonging outside of the city limits, to the exclusion of complainant's child. The answer, which is under oath, denies it expressly, and no witness establishes the fact.

Gilbert Voodry, one of the witnesses for complainant, does not so state, nor does Mr. Gale. Voodry says, he went to the office of the board on the morning of the first day of the Fall term, 1857, of the public schools, at the request of complainant, to procure a ticket of admission for his daughter, and that he did, in the presence of Amos P. Bartlett, and John Hamlin, the treasurer of the board, offer to pay the treasurer one dollar, the tuition fee for the term, and for her admission to the second district school. This is all the testimony to that point.

The answer goes fully into the reasons governing the board in districting the city for school purposes, and for establishing rules and regulations to govern them. The application of complainant was special—for the admission of his daughter into the school in the second district, she living in the fifth, as the case shows. The answer discloses the fact that no non-resident scholars had been admitted into that school—that it had its complement of pupils, and no place for complainant's daughter could be made, except at the expense of some other pupil. The fact that complainant proposed to furnish her seat and desk at his own expense could not have any weight against the system of rules and regulations the board had adopted, as to seating the room. They were the judges as to how many desks and seats were proper in the room, and if the school was full, allowing the complainant to add to the complement, merely because he was willing to provide a desk, would be to repeal their rules, and be a license for any other person outside of, or inside the district, to do the same thing, the consequence of which might be, as the board could well foresee, the school in this favorite district would be filled to overflowing, while others might be empty, or but partially filled. Every authority like this, having a trust so great committed to it, must have a system of wise and salutary rules, and as inflexible as circumstances will allow.

Mr. Gale states in his deposition, that at the term to which complainant made his application, "the second district school was full, and more than twelve, residing in that district, were compelled to attend in other districts." It would then have been a gross departure, had the board, under such circumstances, admitted the complainant's child into this school. The case shows that non-resident scholars have, at no time, been admitted into the city schools, except in the fourth, fifth and sixth districts, neither of the schools therein being full.

The second proposition is disposed of as the first, by the answer and the evidence, the one denying, and the other fortifying it, that at no time has the board refused the complainant's child a place in the public schools of the city, and receiving instruction therein. The answer shows she could have gone to either the fourth or sixth district school. But the proposition embraces more than this, and goes to the power of the board so to exercise the discretion with which they are endowed, as to district the city in such mode and form as to them may seem best.

The great complaint seems to be, that the school districts are so established by the board, as to make it necessary, if complainant's child attends the school in the proper district—the fifth—she will be compelled to occupy a small room roughly furnished, and with pupils with whom she cannot be classed, she being greatly advanced beyond those attending the fifth district school.

The power of the board of inspectors over this branch of their duties is plenary. Laws of 1855, page 197, sec. 4. By clause seven of section four, they have power "to lay off and divide the city into school districts, and from time to time, to alter the same or create new ones as circumstances may require." As they are elected by the qualified voters of the city, it is reasonable to expect, in the exercise of this power, they will feel their responsibility to them, and so act as to give general satisfaction. It is a very difficult duty to perform, and it is not reasonable to expect, however just, wise and impartial they may be, that there will be no single complaint. It requires much deliberation and the exercise of sound judgment, and in such case, a court could not well interfere unless gross injustice had been done, or the marks of corruption in the board so evident as to compel the court to interpose. Nothing of this kind is alleged or proved, and we must remit the whole subject of the districts, and the lines by which they are bounded, to the electors of the city, who will, doubtless, if injustice has been done any considerable portion of the city, or partiality shown,

or oppression attempted, effect a change by a change in the board of inspectors at the next election.

The power of the board to establish rules and regulations for the admission of pupils, is found in clause eight of section four, and by a compliance with those rules, the complainant's child could have been admitted into the school in the fourth or sixth district, at the option of complainant.

The last proposition involves the consideration of the authority of the board to sustain a school for the fifth district in a house outside of the city limits, and expending money in its repairs.

This is a part of the discretionary power with which the board is clothed. By the first clause of section four they have power to erect, hire or purchase buildings for school-houses, and keep the same in repair. By the eighth clause they are empowered to establish, support and maintain public schools for all the children of the city.

When it is considered that a new, and we may say, noble system of public education was being inaugurated in one of our infant but rapidly increasing cities, it must be very apparent that it would be the work of years before the necessary buildings could be erected and furnished adapted to such purpose. Whilst these were in process of erection, many of the children of the city would be rapidly advancing beyond the age at which instruction is most readily imparted to them, especially the elementary branches. It would not then, in view of this consideration, and the object being to educate all the children of the city, and power given to erect, hire or purchase buildings for school-houses, be in our judgment at the commencement of such a noble system, any violation of duty or usurpation of authority, to hire a school-house in which a portion of the children could be educated, even though the building might not be within the corporate limits. The facts show that the inhabitants of this district had built and fitted up this house expressly for school purposes at their own cost. They had placed it at the place most convenient to those requiring schooling, and who otherwise might be greatly incommoded by going elsewhere. The house was built, was suitable for the purpose, and was a convenient auxiliary to the design of the board, and to discharge their duty to provide educational facilities "for all the children of the city." It cannot be a grave matter that the building is a few feet without the city limits. For aught that appears, it is convenient and accessible to a majority of the residents in the fifth district. By accepting the use of this house, and keeping a school in it, quite a large population are accommodated and the original grand design carried out. As

the board has the power to erect or hire buildings, for the purpose of educating all the children of the city, we cannot doubt they had the power to accept the use of this building for the same purpose, and appropriate money to its repair.

The school kept in it is a public school of the city, to all intents and purposes, under any fair construction of the law. It is under the charge and control of the board, is subject to all the rules and regulatious established by the board, common to the entire system, and should be supported out of the fund provided for the general purposes of the system. We think the eleventh clause of section four protects the action of the board.

It is contended the board should have prepared the way for levying a tax in the mode provided in the eighth section, for the purpose of building a school-house for the fifth district within the city limits.

This duty must be performed by the board, but it must rest with them to determine, under all the circumstances, what is necessary for the accommodation of the several districts, or for the support of public schools, whether buildings or whatever it may be. The board have, necessarily, the discretion to determine this, and with their determination, apart from any oppression, corruption, or act of gross injustice, this court could not interfere.

It is certainly matter of rejoicing, that in the infancy of this system so much has already been done. In less than three years edifices have been reared capable of supplying the wants of a city of more than twenty thousand inhabitants, well provided in every respect, and with competent teachers, by taxes voluntarily imposed by the people themselves. It is one of the great ornaments of our noble State, and the benefits resulting from it will be felt throughout its whole extent.

We cannot see wherein the court erred in refusing the injunction and dismissing the bill. We cannot discover any good ground for complaint, properly traceable to the action of the board of inspectors. They have done their duty, and nothing but their duty, so far as we can discover, and we therefore affirm the judgment of the Circuit Court.

SAME
v.
THE SAME. } On *certiorari.*

All the questions arising in this case have been fully considered in the chancery cause between the same parties. The judgment is accordingly affirmed.

Judgment affirmed.

Edwin Hunt, Appellant, *v.* John Q. Hoyt and Wife, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

It is negligence for a party, in hanging a sign on a windy day, in a city, upon an active thoroughfare, to use a swinging stage for the purpose, that has not a rim, or some other preventive against the sliding off of tools, which may occasion injury to passers on the street.

A person injured by reason of such negligence may recover for the length of time the sickness continued, as a component part of her claim.

This was an action on the case, brought by Hoyt and his wife against Hunt, to the September term, 1857, of the Cook County Court of Common Pleas, for an alleged injury to the wife, by the falling of a hammer from a building in the city of Chicago, upon which the defendant's servants were putting up a sign, and striking Mrs. Hoyt upon the head while walking along the street of said city.

The declaration contains two counts, and alleges that Martha Ann Hoyt, the wife, on the first day of June, was walking along Lake street in said city, and in front of a building possessed by Fisk & Ripley; that the defendant's servants were engaged in putting up a sign upon said building, and for that purpose were using a certain iron hammer; that the said servants so carelessly and improperly used, managed and directed said hammer, that the same, by and through the carelessness, negligence and improper conduct of said servants, fell and struck the said Martha Ann Hoyt upon the head, etc.

The second count is substantially the same.

The defendant pleaded the general issue.

The material evidence is stated in the opinion of the court.

The jury found the defendant guilty, and assessed the plaintiffs' damages at five hundred dollars.

Thereupon the defendant moved the court for a new trial, which was denied.

The court entered judgment for the plaintiffs for the said sum of five hundred dollars, the damages assessed.

Scates, McAllister & Jewett, for Appellant.

S. B. Perry, for Appellees.

Breese, J. Three points are made by the counsel for appellant:

First. That the men engaged in putting up the sign, were employed by, and were the servants of Fisk & Ripley, and not of the appellant.

Second. If the appellant is to be regarded as the master of these workmen, then he would be liable only for a want of ordinary care, or for gross negligence.

Third. That positive proof of negligence must be produced by the plaintiff. And that proof of the accident and injury is not sufficient to show negligence, nor can it be inferred from the fact of the accident or injury.

The first point is disposed of by the testimony of *David B. Fisk*, the first witness sworn on behalf of plaintiffs below. He says he engaged Robbins and Gaylord to paint some signs for Fisk & Ripley, and they informed him that Mr. Hunt put up signs, and told him the price he charged. He then went to Hunt's store to ask the price, and was told by some one at the desk what it would be, and he agreed with Mr. Hunt's foreman to put up the signs. Hunt said they had men for that purpose, and he would send them up. After waiting, and the men not coming, he went again to see about it, and this time saw Mr. Hunt, and he promised to send the men up at once. They came and put up the signs, and in putting them up, broke a pane of glass. He paid Mr. Hunt for hanging the signs.

Roswell F. Farr states, after the injury was received by Mrs. Hoyt, Mr. Hunt came into the store and had a conversation with him about it. Hunt said his workmen were as good and as careful as any workmen in the city, and that he would have nothing more to do with putting up signs, it was too dangerous, and too much risk in it.

The defendant's witness also set this point at rest. *George Hauslein*, his foreman, states, Mr. Fisk employed him to do the job, and he sent the men there, and superintended putting up the signs; was told by Mr. Hunt not to put up any more signs.

John Cline states, he worked for Mr. Hunt, and was employed by Hauslein, with Hunt's approbation, to put up the signs; Henry Brandon, another man employed in the shop, was with him; had been working on the staging nearly all day, putting up signs; did not tell Hunt that day about an accident having happened there before.

Henry Brandon states, he was at work on the staging; did not tell Mr. Hunt that any accident happened in the morning.

Benjamin F. Robbins states, that he painted the signs for Fisk & Ripley, and referred them to Mr. Hunt, to get them put up; owned the staging, and lent it to Hauslein, to put up the signs for Mr. Hunt.

This evidence is clear and conclusive, upon the first point, that the men employed to put up the signs were the servants of the defendant, and not of Fisk & Ripley.

How stands the proof on the question of negligence, and

does it show that the injury was the result of mere accident, against which ordinary care could not have guarded? R. F. Farr states that he was an eye-witness to the injury Mrs. Hoyt received; saw Mrs. Hoyt cross the street, from the north to the south side; when she reached the side walk, Mr. Hunt's men were at work, on a swing stage, attached to the store of Fisk & Ripley, putting up signs for them; as she was walking on the sidewalk, he saw a hammer fall from the staging, and saw it strike her on the head; she fell partly down, and he caught her before she struck the sidewalk. The men were on the staging, putting a sign over the top of the second story window, about thirty feet above the sidewalk; they could be seen from the sidewalk, and no others at work except the men putting up the signs; the hammer had a handle; one end had a face, and the other end wedgeshaped, and would weigh about one pound; the staging was a swinging stage, supported by ropes; the injury happened about half-past two o'clock in the afternoon.

George Hauslein states, when the hammer fell from the staging, he was on the opposite side of the street, looking to see that the sign was put up straight. At the time the hammer fell, the men were holding up the sign and screwing it to the building, and were not using the hammer; it fell between the staging and the building; it was a windy day, and the wind had some effect on the staging, to swing it, and loose the fastenings.

John Cline says, he used the hammer to drive the screw in a little, and then laid it down behind him on the staging; it fell without his knowing how it came to fall; the wind was blowing pretty hard, and they were then at the corner of the building, just where the wind caught them over the top of the roof of the city hotel, a much lower building than the one they were at work upon. The staging was about two feet wide, and had no railing or board upon the sides; nothing to prevent the tools from sliding off; the wind made the staging swing some, and he tried to fasten it to some ornamental work on the iron columns, but the wind slipped off the fastenings; the ornaments were too weak to hold it; the columns were about a foot out from the building, so that the staging rested against them, leaving a space between it and the face of the building; the staging was suspended by ropes, from the top of the building; does not know how the hammer got off the staging, but saw it falling.

H. Brandon says, he worked on the staging with Cline; was holding up the sign while he screwed it to the building; was on the left, and Cline on the right side; both sitting on the staging; Cline knocked a screw in, and laid the hammer on the staging behind him; saw it on the middle of the staging; don't know how it came to fall; it was very windy.

These workmen, it seems, do not know how the hammer came to fall, though one of them, Cline, saw it falling. He says, after driving in the screw, he laid the hammer down behind him on the staging—the wind was blowing pretty hard, and Brandon says it was very windy, and so does Robbins, and his testimony fully explains, "how the hammer came to fall," and fixes the charge of negligence upon the appellant, although Robbins gives it as his opinion that the staging was a proper one to use in putting up signs, and combined all the qualities needed for such a purpose. The staging belonged to him, and as he had used it, successively, for the same purposes, he is of the opinion it could not be improved. He says, "It was twenty-two feet long and two feet wide, *and had no protection on the sides!*"

Mr. Robbins is a practical man, doubtless, and should be presumed to have correct notions of such a matter, but we, not so practical, are at a loss to perceive how he could have judged such a staging to possess all the requisites necessary for the dangerous business in which it was employed, and in the great thoroughfare (Lake street) of our most populous and stirring city. No witness, it is true, has stated that the injury occurred in that street, but the declaration so alleges, and it was admitted on the argument. In a quiet town, on a calm day, in a secluded place which foot-passengers seldom frequent, the apparatus might be safe, and should a sudden gust of wind cause it so to swing as so throw off the tools, thereby causing injury to a person, a charge of negligence might not be sustained. In a city, and in a street, where people congregate and pass in crowds, and on a very windy day, to suspend such a staging by ropes, with no bottom or other stays, from the top of a high building, and thirty feet above the sidewalk, and with no protecting rim on the sides or ends, is such an exhibition of negligence as to deserve, as it has received, the severe but just judgment of the jury. The workmen say they did not know how the hammer came to fall. Surely, there is no difficulty on that head from their own evidence, and that of Mr. Robbins. The day was very windy—the staging was swinging back and forth by the wind—the workmen were not self-possessed—the hammer, when used, was hurriedly and carelessly placed on the staging, which, having no stays, or board rim at the sides or ends, could not retain it, when it was swayed to and fro by the wind, throwing it against the columns with great violence, producing a powerful concussion, and causing the hammer to slide off. Had the staging been a proper one for use in a populous city, and kept from swaying by proper fastenings at bottom, secured to the pavement or railings, which are always at hand in cities,

and the sides and ends protected by a slight rim, this injury would not, in all human probability, have happened ; or, if happening, no jury would say the workmen had not used all the care and diligence, and caution required of them. Mr. Robbins may be taught, at some future day, by the finding of a jury, that his staging, as he has described it, is not "all that is needed" for the purpose of putting up signs on "a very windy day," on a tall building, in the great thoroughfare of a populous city.

The facts are made to bear more heavily against the appellant, because he was informed that an accident had happened in the morning of the same day, at the same place, occasioned by the high wind, causing the destruction of a sign and of a pane of glass. He said the men told him,—though they say they did not,—that they were obliged, in the morning, to drop a sign on account of the wind, to save themselves from falling, and that they were afraid to work there.

Under these facts, we are free to say, that the grossest negligence marked the conduct of the appellant in permitting to be used, on such a day, at such a time, in such a crowded street, and forewarned, an apparatus so unfit for the dangerous business in which it was employed.

We have examined the cases cited by the appellant's counsel, but think they do not bear upon this case, except so far as the maxim of *respondent superior* is applicable. The case shows actual negligence in the master, in the particulars we have pointed out, and the views we have expressed on the facts require no support from adjudicated cases.

Another point was raised, but not much relied upon by appellant's counsel, on the second instruction given for appellees, that "in estimating the damages, if they found for the plaintiff, the jury should take into consideration the length of time Mrs. Hoyt was sick in consequence of the injury, the effect of the injury upon her, and the bodily suffering consequent thereupon."

The counsel thinks this instruction is too broad, and involves damages for loss of time, for which the husband alone would be entitled to an action.

The length of time the injured party was sick, is, we think, an important element in her claim for damages, and taken in connection with the effect of the injury upon her, and of her bodily sufferings, also, they all become properly component parts of such claim. There is no color for the idea that the jury were so misled as to give damages for loss of time. We see no error in the instruction as given. *Slater* v. *Rink and Wife*, 18 Ill. R. 527.

The judgment is affirmed.

Judgment affirmed.

TRUMAN WHITCOMB *et al.*, Plaintiffs in Error, *v.* FRANCES H. SUTHERLAND, by her next friend, Defendant in Error.

Per curiam. Since the re-argument we have attentively considered this cause, and are of opinion that the former judgment herein was correct, and therefore now enter the same judgment, and we do not think it necessary to add anything to the opinion of the court given on the former hearing.

The decree is affirmed.

This case is reported in 18 Ill. R. 578. Upon a re-hearing of the case the foregoing opinion was pronounced. The same counsel who argued the cause in the first instance, were heard at the re-argument.

AUGUSTUS O. GARRETT, Plaintiff in Error, *v.* WILLIAM S. MOSS *et al.*, Defendants in Error.

ERROR TO PEORIA.

Any corrupt agreement among bidders, which prevents competition at a public sale, is a fraud upon the owner, which will vitiate the sale.

An agreement on the part of a senior mortgagor to foreclose and sell only a part of the mortgaged premises, and bid them off in satisfaction of his judgment, is not a fraud upon the debtor, nor is it against justice or equity.

Where a notice of sale under a decree is ordered to be advertised in a newspaper for "three weeks successively," or, "for three successive weeks," and there were twenty-one days between the date of the notice and the day of sale, and there were nineteen days intervening between the first publication and the day of sale, and there were three publications of the notice, if it appears that no injury has resulted to either party, the deviation from a strict compliance with the order of publication will not be a sufficient cause for refusing to confirm the sale.

A chancellor has a large discretion in the approval or disapproval of sales made by a master, and a bidder acquires no independent right to the property, but his purchase depends upon the confirmation by the chancellor.

Exceptions to the proceedings of a master in the sale of property, taken ten years after the approval and confirmation of his acts, come too late, unless it is made to appear that positive injury has resulted.

If it appears that the purchasers under a sale, and the commissioner who conducted it, used means to prevent bidding, the sale would be set aside. But such a state of case should be shown to have existed, before the court will act.

In order to set aside a sale because of inadequacy of price, a case of sacrifice must be made out to justify the setting aside of a sale.

While several distinct tracts of land should not be offered for sale in block, yet an officer is not, unless required, bound to divide a tract of land into smaller parcels than any previously indicated, and offer them for sale.

ON the 14th of Sept., 1840, Garrett and wife made a mortgage to Moss on the south-east quarter of Sec. 5, 8 N., 8 E., for

$1,000, due at one year, with twelve per cent. interest. At May term, 1843, a decree of foreclosure was rendered in favor of Moss by default, the money, $1,326.66, found due upon the mortgage, to be paid in ten days, or the mortgaged premises to be sold after being advertised three successive weeks. H. O. Merriman, one of the complainant's counsel, was appointed commissioner to make the sale.

On the 8th day of February, 1841, Garrett and wife made another mortgage to Pettingill and Bartlett, for $510, with ten per cent. interest. At the same May term, 1843, a decree of foreclosure was rendered in their favor, for $629.10, with the same order of sale as made in the case of Moss, and William Mitchell appointed commissioner to make the sale.

The decrees were rendered on the 5th day of June, 1843, and the sales were made July 10th, 1843.

The notices were published for three weeks successively, as appears by the reports of the commissioners.

Before the time of sale, Moss agreed with Pettingill & Bartlett, that he would bid the amount due on his mortgage on that part of the tract, about eighty acres, lying south of the Farmington road, and to release the residue from his mortgage.

This agreement was reduced to writing, and is as follows:

AGREEMENT, Made and entered into this first day of June, A. D. 1843, between William S. Moss, of the one part, and Moses Pettengill and Amos P. Bartlett, of the other part, witnesseth, that whereas the said Moss has commenced a suit against Augustus O. Garrett, Moses Pettingill and Amos P. Bartlett and others, in the Peoria County Circuit Court of the State of Illinois, for the foreclosure of a mortgage held by the said Moss, given to him by the said Augustus O. and Mary Garrett, on the south-east quarter of section number five, in township number eight north, range number eight east of the fourth principal meridian, to secure the payment of one thousand dollars and interest, as is alleged by said Moss in his bill filed in said suit, which suit is now pending and undetermined in said court. Now it is agreed by the said Moss, that in consideration that the said Moses Pettingill and Amos P. Bartlett will make no defense to the rendition of a judgment of foreclosure in said suit at this term of said court, and the making of a decree by said court, ordering so much of said land to be sold as will satisfy the mortgage of said Moss, and so much of the remainder to be sold as will satisfy a mortgage on the same premises, held by said Pettingill and Bartlett, executed to them by the said Augustus O. and Mary Garrett, that then on the sale of said land under the decree of said court to be rendered in said suit, the said Moss will bid the amount of his said mortgage on that part of the said mortgaged premises lying south of the Peoria and Farmington road, running through the said land from east to west near the centre of said quarter section, and will release the remainder of said land from any incumbrance or claim held by him on the same by reason of the said mortgage to him, or by reason of said judgment of foreclosure. Witness my hand and seal affixed the day and year first above written.

WM. S. MOSS. [SEAL.]

The quantity sold was one hundred and thirty-five acres. Moss bought the part south of the Farmington road for $1,327.43, and Pettingill and Bartlett the residue for $632.67, being $14.51 per acre.

The original bill was filed Oct. 19, 1847, four years and three months after the sales under the decrees, seeking to set aside the sales solely upon the ground of a fraudulent combination and conspiracy between Moss, Pettingill and Bartlett, and H. O. Merriman, one of the commissioners, to prevent bidders from attending the sale, and that the land was sold for less than its value.

In this bill no claim was made or set up, that the land was susceptible of a better division than was made, or that it ought to have been subdivided and sold in smaller parcels, or that it had not been advertised according to the order of the court.

Moss filed his answer and amended answer to the original bill, and in the latter set up and asserted another title to the lands, acquired through Ballance, who purchased the same at sheriff's sale, upon executions against Garrett and others, issued against them upon judgments obtained against them as securities of Bryant, late sheriff of Peoria county.

Garrett then filed a supplemental bill, setting out the record judgment and proceedings under which Moss's new title was acquired, alleging that such sale was also fraudulent and void, because the land in controversy, with other lands, were sold *en masse*, and below their value, and praying also that the same might be set aside.

It was not until July 31, 1854, more than seven years after the filing of the original bill, that it was discovered that the land, at the time of sale, ought to have been put up in smaller lots, or that the sale had not been advertised according to law. At this time an amended bill was filed, setting up these pretended facts.

The amended answer of Moss was filed June 9th, 1848.

This answer sets up the further facts, that after the sale to Moss on the foreclosure, Garrett should have the avails of the spring on the land, which was sold, and by Moss deeded to the "Peoria Water Company" for $250, which Garrett received; and also that Garrett might redeem from the sale in one year. Garrett received the $250 for the spring, in stock of the "Peoria Water Company."

After the death of Wm. Mitchell, a paper is found by his administrators, by which Pettingill and Bartlett give to Garrett thirty-five days time in which to redeem from their sale. This paper is dated July 10, 1843.

At the October term of the Circuit Court of Peoria county, Garrett applies to the court for an order setting aside the sale made under their decree, alleging and setting forth precisely the same causes therefor as are stated and set forth as grounds of relief in the plaintiff's original bill, filed in this cause. Affidavits were filed and evidence heard for and against said motion, and a decision made thereon overruling the same, and Garrett prayed an appeal to the Supreme Court, which was not prosecuted or perfected.

In the affidavits filed by Garrett upon this motion, he distinctly states and admits, that he had made the contract with Moss that he might redeem the premises in one year after the sale.

At April term, 1856, this cause having been submitted to the court at the October term, A. D. 1855, upon the bills, answers, replication, evidence, and exhibits and depositions on file, and the court being sufficiently advised in the premises, did order, adjudge and decree that the said complainant's bill be dismissed, and that the complainant pay the costs of this proceeding, and that execution issue therefor.

MERRIMAN & MANNING, and LANDER, for Plaintiff in Error.

N. H. PURPLE and C. BECKWITH, for Defendants in Error.

WALKER, J. It is urged that this decree should be reversed, and the order confirming the commissioners' reports be vacated, because Moss, who holds a senior mortgage, and Pettingill and Bartlett a junior mortgage, on these premises, agreed that the latter would make no defense to Moss's suit for a foreclosure, and that he would bid the amount of his mortgage on that portion of the premises south of the Peoria and Farmington road, and would release his mortgage to the remainder of the quarter section.

It is a well established doctrine, that any corrupt agreement amongst bidders, which prevents competition at a public sale, is a fraud upon the owner, for which a sale should be set aside. If this arrangement was for that purpose, and had that effect, then these sales should be vacated, and the property resold. Upon a careful examination of the agreement, we can only see, from its terms, that Moss agreed that if the junior mortgagees would interpose no defense to prevent his getting a decree of foreclosure, he would release a portion of the premises upon which he had the elder mortgage. To him it was desirable to prevent delay, to them to collect their debt without having to redeem from this prior incumbrance. To the debtor it could work no injury, as it subjected the land to sale in smaller lots,

of convenient size, which would insure a better price, and the payment of these debts, while, if sold under both decrees and the junior mortgagees had not been able to pay off the prior mortgage, they would not have bid, and after the property was sold the debt might not have been satisfied. There was no stipulation in this agreement that neither party should bid, but Moss bound himself to bid the whole amount of his mortgage debt upon a portion of the property, and the other mortgagees were left perfectly free to bid more than that amount on that part, and left him free to do the same on the remainder. In the light in which we view this agreement, it was no more than a release, by the senior mortgagee, of a portion of the mortgaged premises, to the junior mortgagees. And it cannot be doubted that he has such right, and in doing so violates no principle of justice or equity.

It is again urged that the advertisements of the time, place and terms of these sales were not inserted the proper length of time. The notices were each inserted in the newspaper, first on the 21st of June, again on the 28th, and lastly on the 5th of July, and each bore date on the 19th of June, and the sale was made on the 10th of July. From the date of the notices till the day of sale there were twenty-one days; and from the date of the paper, in which they first appeared, there were nineteen days intervening before the sale. In the case of Pettingill and Bartlett's decree, it provides for the sale, etc., "after having given notice of the time of said sale by inserting an advertisement of the same, for three weeks successively, in the 'Peoria Democratic Press,' a newspaper printed and published in the town of Peoria, county of Peoria, State of Illinois." The decree in favor of Moss provides for the sale, etc., "after having advertised the same by putting up notices in three of the most public places in Peoria county, or by inserting such an advertisement for three successive weeks in the 'Peoria Democratic Press,' a newspaper printed and published in the town of Peoria, Peoria county, Illinois."

In cases of the foreclosure of mortgages without redemption, it has been the uniform practice of the court of equity, in this State, to decree a sale of the property, for the payment of the mortgage debt and other liens, and to pay the surplus, if any, to the mortgagor. This seems to be the practice in most of the States of the Union. And to effect a sale the court must impose the duty upon the master, or upon a commissioner appointed for that purpose. The court, when it decrees the sale, also fixes the terms and conditions upon which it shall be made, having reference to the interest of all the parties. It is also usual to fix a time within which the mortgagor may pay the debt and

prevent a sale. But the terms upon which the sale is to be made, are necessarily, to a great extent, discretionary with the court decreeing it. The master or commissioner is the agent of the court, and derives his authority to act from the decree, and should be required substantially to conform his acts to its conditions and terms.

But on an application to have the report of his proceedings, under the decree, confirmed, the court should not regard mere captious objections. Any slight deviation from the requirements of the decree, which has not resulted in injury to either party, should not be a cause for refusing to confirm the sale. And while it is not the practice to refuse biddings in this State, it is not to be doubted that the chancellor, as elsewhere, has a large discretion, limited only by sound equitable considerations, in the approval or disapproval of sales made by his master. The accepted bidder at a master's sale, acquires no independent right to have his purchase completed, but is nothing more than a preferred bidder, who proposes for the purchase of the property, depending upon the sound, equitable discretion of the chancellor for a confirmation of the sale by his ministerial agent. *Freeman* v. *Hunt*, 3 Dana R. 614; *Campbell* v. *Johnson*, 4 Dana R. 186; *Owen* v. *Owen*, 5 Humph. R. 355. In determining this discretion, a regard to the stability of judicial sales has necessarily a large influence. This policy has rejected here the practice of refusing the biddings on an offer of an advanced price. But a higher policy, that of maintaining the purity of decretal sales, and of preserving the public confidence in their entire fairness, must prevail over the policy of giving stability to them. And where there has been fraud, accident, mistake or unfairness in the sale, the chancellor should not hesitate to withhold his approval of the sale, by his commissioner.

In this case there was a sale on the day fixed by the notice, at the time and at the place fixed by it, and by the proper person. The notices were inserted three times, once in each successive week, on the same day of each week, and the last insertion some five days before the sale. And while the intention of the court may have been to require three full weeks from the first publication to the day of sale, it was not required in terms by the decree. The notices were returned and filed with the commissioner's report, and by its approval they were regarded as in compliance with the decree. And the complainant must have so regarded them at the time, and for many years afterwards. In resisting the confirmation of the sales, this was not noticed as an objection in his affidavit, and was not urged in this proceeding until he filed his amended bill, in February, 1854, ten years and nine months after these sales were

approved. This objection is thus urged at such a length of time after the sale was confirmed, that, unless it be shown that positive injury resulted, the objection can have no weight to vacate these sales. If the party had urged it promptly, upon the filing of the master's report, it might have been heard with more favor, but as the court has exercised its discretion in adopting this sale, and no positive injury is shown, we do not feel justified in reversing the decree, upon this objection.

It is again insisted that the decree should be reversed, because the purchasers under these sales and the commissioners used means to, and did prevent bidders from attending the sale. If such were true, than it would amount to a fraud for which the sale should be set aside. The evidence shows that Hotchkiss inquired of Bartlett and of Merriman whether they supposed the sale would be made, and they informed him that they supposed it would not. And it also appears from the evidence, that complainant had promised to pay the money before the day of sale, and relying on that assurance they gave the opinion. But he does not say that if he had attended the sale, he would have bid a greater or even a less sum than it was sold for. He says that he had means for the purpose of purchasing property, that this property suited him, and he wanted to buy it if the price at the sale suited him, but had not made up his mind to bid until he saw how it went. He was at the place of sale and left just before the biddings commenced, in consequence of some one informing him that there would probably be no sale. Who this person was, he does not remember, and he is unable to connect it with any of the parties to the transaction. This we think is not sufficient to establish fraud in keeping bidders from attending the sale. And there is no evidence that any thing was said to others for the purpose. And on the other hand it appears that Merriman notified persons that the sale was about to commence, and requested them to attend and bid.

It is again urged that there was such a sacrifice in the sale of the property, that the sale should be set aside and a re-sale ordered. The evidence in regard to the value of this property, like all evidence of value depending upon the opinion of witnesses, is conflicting. A number of witnesses give the opinion, that the property at the time of the sale was worth from twenty to one hundred and twenty-five dollars an acre. Others again fixed the value at less than twenty. And the evidence shows that lands adjoining this were about and after that time purchased for about the same price, and even much less than this. Bryan sold eighty acres adjoining this tract and lying nearer the city, the year after this sale for ten dollars an acre. Bradley, more than a year after, purchased the undivided half of an

adjoining quarter for sixteen dollars and sixty-six cents an acre, and in the spring of 1846, purchased the other half at the same price. He purchased in the spring of 1848 eighty acres of the north-west quarter of the same section, in which this land was situated, with thirty acres improved and in cultivation, for twelve dollars and fifty cents per acre. And Underhill sold land adjoining this, in 1843, at eight dollars per acre, worth about half the price of this.

A number of witnesses give their opinion that the land sold for its value. And Bartlett and Pettingill gave complainant thirty-five days to pay the money and get back his land. If sold at such a sacrifice, it is strange that he did not raise the money by the sale of a portion of the land or by mortgage, and prevent its being lost. And if it was purchased at such a sacrifice, it is strange that they should sell it at an advance of only about one hundred dollars near a year after they became the owners. At the time of the sale there was an unsatisfied judgment against complainant and others as securities of Bryant, which was a lien on the premises, and the probability is, that had some effect in fixing the value of the land. When we take into consideration the great scarcity of money, that the property was then only valuable for farming purposes, and that no person could foresee the rapid growth of the city which has since taken place, it is not strange that it should have only sold at fourteen dollars and fifty-nine cents per acre. And in view of all the evidence of the case, while it is conflicting, we are not prepared to hold that there was such a sacrifice as would justify the reversal of the decree.

It is again urged that the land was susceptible of a more advantageous division than the one made, and the property should have been offered in smaller lots, and failing to do so, the sale should be set aside. It has been repeatedly held that it is erroneous to offer several distinct tracts together, because, when thus offered, the presumption is, that the price was by that means depressed, as it required more means to purchase the several tracts together, and cut off competition, and in cases of redemption, when sold separately it affords the debtor the means of redeeming a part, while he might be unable to redeem all. We have been referred to no authority, and we are aware of none, that requires a sheriff or commissioner to divide land, on his own motion, into small parcels for sale. Yet when required by the debtor to do so, and when it would not produce a loss on the property, we do not hesitate in saying he should so offer it. But in this case there does not appear to have been such a request by the complainant or any one else. He was required by the court to sell all, or so much as would pay the mortgage

debt. It directed no division unless the bids had run the price beyond the amount to be raised. And the evidence shows that it was then valuable for farming purposes only, and the reasonable probability is, that to have so divided it would have reduced instead of increasing the price.

This objection was not urged against the confirmation of the sale, and was not embraced in the original bill, from which it is inferrable that it was not regarded as any serious objection at the time the sale was made.

And whether we consider the evidence in the case in reference to these objections singly or collectively, we do not perceive that the allegations of the bill are sustained. And we are of the opinion that there was no error in the dismissal of the bill, and that the decree of the court below should be affirmed.

Decree affirmed.

Nathaniel B. Curtiss, Appellant, *v.* Warrick Martin, who sues for the use of Wilshire Scott Courtney and Springer Harbaugh, Appellee.

APPEAL FROM MARSHALL.

It is not erroneous to sustain a demurrer to a special plea, or to strike it from the files, if the same end can be attained under the plea of the general issue, filed in the same case.

Where a demurrer is sustained to special pleas, because they only amount to the general issue, whether they did or not, is immaterial, if the facts alleged in them could be given in evidence under that plea; and unless the bill of exceptions shows to the contrary, it will be presumed that the evidence received was admitted under the general issue.

Where a commission issues to Jasper E. Brady, to take the testimony of J. Gardner Coffin, if he signs it, J. E. Brady, commissioner, and certifies that he has executed the commission by taking the deposition of J. G. Coffin, the identity of the parties will be presumed.

A letter from the drawer of a bill from which a promise to the holder to pay the bill may be implied, is proper evidence, as showing a waiver, for omission to present the bill for acceptance or payment.

The affidavit of a security for costs, may be read to the court, as laying a foundation for an objection to the admission of the answer of a plaintiff to a bill of discovery, which is offered as evidence to the jury.

Admissions made by the owner of a bill or note, are admissible as evidence against a purchaser after maturity. And the evidence of a plaintiff, upon bill of discovery, who sues for another, as to any matter which existed before he parted with the bill, may be read in evidence.

The purchaser of an overdue bill or note, takes it subject to all infirmities and objections, and at his peril.

Instructions which present the same propositions of law, in nearly the same terms, need not all be given.

It is a proper question for a jury to determine, whether the presentment of a bill has been waived.

If a drawer of a bill deposits a particular kind of funds with the drawee, to be disposed of, and have the proceeds applied to meet the payment of the bill when it becomes due, it may be considered by the jury as evidence, with other circumstances, as to whether a waiver has been made or not.

A subsequent payment of money may be a waiver of presentment.

A party may show any sufficient excuse for the want of dilligence, in making protest for non-acceptance and non-payment.

The acceptance of a less sum, in payment, than that which is due, is not a satisfaction of the whole debt; unless it be in compromise of a controverted claim, or from a debtor in failing circumstances.

The holder of a note without suspicion of bad faith, is presumed to be the legal owner.

THIS suit was commenced in the Circuit Court of Peoria county, on the 15th day of October, 1853, upon two bills of exchange, which are as follows:

$4,000. No. 1275.

COLUMBUS, OHIO, September, 1st, 1847.

Four months after date, pay to the order of Messrs. Warrick Martin & Co., four thousand dollars $\overline{100}$, value received, and charge the same to account of

Your Obdt. Servant, N. B. CURTISS.

To E. PLATT, ESQ., Cashr.
Leather Manufacturers' Bank, New York.

$5,000. No. 1276.

COLUMBUS, OHIO, Sept. 10th, 1847.

Four months after date, pay to the order of Messrs. Warrick Martin & Co., five thousand dollars, value received, and charge the same to account of

Your Obdt. Servant, N. B. CURTISS.

To E. PLATT, ESQ., Cashr.
Leather Manufacturers' Bank, New York.

The declaration contains five counts on each of the bills.

The first count upon the first bill describes the bill, and contains the following averments: 1st, That bill was duly presented for payment at maturity, which was refused; 2nd, That it was duly protested for non-payment; 3rd, That defendant was duly notified of presentment and non-payment.

The second count is upon the second bill, and contains the same averments as the first count.

The third count is upon the first bill, and avers: 1st, Presentment to drawee, and refusal to pay; 2nd, That defendant had not, at any time, funds in the hands of the drawee; 3rd, Drawee had not received any consideration from defendant for the acceptance or payment by him of said bill; 4th, Defendant sustained no damage by reason of his not having notice of non-payment.

The fourth count is upon the second bill, and contains the same averments as the third count.

The fifth count is upon the first bill, and contains the following averments: 1st, That when the bill was drawn, and at its maturity on the 4th of January, 1848, plaintiffs were ready to present the bill to the drawee for acceptance and payment, and to demand acceptance of said bill, and payment of the money, and would have done so, but defendant requested the plaintiff not to present the same for acceptance and payment, and dispensed with and discharged the plaintiffs from the presentment of the bill for acceptance and payment.

The sixth count is upon the second bill, and contains the same averments as the fifth count.

The seventh count contains the common count, for money lent and advanced, and paid, laid out and expended; money had and received by defendant for the use of the plaintiff.

The eighth count is upon an account stated.

The ninth count is upon the first bill, and contains the following averments: That at the time of making the bill, it was understood and agreed between the plaintiff and defendant, that the bill should not be presented to the drawee for acceptance or payment, but that the defendant should, at or before the maturity of the bill, pay the same to the plaintiff. That the defendant did not pay, and therefore became liable, and agreed to pay, etc.

The tenth count is upon the second bill, and contains the following averments: That at the time of making the bill, it was agreed between the plaintiff and defendant that the bill should not be presented to the drawee for acceptance or payment, but that defendant, before the maturity of the bill, would furnish and place in the hands of the plaintiffs, funds to meet and pay the bill at maturity. That defendant did not do so, and therefore became liable, and agreed to pay, etc.

The following pleas were filed 18th September, 1854:

1st. *Nil debet* to the whole declaration. Issue to the country.

2nd. Set-off, $15,000 for goods, wares, etc., sold and delivered; money lent and advanced, and paid, laid out and expended; money had and received; money due and owing from the plaintiffs to the defendant for interest; money due upon an account stated.

Replication. Plaintiff not indebted, as stated in the plea. Issue to the country.

3rd. Payment.

Replication. Defendant did not pay, etc. Issue to the country.

4th. Statute of limitations, five years.

Plaintiff demurred to this plea. Demurrer sustained. Defendant abided by the demurrer.

6th. Causes of action set forth in the declaration, are all upon accounts or promises not in writing, and that the several causes of action did not, nor did any or either of them accrue to the plaintiffs within five years.

Special demurrer to this plea, as not being responsive to the declaration, and amounts only to the general issue. Demurrer sustained, and defendant abided by demurrer.

11th. To fifth and sixth counts. Defendant did not request the plaintiffs not to present said bills to the drawee for acceptance and payment, nor dispense with nor discharge the plaintiffs from presenting said bills for acceptance or payment.

To this plea there was a special demurrer, because not responsive to the counts. Amounts only to the general issue. Demurrer sustained. Defendant abided by demurrer.

12th. To ninth and tenth counts. That there has been no agreement, arrangement or understanding between the defendant and plaintiffs, that said bill should not be presented to the drawee for acceptance or payment, within five years next before the commencement of this suit, nor has defendant agreed to pay the same within five years, etc.

Special demurrer to this plea, because it contained no answer to the counts—no defense to the action. Carried back to the ninth and tenth counts of the declaration. Plaintiffs abided by demurrer.

13th. To ninth and tenth counts. That the agreement that the plaintiffs need not present said bills to the drawee for acceptance and payment, was a verbal agreement, made at the same time said bills were made and executed, and not afterwards.

Special demurrer to this plea was, no defense to the action. Sustained to ninth and tenth counts of amended declaration. Plaintiffs abided by the demurrer.

14th. To ninth and tenth counts. That the agreement that the plaintiffs need not present said bills to the drawee for acceptance and payment, and that defendant would pay said bills on or before maturity, was a verbal agreement, made at the same time said bills were made, and not after, and that there was no consideration for said agreement, except that stated in said bills.

Special demurrer to this plea, no defense to the action. Sustained to the ninth and tenth counts of the declaration, as amended. Plaintiffs abided by the demurrer.

Pleas to ninth and tenth counts, filed December 11th, 1854.

1st. *Nil debet.*

Demurrer sustained to ninth and tenth counts of amended declaration. Plaintiffs abided by the demurrer.

2nd. Defendant had, at maturity of the bills, funds in the hands of the drawee sufficient to pay the same, but plaintiffs neglected to present the same for payment.

Special demurrer. Amounts only to the general issue. Presents no defense. Sustained to ninth and tenth counts of amended declaration. Plaintiffs abided by demurrer.

3rd. Defendant, at the maturity of the bills, had funds in the hands of the drawee sufficient to pay said bills.

Special demurrer. Same causes. Sustained to ninth and tenth counts of amended declaration. Plaintiffs abided by the demurrer.

There were pleas to all the counts.

4th. Causes of action in all the counts the same. Plea same as second plea last before stated.

Special demurrer. Same causes. Sustained. Defendant abided by demurrer.

5th. Causes of action in all the counts the same. Plea same as third plea last before stated.

Special demurrer. Same causes. Sustained. Defendant abided by demurrer.

6th. Causes of action in all the counts the same. That bills were made in the State of Ohio, payable in the State of New York, and that by the laws of Ohio and New York, a parol contract to dispense with presentment and demand for payment, made at the time of the making of the bills, was void, being inconsistent with the terms, conditions and legal import of the bills.

Special demurrer. Same causes, and also because the laws of New York have nothing to do with the construction of the contract. Sustained. Defendant abided by demurrer.

7th. That before said bills were made, he paid plaintiffs $9,000 in bank notes, issued by the New Hope and Delaware Bridge Company, the full amount of said bills. That they were received by plaintiffs for $9,000, and credited by plaintiffs to defendant upon their books. That said notes, when paid to plaintiffs, were in good repute, and circulated at par, the company solvent, and redeemed its notes in specie; that the plaintiffs might have paid the same out at par, but retained them until the bank broke, and then charged them to the defendant.

Special demurrer. Same causes as are assigned against the validity of the first plea of Dec. 11, 1854. Overruled. Leave to reply was granted.

Replications.

1st. Said New Hope and Delaware Bridge Company notes were not accepted by plaintiffs in payment or discharge of said bills of exchange, as stated in said plea.

Demurrer to this replication overruled. Defendant abided by the demurrer.

2nd. The notes of the New Hope and Delaware Bridge Company Bank were left with the plaintiffs as collateral security for the payment of said bills of exchange, and to be put in circulation in the ordinary course of business, and to be allowed as payment only so far as put in circulation and value should be received therefor.

Before they could be put in circulation, the bank failed, leaving $5,880 in plaintiffs' hands, which were returned to defendant on the 20th June, 1848, and accepted by him as part of the same $9,000 so deposited by him with plaintiffs.

Rejoinders to second replication to seventh plea, filed Dec. 11th, 1854.

1st. Said notes of the New Hope and Delaware Bridge Company were not left with plaintiffs as collateral security for the payment of said bills, and to be put in circulation in the ordinary course of their business. Issue to the country.

2nd. That said $5,880 New Hope and Delaware Bridge Company notes were not returned by plaintiffs to the defendant, and received as part of the $9,000 deposited with plaintiffs by defendant—but were sold by plaintiffs to defendant for $1,470, which was to be in full satisfaction of said bank notes, and also all matters connected with said bills of exchange.

Surrejoinder. Said $5,880 New Hope and Delaware Company notes were not sold by plaintiffs to defendant for $1,470 in satisfaction of said bills of exchange, as alleged. Issue to the country.

8th. That after making the bills of exchange, and before they became due, defendant paid plaintiffs $9,000, the amount due on said bills, in notes of the New Hope and Delaware Bridge Company, a company duly authorized to issue bank notes. That the same was at the time credited to the defendant by plaintiffs—notes good at the time, passed at par, and were redeemed in specie. The bank broke about two weeks after, and the money was depreciated. Notes were paid to plaintiffs in December, 1847. They retained them until June, A. D. 1848, and then sold them to the defendant for $1,470, which was to be a full satisfaction for said notes or bills.

Special demurrer. Same causes. Sustained. Defendant abided by the demurrer.

Pleas filed March 14th, 1855, to the fifth and sixth counts.

1st. That the request to dispense with the presentment of said bills to the drawee was a verbal one, made at the time of the making of the bills, and at no other time.

Replication. Request not a verbal one, as stated in the plea. Issue to the country.

2nd. Defendant at no time after making said bills, requested the plaintiffs not to present them to the drawee for acceptance or payment, nor dispense with or discharge the plaintiffs from such presentment for acceptance or payment.

Plaintiffs moved to strike this plea from the files. Motion sustained.

3rd. Bills were made in the State of Ohio. That by the laws of Ohio, a contract to dispense with presentation of same for acceptance and payment was void.

Replications.

1st. That contracts were not void. Issue to the country.

2nd. Said bills were not drawn in the State of Ohio. Issue to the country.

4th. Bills were made payable in the State of New York, and by the laws of the State of New York, contracts for acceptance and payment were void, as being inconsistent with the terms, conditions and legal import of the said bills.

Demurrer sustained. Defendant abided by the demurrer.

Additional plea filed 2nd February, 1858.

That on the 1st January, A. D. 1850, and before the commencement of this suit, defendant settled and accounted with the plaintiffs, of and concerning said bills of exchange in said declaration mentioned, and settled and fully paid the same and all the interest and damages then due thereon.

Replications.

1st. Defendant did not settle and account as stated in the plea. Issue to the country.

2nd. Defendant never did fully pay the bills of exchange in plaintiffs' declaration mentioned, and interest and damages then due. Issue to the country.

A motion was made to suppress the deposition of J. G. Coffin and J. B. McVay, taken by the plaintiffs, for the following reasons:

Of J. G. Coffin for the following reasons:

1st. Because the notice is to take the deposition of J. Gardner Coffin, and the deposition taken purports to be that of J. G. Coffin, there being nothing to establish the identity of the parties.

2nd. Because the commission is directed to Jasper E. Brady,

and executed by J. E. Brady, without any evidence of the identity of the parties.

3rd. Defendant excepted to the answer of the witness to the 2nd interrogatory, so far as the same related to the business of defendant, or his contemplated business, because he said he learned it from conversation with him, without stating what the conversation was.

4th. To the answer to the 5th interrogatory, because said witness attempted to explain the meaning of a written contract.

5th. To the answer to the 6th interrogatory for irrelevancy and incompetency.

6th. To the answer to the 7th interrogatory, because it sets up a parol contract, contrary to the terms, conditions and legal effect of the written contract declared on.

7th. To the answer to the 8th interrogatory, because the same is irrelevant and incompetent, and the statement of the witness as to the return of the notes is uncertain and indefinite.

Of Ira B. McVay:

1st. Because the commission is directed to Jasper E. Brady, and is executed by J. E. Brady, without any evidence of the identity of the parties.

2nd. To answer to 1st interrogatory, because he says "the drafts were given in some way in conveyance with the New Hope and Delaware Bridge Co., and is wholly irrelevant."

The court overruled the motion, with the following exceptions:

"In Coffin's answer to 5th interrogatory, the words 'waiving acceptance' were put on the face of the draft, for the purpose of obviating the necessity of the bank's accepting them, or having them protested for non-acceptance, as it was well understood at the time, that Mr. Curtiss had no funds in the bank to draw upon."

To 6th interrogatory:

"From the conversation which I had with the defendant, at the time the drafts were drawn or negotiated, it was not intended that he should have funds in the bank to meet them at their maturity; the arrangement contemplated a different mode of payment."

The defendant excepted to the opinion of the court, and the court then and there signed a bill of exceptions.

The plaintiffs, to maintain the issue on their part, read in evidence two bills of exchange, one dated September 1st, and the other September 10th, 1847, which said bills of exchange are those described *ante*.

He next read in evidence the deposition of *J. G. Coffin*, taken under a commission to Jasper E. Brady, upon interroga-

tories to J. Gardner Coffin, which interrogatories and answers read, are as follows:

On the part of the plaintiffs:

1st. Do you know Warrick Martin and Frederick Kahl, plaintiffs above named, and Nathaniel B. Curtiss? How long have you known them, or either of them, and where does said Curtiss now reside?

Ans. To the 1st interrogatory, he answers and says, I know Warrick Martin and Frederick Kahl, the plaintiffs in this case, and also Nathaniel B. Curtiss, the defendant. I have known Martin for at least twenty years, and Curtiss and Kahl for, I suppose, twelve years.

2nd. In what business were said plaintiffs engaged in the fall of 1847, and under what name and style did they then conduct their said business, and where? What was the business of said Curtiss at that time?

Ans. To the 2nd interrogatory, he answers and says, in the fall of 1847 the plaintiffs were engaged in the business of exchange brokers, in the name and style of Warrick Martin & Co., in the city of Pittsburg, Pennsylvania. At that time Curtiss was not engaged in any business; he was making arrangements to go into a sort of brokerage business, in Philadelphia or New York, and to act as an agent for the New Hope and Delaware Bridge Co. Bank. This is my recollection of what he was about engaging in, from what I learned in conversation with him.

3rd. Do you know the handwriting of said Curtiss, and how do you know it?

Ans. To the 3rd interrogatory, he answers and says, I know the handwriting of Curtiss; I have seen him write frequently.

4th. Look at the papers now shown you, purporting to be drafts or bills of exchange, drawn by said Curtiss, in favor of Warrick Martin & Co.; describe them by numbers, dates, respective amounts for which drawn, on whom drawn, and on what time. State in whose handwriting they are filled up and signed, if you know; mark and attach the same to your deposition, and designate the marks so placed by you thereon, in your answer to this question.

Ans. To the 4th interrogatory, he answers and says, one of the drafts is numbered 1275, dated September 1st, 1847, for four thousand dollars, drawn on E. Platt, Esq., cashier of the Leather Manufacturers' Bank, New York, at four months after date; the other is numbered 1276, dated September 10th, 1847, for five thousand dollars, drawn on E. Platt, Esq., cashier of the Leather Manufacturers' Bank, New York; they are both filled up and signed in the handwriting of N. B. Curtiss, the de-

fendant. I have marked these drafts J. G. C., No 1, and J. G. C., No. 2, on the back of each draft.

5th. What word, if any, do you find written across the face of said drafts? By whom, and when were they written, if you know? Were you or not present at the time when said drafts, or either of them, were or was made; and do you or not know the reason for placing said words thereon?

Ans. To the 5th interrogatory, he answers and says, the words "waiving acceptance" are written across the face of these drafts, in the handwriting of Curtiss. My recollection is, that the drafts were made by Curtiss in Warrick Martin & Co.'s office, in Pittsburg, in the fore part of December, 1847. I was present when the arrangement was made for giving the drafts, but I do not recollect whether I saw the drafts filled up or not, but I presume I did.

[Here follows that portion of the answer which was suppressed.]

6th. Had or had not said defendant, at the time of making said drafts, or when they or either of them fell due, any funds in said Leather Manufacturers' Bank, or in the hands of said drawee, to meet said drafts? What have you understood from said defendant, if anything, on that subject?

Ans. To the 6th interrogatory, he answers and says, [here follows that part of the answer excluded by the court,] I cannot say whether the defendant had any funds in the bank at the time they matured.

7th. Do you or not know the reason why said drafts were given? What understanding or arrangement, if any, was made in regard to them, or existed at the time? What consideration was paid to said Curtiss therefor, and how was it expected said drafts would be paid? Please state fully all your knowledge touching the several branches of this question.

Ans. To the 7th interrogatory, he answers and says, Warrick Martin & Co. gave Curtiss their drafts on New York, for ten thousand dollars, and received these drafts and one thousand dollars in money, from Mr. Curtiss, in payment; the drafts which Warrick Martin & Co. gave for ten thousand dollars, were paid by the person on whom they were drawn. At the time Warrick Martin & Co. received the drafts from Curtiss, it was agreed between the parties, that the plaintiffs should receive nine thousand dollars of the notes of the New Hope and Delaware Bridge Co. Bank, and if they paid them out, it was to be, with the thousand dollars in cash, a payment of the drafts; but if they did not, then whatever amount they did pay out was to be credited upon the said drafts, and defendant was to pay the balance; they did receive nine thousand dollars of the notes

of the said bank, at different times, and paid a part of them out, when the bank failed, leaving in their hands five thousand eight hundred and eighty dollars. At the several times at which the said notes of said bank were received by plaintiffs, the amount was placed to the credit of the defendant, on their books. About, I suppose, the time that these drafts matured, they were charged, together with the amount of the bank notes unused, to the defendant, on the same books. These facts I state, without a reference to the books, from recollection of what occurred at the time, and from a reference to the books this morning, I find my recollection to be correct; by these facts, I mean the charges and credits to the defendant.

8th. If funds or securities of any kind were deposited with said Warrick Martin & Co., to apply in any way on said draft, state what they were, by whom, the amount and nature thereof, on what terms, and when left; the connection of defendant with, or his interest in said securities; whether any and what part of them was used or disposed of by said Warrick Martin & Co., and how much, if any, of said funds or securities were not used by said firm, or applied on said drafts; how much of them; why they were not all used, and what became of those not used, and what proportion of said drafts remained unpaid, if any; please state the whole fully; what, if anything, passed between said parties, to your knowledge, in relation thereto; your situation at the time, and means of knowledge in the premises.

Ans. To the 8th interrogatory he answers and says, the notes of the New Hope and Delaware Bridge Company Bank, which were deposited with plaintiffs by defendant, and which were not used, were returned to defendant, according to my recollection, in June, 1848, at which time there appears a credit on the books of Warrick Martin & Co., to the defendant, of one thousand four hundred and seventy dollars, leaving a balance due on the draft of four thousand four hundred and ten dollars against the defendant, as appears from the books. I was, at the time of the transactions which I have related, book-keeper and clerk of Warrick Martin & Co.

I have fully answered all the rest of this interrogatory in my answer to the seventh interrogatory.

Deposition of Ira B. McVay.

1st. Examine the papers attached to the deposition of J. Gardner Coffin herein, purporting to be drafts drawn by N. B. Curtiss, in favor of Warrick Martin & Co. upon E. Platt, Esq., Cashier of the Leather Manufacturers' Bank, dated September 1st, and September 10th, 1847, and numbered 1275 and 1276, respectively, and state what you know, if anything, relative to the making of said drafts by said Curtiss; the occasion of giv-

ing the same; what was the understanding and arrangement between the parties in relation thereto, and how you derive your knowledge on the subject.

Ans. To the first interrogatory, he answers and says, I have examined the drafts mentioned in this interrogatory, and attached to J. G. Coffin's deposition. I know that these drafts were drawn and signed by N. B. Curtiss; they were given some way in connection with some notes of the New Hope and Delaware Bridge Company Bank, which notes were left with and forwarded to Warrick Martin & Co. for circulation. There was a considerable amount of these notes in the hands of Warrick Martin & Co. uncirculated at the time the bank failed, but I cannot say what the amount was. I know nothing about the understanding and arrangement between the parties in relation to the matter. All the knowledge I have of these, results from the fact that I was teller in the office of Warrick Martin & Co., except that I know the handwriting of the body of the drafts, and the signatures thereto to be in the handwriting of Curtiss. I have frequently seen him write.

2nd. What, if anything, have you heard said Curtiss say about the drafts, or either of them, remaining in whole or in part unpaid; why they were not fully paid; how much was still due; when, where, and to whom, and under what circumstances were these statements made?

Ans. To the second interrogatory, he answers and says, I have no distinct recollection of the purport of any conversations of Mr. Curtiss about these drafts; I have heard him talk about them, but not feeling any interest in the matter, I do not recollect the purport of his conversations.

To the 3th interrogatory, he says, I never heard defendant make any promise to pay these drafts.

The defendant objected to said depositions, for irrelevancy and incompetency. The court overruled the objection and admitted the evidence, and the defendant excepted.

Plaintiffs next read in evidence a letter from the defendant to Warrick Martin & Co., dated January 8th, 1847, together with the postoffice mark or stamp thereon, which said letter is as follows:

New York, January 8th, 1847.

Messrs. Warrick Martin & Co. — *Gents:* Your favor of the 4th instant was duly received and contents noted. No one can regret the course things have taken more than the writer of this, and I deem it unnecessary to multiply words with you, but when the proper time comes, I will make *square work;* at present we are completely tied up, and cannot ever pay the bank what we owe her in her own notes, as an attachment has been issued against the bank as a foreign corporation. It will depend on what course the bank pursues towards us, *what time*

I shall get in *proper position;* but rest assured the time will come, and now take notice—I wish you to write me immediately upon the receipt of this, stating the exact amount of N. Hope notes you have on hand, received from me, which you have never circulated; state also that you must hold them as collateral until some arrangement is made about that bill; without going into particulars, also at what price the whole or any part of them can be sold in Pittsburgh, and in that letter state nothing else. I wish to show that letter to Mitchel, who knows nothing of my arrangement with you, and it is best as things are now that he should not. The $9,000 N. H. was charged to me, and I wish to make a return of what was not used, and although I cannot command the same notes, I can obtain them from other sources. Be discreet, and keep your own councils, and by so doing I trust you will promote your own interests as well as mine. I think you had better not correspond with St. John on the subject. I shall come to Pittsburgh as soon as I can leave New York. Please let me hear from you soon.

Respectfully,

N. B. CURTISS.

Messrs. Warrick Martin & Co.,
Bankers, Pittsburgh, Pa.

The defendant then read to the jury a bill of discovery filed in this cause against Warrick Martin, May 13th, 1857, stating that he did not read the same as evidence, but only for the purpose of showing the application and relevancy of the answer of the said Martin to the same.

The defendant then offered to read the answer of said Martin to said bill of discovery, to which the plaintiff objected, and before the said answer was read, the plaintiff read the affidavit of Jonathan K. Cooper, filed February 2, 1858, which is as follows:

Jonathan K. Cooper, being duly sworn, says that he is and has been of counsel for said Courtney and Harbaugh, the parties in interest in this suit, ever since the same was instituted; that the firm of Cooper and Reynolds, of which affiant is a member, received from said Courtney and Harbaugh the bills of exchange declared on, and on which said suit is founded, some four or five years since, and were then and still are retained by them, as the holders and equitable owners and holders of said bills, to institute and prosecute said suit, and to look to them alone as the parties to whom alone they are responsible for its management, and the disposal of whatever may come to their hands in the prosecution of said claim. Said suit was originally brought in the name of said Martin and Frederick Kahl, (since deceased,) for the use of said Courtney and Harbaugh, but neither said affiant nor said Reynolds, as affiant is informed and believes, ever knew or had any intercourse with said Kahl, nor with said Martin till about a year since, when said Martin came to Peoria. Affiant states that he has knowledge, derived as well from said Curtiss as from said Courtney and Harbaugh, that said Courtney and Harbaugh are the real parties in interest in this suit. Said Curtiss has uniformly, since affiant's connection with the subject, recognized said Courtney and Harbaugh as the actual parties in interest, and entitled to control and manage the same, and has on more than one occasion, proposed to treat with them for the settlement of said claim, and as confirmatory in part hereof, affiant refers to the affidavit of said Curtiss, filed in said

cause, under date of March 26th, 1855, for which purpose only, affiant asks to have the same taken and treated as part hereof. Affiant has heard said Curtiss say in connection with propositions of settlement, that if the money was coming to the said Martin or his family, he, said Curtiss, might be induced to make more liberal offers, but that as not a dollar of anything he might pay would come to them, he was not disposed to do anything better than he had offered.

JONATHAN K. COOPER.

Sworn to before me, this second day of February,
A. D. 1858. JAMES WESCOTT, *Clerk.*

The defendant objected to the reading of said affidavit, because said Cooper was interested in the suit, he being security for costs, and on account of its incompetency and irrelevancy. The affidavit was read to the court only, with a view and for the purpose of laying a foundation for an objection to the answer of said Martin, and therefore the plaintiffs' counsel objected to the reading of the answer of said Martin in evidence. The court overruled the objection, and plaintiffs excepted to the opinion of the court, and the answer was read in evidence.

The plaintiff then offered in evidence a bill of discovery, filed in this cause by the defendant against one of the then plaintiffs, Frederick Kahl, on the 16th May, 1855, which is the same, substantially, as the bill of discovery filed by the said defendant against Warrick Martin in said cause, stating that one object of the evidence was to contradict the answer of said Martin. The defendant objected to the same as evidence for such purpose, but the court overruled the objection and admitted the same in evidence.

Defendant admitted that an injunction had been issued upon the filing of the bill of discovery against Frederick Kahl.

The jury found a verdict for the plaintiff for debt, $4,410, and $3,551.28 damages. The defendant entered a motion for a new trial.

The errors assigned are—

1st. Sustaining the demurrer of plaintiff to the 4th, 6th and 11th pleas of the defendant, filed Sept. 18, 1854.

2nd. Sustaining plaintiff's demurrer to pleas Nos. 4, 5, 6 and 8, filed Dec. 11, 1854.

3rd. Rendering judgment for the plaintiff upon the verdict.

4th. Overruling demurrer to plaintiff's first replication to the 7th plea, filed Dec. 11, 1854.

5th. Striking from files 2nd plea, filed March 14, 1855.

6th. Sustaining demurrer to 4th plea, filed March 14, 1855.

7th. Refusing to suppress depositions of J. G. Coffin and Ira B. McVay.

8th. Admitting said depositions in evidence.

9th. Admitting improper evidence, offered by plaintiff.

10th. Giving the instructions asked by plaintiff.
11th. Refusing instructions asked by the defendant.
12th. Overruling defendant's motion for a new trial.
13th. Entering judgment on the verdict.

N. H. PURPLE, for Appellant.

GLOVER & COOK, and J. K. COOPER, for Appellees.

WALKER, J. The first objection urged against this judgment, is the sustaining the plaintiff's demurrer to the defendant's plea to the fifth and sixth counts of the declaration. This plea traversed the allegations in these counts, that when the bill was drawn and at its maturity, defendant requested plaintiff not to present the same for acceptance and payment, and dispensed with and discharged the plaintiff from the presentment of the bill for acceptance and payment. The first plea filed, was a plea of *nil debet* to the whole declaration, which fully traversed every material allegation it contained. And this plea did no more than again traverse facts already traversed. According to the ancient rules of pleading, the defendant had a right to file such a plea as this, traversing any material allegation in the declaration, or he might plead the general issue. When he pursued the former course, it put the plaintiff upon the proof of the fact traversed, and failing to prove that fact, he failed in his action; and by pleading the general issue, he put the plaintiff to the proof of every material allegation, and failing in any one of them, he was defeated in a recovery. But we do not understand the defendant has the right to plead both pleas in the same action, and upon doing so, the court may strike such a plea from the files as unnecessarily incumbering the record. By having filed the general issue, everything could be attained under it that could be under both. And it was in the nature of, and in part amounted to the general issue, and was obnoxious to a special demurrer for that reason, as that plea had already been filed. There was no error in sustaining this demurrer.

A demurrer was sustained to the fourth and fifth pleas, filed December, 1854, on the ground that these pleas only amounted to the general issue. Whether they did or not is not material, if the facts alleged in them could have been given in evidence under the general issue already pleaded in this action. Unless the bill of exceptions showed that the evidence was offered on the trial and rejected by the court, the presumption would be that it had been admitted under the general issue.

The same may be said of each of the remaining pleas, to which demurrers were sustained. And as the bill of exceptions

nowhere shows that the evidence which was admissible, as well under them as under the general issue, was rejected by the court, there was no error in sustaining the demurrers to these pleas, for which the judgment should be reversed.

It is insisted that the court erred in refusing to suppress the deposition of Coffin, because the notice was to take the deposition of J. Gardner Coffin, and the deposition taken purports to be that of J. G. Coffin, and because the commission is directed to Jasper E. Brady, and executed by J. E. Brady, when there was no evidence to identify the persons as being the same. We see that a commission was issued to a person giving his full name, and was executed by a person of the same surname, and with the initial letters of his christian name. This, it is believed, is sufficient to raise a presumption, that hardly admits of a doubt, that he is one and the same person, and in addition, he certifies that he acts in pursuance of the commission which is annexed to the deposition, and he signs his name to the certificate as commissioner. This, we think, is sufficiently certain, that the person to whom the commission was directed had executed it. He also certifies, that in pursuance to the commission he had taken the deposition of J. G. Coffin. In the commission he was commanded to take the deposition of J. Gardner Coffin, and we think the certificate renders it reasonably and sufficiently certain that he had examined the proper person. The same objections were taken to McVay's deposition, and were properly overruled. We are also of the opinion, that there was no error in overruling the motion to suppress these depositions for the other reason assigned, and that they were properly permitted to be read in evidence on the trial, as the evidence was pertinent and material under the issue.

It is insisted that the court erred in admitting the letter of defendant, written to Warrick Martin & Co., from New York, under date of the 8th of January, 1848, and mailed to their address at Pittsburgh, on the same day. The materiality of this letter under the issue, will depend upon whether a subsequent promise or agreement to pay by the drawer of a bill made to the drawee or holder, who had failed to present it for acceptance or payment, waives the right to insist that he is discharged from liability, on account of such failure to present. It is said by Chitty, in his treatise on Bills, that, "The consequences, however, of a neglect to give notice of non-payment of a bill or note, or to protest a foreign bill, may be waived by the person entitled to take advantage of them. Thus, it has been decided, that a payment of a part, or a promise to pay the whole or part, or to see it paid, or an acknowledgment that it must be paid, or a promise that he will set the matter to rights,

or a qualified promise, or a mere unaccepted offer of *composition* made by the person insisting on a want of notice, after he was aware of the laches, to the holder of a bill, amounts to a waiver of the consequence of the laches of the holder, and admits his right of action. Where there has not been an express waiver of notice of dishonor, *facts implying* a waiver must be left to the jury." Page 501. In this letter there are expressions which clearly imply a promise to pay the bills held by the plaintiff, and it was, for that reason, proper evidence to go to the jury.

It is urged, that the court erred in admitting the affidavit of Cooper, because he was security for costs in the suit. It appears that this affidavit was read for the purpose of laying a foundation for an objection to the admission of the answer of Martin, the plaintiff of record, to a bill of discovery, filed by defendant. This evidence was, obviously, directed to the court and not to the jury, and notwithstanding it was read to the court, the answer of plaintiff was permitted to be read, and we are at a loss to see in what manner it could have prejudiced the defendant in the slightest degree.

It was also urged, that the court erred in permitting the plaintiff to read in evidence a bill of discovery, exhibited by defendant, against Frederick Kahl, one of the then plaintiffs, for the purpose of contradicting the answer of the plaintiff, Martin. On the argument, it was urged with a considerable degree of earnestness, that the defendant had no right to discovery from the plaintiff of record, who sues for the use of the equitable holder of a bill or note. And it was insisted, that as his admissions were not evidence against the holder, his answer to a bill of discovery, for the same reason, should be rejected. It is believed to be the law, that any admissions made by the holder, while he was the owner of the bill or note, are, as against a purchaser after maturity, admissible. And even if they were not, we see no reason why the defendant should be deprived of the evidence of the plaintiff, simply because he may have instituted suit for the use of some other person. When the equitable holder purchases a note or bill over due and dishonored, he takes it subject to all of its infirmities, and the law requires him to ascertain whether the maker or other person apparently liable, has any defense, and failing to do so, he acts at his peril, and must submit to any loss he has incurred for the want of care in purchasing. We think that all the reasons, why a plaintiff suing for the use of another, should be required to discover any matter of defense which existed before he parted with the instrument, apply with equal force as in the case of any other plaintiff. And it has been held by this court,

that the party against whom an answer to a bill of discovery has been read, may contradict it by any legitimate evidence. The court says, "It is true, that, after reading the answer to the jury, the appellants were not at liberty to discredit it, by impeaching the general reputation of the appellee for truth; for the reason, that a party is not permitted to show that his own witness is unworthy of belief; but he may always controvert the correctness of the statements made by his own witness, by the introduction of other evidence, and in that way discredit his testimony. An answer to a bill of discovery is entitled to no higher consideration than the answers of a party's own witness upon the stand, and may be controverted in the same way." *Chambers et al.* v. *Warren*, 13 Ill. R. 321.

There would seem to be greater reason to permit the beneficial plaintiff to contradict the answer of the nominal plaintiff, than to permit a defendant to do so, after having compelled the discovery, and if he were not permitted to do so, his position would be worse than that of the defendant or nominal plaintiff. And such a rule would be manifestly unjust.

The case of *Chambers* v. *Warren* is, we think, decisive of the question, and renders further discussion unnecessary.

The plaintiff asked for, and the court gave, these instructions, to which the defendant excepted:

1. That if the jury believe, from the evidence, that at the time the bills sued on were made, Curtiss agreed to waive or dispense with the presentment of said bills for acceptance and payment, the liability of said Curtiss on said bills was complete at their maturity, without presentment for acceptance or payment, or protest for non-acceptance or non-payment, or notice thereof to said Curtiss.

2. If the jury believe, from the evidence, that when said notes were made, Curtiss deposited with Warrick Martin & Co., notes of the New Hope and Delaware Bridge Company equal in amount to said bills, and from the proceeds of which it was agreed by said parties, said bills would be paid, said Warrick Martin & Co. were not bound to call on the drawee of said bills for acceptance or payment, but might at once sue Curtiss on said bills when they fell due, if not then paid conformably to the understanding of the parties, out of the fund so provided.

3. That the payment by Curtiss, if proven, of any part of said bills after they fell due, is in law a waiver of presentment to the drawee for acceptance and payment, and notice for non-acceptance and non-payment.

4. That the counts in the plaintiff's declaration, alleging due diligence in presenting said bills to the drawee for acceptance and payment, and protest thereof for non-acceptance and non-

payment, are sustained by proof of anything showing a sufficient excuse for the want of such diligence.

5. An acceptance by a creditor from his debtor of a less sum than is admitted by the debtor to be due, is not a satisfaction of the whole debt, and will not bar a suit by the creditor to recover the balance of the debt.

6. If Curtiss was indebted to Martin & Kahl in a sum exceeding five thousand dollars, and if Martin & Kahl agreed to take twenty-five cents on the dollar of their debt in full satisfaction of the whole debt, and in pursuance of said agreement Curtiss paid twenty-five cents on the dollar of his debt to Martin & Kahl, these facts would not be a bar to a recovery, by Martin & Kahl, of the remainder of said debt.

7. A bill of exchange payable on a specified day, and not to be presented for acceptance till it is presented for payment, and if in such case acceptance is waived, it dispenses with presentment for payment also, and the drawee is at once liable upon it, if not paid at maturity.

8. If the jury believe, from the evidence, that Warrick Martin & Co. received from said Curtiss, and held the notes of the New Hope and Delaware Bridge Company, as collateral security to the payment of the said bills of exchange sued on, the sale of said notes, or any part of them, to said Curtiss, by said Warrick Martin & Co., for twenty-five cents on the dollar, or any other price, would not discharge said bills of exchange, only to the amount actually paid by said Curtiss for said notes, upon such purchase.

9. The possession by Courtney & Harbaugh, of the bills sued on, are evidence of ownership in said Courtney & Harbaugh.

10. The fact that this suit is brought and prosecuted upon this record in the name of Martin, for the use of Courtney & Harbaugh, is evidence from which the jury may presume that said Courtney & Harbaugh are the real parties in interest.

11. If the jury shall be of opinion that the plaintiffs are entitled to recover, they shall find for said plaintiffs the amount of said bills of exchange still unpaid, as debt, and interest on that amount from the time it fell due, as damages.

12. If the defendant, Curtiss, did give to the plaintiffs the bills of exchange sued on in this case, and did deposit with the plaintiff $9,000 of notes of the New Hope and Delaware Bridge Company, with the agreement that plaintiffs should put said notes into circulation, so far as they could, and so far as said notes were put in circulation the same were to be credited upon the bills of exchange, and that Curtiss should pay the balance of said bills of exchange, and plaintiff did circulate the New Hope and Delaware Bridge Company notes, until said company failed,

and had $5,580 of said notes on hand at that time, and Curtiss purchased the said notes of plaintiffs for twenty-five cents on the dollar, said notes being then held as collateral security for the payment of said bills of exchange, then the sale of said New Hope and Delaware notes to Curtiss would not discharge the liability of Curtiss on said bills of exchange, except as to the amount which plaintiff actually received from said New Hope and Delaware Bridge Company.

13. This suit being brought for the use of Springer Harbaugh and Wilshire S. Courtney, the presumption of the law is, that they are the real parties in interest in this suit.

14. Although the answer of Warrick Martin has been admitted in evidence, yet the jury are not bound to take it as absolutely true; they are to give it just such weight as they believe it is entitled to, as a means of coming at the truth.

We will take occasion to say that it is a matter of regret that the records of courts should be incumbered by numerous instructions presenting the same proposition of law in the same terms, or so nearly so as to leave no difference in their meaning. We can see no benefit resulting from such a practice, and think it should be discouraged, and when asked, no more of them should be given by the court than embody the principle intended to be announced. The practice seems to be growing, and it can have no other tendency that we can perceive, than to confuse the jury, and induce them to suppose that the slight variance in the language implies a difference of principle. A number of the foregoing instructions are of this character, and should for that reason have been refused, though containing correct legal propositions.

In determining the question of whether these instructions were properly given, it will be necessary to ascertain what the law is, in regard to the rights and liability of parties to negotiable paper.

The doctrine as laid down by Story on Bills, p. 438, sec. 371, seems to be the well-established law. He says, "So, if there be an express agreement, either verbal or in writing, between any of the parties to the bill, to waive or dispense with the necessity of a due presentment of the bill at its maturity, that will, as between themselves, although not as to other parties, constitute a sufficient excuse for non-presentment thereof." The first instruction announces this legal proposition, and it was a question for the jury to find, whether a presentment was waived by agreement of the parties, and there was evidence in the case that justified its being given.

The second instruction on the same principle was properly given. It told the jury that if the drawer had placed in the

hands of the payee, at the time the bills were drawn, the amount of the bills in a particular kind of funds to be disposed of, with the agreement by the parties, that the proceeds of these funds should be applied to meet the bills when due, that such agreement would amount to a waiver of presentment, and that the payee might sue the drawer at maturity, if they were then not paid according to the agreement. The evidence all tends to show that presentment was dispensed with, and that notice was not required. The drawer wrote across the face of the bills "waiving acceptance," and that he had placed in the hands of the payees, funds to be converted to meet these bills, all of which showed an intention and agreement to waive a presentment and notice.

The jury are told by the third of these instructions, that if they believe, from the evidence, that defendant paid any part of these bills after they fell due, it would be a waiver of presentment for acceptance and payment. This we have already seen is the law, and there was evidence in the case which justified its being given. The evidence showed a subsequent payment, and it was for the jury to determine of what character it was.

The fourth instruction was properly given, as the decisions settle, that evidence which shows an excuse for not using diligence, supports the averment of diligence. *Taunton Bank* v. *Richardson*, 5 Pick. R. 436; *Baker* v. *Parker*, 6 Pick. R. 80.

The fifth instruction presents the question, whether the acceptance of a smaller amount than that which is due as a payment in full, is binding on the creditor. On this question the decisions, which are numerous and uniform, hold that it is not. They proceed upon the ground that there is no new consideration to support the agreement. It is said that a payment of a part of a debt, or of liquidated damages, is no satisfaction of the whole debt, even when the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand, and a plea of payment of a smaller sum in satisfaction of a larger, is bad, even after verdict. 2 Pars. Contracts, 130; and the numerous authorities cited support this doctrine. But if the smaller sum be taken by way of compromise of a controverted claim, or from a debtor in failing circumstances, in full discharge of the debt, no reason is perceived why it should not be binding on the parties. This instruction was properly given, as it only presents this principle of law.

The ninth instruction was properly given, as the principle, that the holder of a note, when there are no circumstances of suspicion of *mala fides*, is presumed to be the legal holder and

owner. This principle is too familiar to require discussion or authority.

The other eight instructions asked by and given for the plaintiff, except the fourteenth, (the principle upon which it was properly given has already been discussed,) only present the same questions involved in the six, already considered, and it is deemed unnecessary to notice them further.

The instructions asked by the defendant, and which the court refused to give, only present the reverse of the instructions given for the plaintiff, and the discussion of those disposes of these; and they were, consequently, properly refused.

Upon the whole record, we are unable to perceive any error, for which this judgment should be reversed.

Judgment affirmed.

Charles H. Swits and William P. Dennis, Plaintiffs in Error, *v.* Ira K. Carver and Bloomer Carver, Defendants in Error.

ERROR TO WINNEBAGO.

A party who does not enter an appearance, but permits his name to be called and a default to be entered, if he attempts to avoid the default by unfairly getting a plea into the record, must see that his pleading is in every particular accurate, so that it will not require extraneous proof to identify it, or the default will not be set aside, and the judgment will be sustained.

This was an action of assumpsit, brought by the defendants in error, against the plaintiffs in error, on a promissory note, at the December term, A. D. 1857. The summons was duly served, and the declaration filed November 23, 1857.

The declaration was in the usual form in assumpsit on a promissory note.

December 7, 1857, the second day of the term, a plea of general issue was filed, by O. Miller, Jr., attorney for defendants.

December 8, 1857, default was entered against the defendants, and judgment rendered against them for $273.34, the amount of the note.

February 27, 1858, the plaintiffs in error sued out their writ of error and supersedeas, and assign for error that the court erred:

1st. In entering defendants' default while there was a plea on file.

2nd. In rendering judgment against the defendants, by default, without noticing the plea on file.

JASON MARSH, for Plaintiffs in Error.

L. F. WARNER, for Defendants in Error.

BREESE, J. The record in this case shows an ordinary action of assumpsit, on a promissory note, with the money counts and account stated. The process was duly served, returnable to the December term, 1857, of the Winnebago County Court.

At that term, Dec. 8, on motion of the plaintiffs' attorney, the defendants were three times solemnly called, and came not, nor any one for them, and their default was entered, and a judgment rendered against them, for the amount of the note and interest, as damages. The record shows that on the 7th Dec., in a cause entitled *Charles Swits and William P. Dennis* ads. *Bloomer Carver et al.*, a plea of non-assumpsit had been filed.

By a supplemental record, brought here on suggestion of diminution by counsel for defendants in error, it appears that at the following March term, the plaintiff Carver, defendants being present by counsel, submitted their motion, and asked leave to file in said court, in the cause of *Ira K. Carver* v. *Charles Swits and William P. Dennis*, tried at the last December term, a motion to strike from the files of said cause the plea purporting to be filed in said cause, on a day previous to the entry of the judgment in that suit, for the reason that at the time of the judgment in the cause, the plea was not on file with any of the papers of the cause, and that no appearance of the defendants in the cause had been entered previous to the judgment, upon the docket or otherwise, and that no notice of the plea was given, and in support of the motion, asked leave to file affidavits, which being allowed, the plaintiffs submitted the affidavit of *Hulin*, the clerk of the court, to the effect that there was no appearance entered in the cause at the last term of the court, by the defendants, upon the records of the court or upon either of the dockets of the court, in the cause; that after the term of the court closed, he found among the loose papers belonging to various cases, a paper purporting to be a plea in the cause; that he has no recollection of ever seeing the plea until after the court had finally adjourned; that the plea bears his signature as clerk, as having been filed by him, and that is all his recollection about it; that he never saw the same among the papers of the cause in its appropriate package, that he remembers, until after the last term, when he found it and put it with the papers in the cause, in its proper envelope.

Also the affidavit of *L. F. Warner*, plaintiffs' attorney, to the effect that when judgment was rendered in the cause, no appearance had been entered for either of the defendants upon the court's, clerk's or bar docket, and no plea on file in the cause, among the papers of the cause, at the time the default was taken; and he had no notice that any plea had been filed at the time the default was taken, or at any time during that term of the court, and that no appearance of defendants, or either of them, was entered upon the records of the court.

After argument by counsel, the court allowed the motion, save and except the motion to strike the plea from the files. Leave was given only to file the affidavits of which the above is the substance. The effect of this is simply to make the affidavits a part of the record of the proceedings of the December term.

The questions are questions of practice, and may deserve a few remarks.

It is a deplorable fact, as the history of proceedings in our Circuit Courts prove, that a degree of looseness prevails in them, quite inexcusable, and which ought not so to be. Instead of being modes by which to obtain justice, courts become snares to entrap the honest suitor, and a protection for dishonesty. Several instances like the one now before us, have been noticed, where a defendant having entered no appearance, and having given no notice of any defense or plea, has contrived to set aside a default, by the trickery of causing a plea to be marked as filed by the clerk, and then retaining possession of it himself and afterwards putting it among papers to which it does not belong. The clerk, in the hurry of business in court, cannot know or remember the fact of marking each paper handed to him as filed, and all the inquiry that might be instituted by the plaintiff's counsel, when his cause is called, would fail, as in this case, to discover a plea regularly filed.

We think it should be made the duty of the clerks of the Circuit Courts to keep a book, in which the defendant's attorney shall enter notice of appearance or plea, as the case may be, so that upon reference to it, the true condition of the cause can be at once ascertained.

But this particular case will be tried by the record, and as it there appears.

The original record shows that the defendants were three times solemnly called and came not. They were then in default for want of appearance, no one of the dockets showing an entry of the appearance of either of them. The plaintiff was then at liberty to have their default entered without pro-

ceeding further, and which could only be avoided by showing a plea regularly filed.

If a plea was filed in time, the party could have called the attention of the court to it, and the default would have been set aside on motion.

We have high authority for saying, that in no case where the court below would give relief on motion, this court will entertain error, or an appeal; and such a rule would seem to be consonant to justice.

The ground, however, on which this judgment by default can be sustained, is, that the plea actually filed is not a plea in the cause then pending, and as technical advantages are sought by the plaintiffs in error here, so the defendants should be allowed the benefit of such advantages, the merits being clearly with them. We say the plea is not a plea in the cause then pending.

That action was in the name of Ira K. Carver and Bloomer Carver *vs.* Charles H. Swits and William P. Dennis. In the plea, the suit is entitled Charles H. Swits and William P. Dennis *ads.* Bloomer Carver *et al.*

Bloomer Carver et al. may mean Ira K. Carver and Bloomer Carver, we cannot tell. It is not a plea in this cause. It cannot be identified without extraneous proof.

We do not wish to be understood that such an objection to a plea that had been acted on, would be entertained by this court, for in such case, the plea would be considered as in by consent, and no after objection of this kind would be tolerated. This plea was not acted on—it was in surreptitiously, and the defendants shall have no advantage of it; and their attorney can reflect upon the rebuke administered to him in this opinion, for his conduct in the premises.

The judgment is affirmed.

Judgment affirmed.

Alexander Ferguson *et al.*, Appellants, *v.* Asa Tallmadge, Appellee.

APPEAL FROM WINNEBAGO.

A party who insists that land was bought for him in the name of another, who loaned the money at usurious rates, must connect innocent purchasers with a knowledge of such facts; and if he has been ejected from the premises without setting up such facts in his defense as a notice to others, and has abandoned the premises, declaring an intention to forego all claim thereto, he cannot have an equitable right to pursue subsequent purchasers and recover the land.

Ferguson et al. *v.* Tallmadge.

This bill in chancery states, that in May, 1839, a joint stock company was formed at Aberdeen, Scotland, to loan money to persons in the United States, desirous to purchase lands at the government sales, particularly in Illinois, called "The Aberdeen North American Investment and Loan Company." Its affairs were under the direction of D. Chalmers, Littlejohn, Yeates, Catto, Williamson, A. Smith, C. Chalmers, Farquahar and Foulerton, residing in Aberdeen and its vicinity.

On 10th May, 1839, these directors entered into an agreement under seal, with one William Taylor, then of Thomaston, Scotland, appointing him manager of the company's business in America, for the term of five years, and Taylor covenanted to proceed to the United States, and continue in the service of the company for five years, and to act as manager, for a salary stipulated in the agreement, and would not enter into or be concerned with any transaction whatever in business in America, in his own name or that of another, and that all investments in America which should be made in his name or another's for his behalf, should be held to be made with the funds and for the behalf of the company.

The directors furnished Taylor with a large amount of money, with which he came to Illinois, to loan the same to persons desirous of borrowing it to purchase public lands at government sales thereof, upon the security of such lands. For that purpose he attended previous to and at a land sale at Chicago, previous to the sale at Galena afterwards mentioned in the bill, and loaned a large number of thousand dollars to a great many persons, to enter lands at the sale, at the rate of thirty-three and a third per cent. interest to the year or higher, and to secure the payment of the loan and interest, had the lands bid off in his own name, and gave the purchasers thereof contracts to convey the legal title to their lands respectively upon the repayment of the loan and interest, in the same printed form as the contract between Taylor and complainant afterwards mentioned in the bill, the parcels entered lying in McHenry, Boone, De Kalb and La Salle counties.

For two or three years previous to the land sale at Galena, in the latter part of October, 1839, complainant was settled upon a tract of land in the county of Winnebago, consisting of south half of Sec. 34 and west half of Sec. 35, Town. 45 north, Range 2 east, 3rd principal meridian, containing 640 acres. He had a pre-emption right to a quarter section of it, by residence, and had improvements thereon of considerable value. The tract, including improvements, was then worth $2,000; and he held the whole tract as his claim, according to custom. He intended to acquire the legal title by purchase from the

government, for his own benefit, when it should be sold, and he held possession for that purpose.

A sale of lands, including this section, was proclaimed by the President, at Galena, about 24th October, 1839, but the proclamation was known in the vicinity only about six weeks previous to the sale.

Complainant had not means to enter the land, nor could raise the same otherwise than by loan, and from the shortness of the time and other causes, could not go East where the money could be procured.

Taylor had shortly before lent money at the sale at Chicago; and shortly after the publication of the proclamation, he gave out word that he would attend the sale at Galena, to lend money in the same manner as at Chicago; and complainant was induced to rely upon borrowing of him, and made no other provision.

Taylor accordingly attended at Galena, previous to and during the sale, for the purpose of loaning money as aforesaid, and so loaned $16,000 or thereabouts.

Complainant went to Galena shortly before the commencement of the sale, for the purpose of effecting a loan from Taylor to purchase the two half sections at the usual rate of $1.25 per acre. Complainant made application to Taylor, to lend him $800 for that purpose, to which he readily consented, and thereupon a discussion arose as to the rate of interest; whereupon Taylor stated to complainant that he loaned money to all others at the rate of thirty-three and a third per cent. or more, and that he would lend to complainant at no lower rate.

Having no other resource, complainant was obliged to comply, or lose his improvements, and the chance of entering the half sections, and was forced to and did consent to borrow the $800 at the rate of thirty-three and a third per cent. by the year, to be paid in four installments, or fifty per cent. for one year, if complainant desired to pay it in one year.

Complainant inquired what security he would require, and was informed by Taylor that he in all cases required the land to be bid off in his own name, and the receipts to be given in his own name, and held the title as security for payment, and should require the same of complainant.

It was therefore agreed that complainant should bid off the half sections in Taylor's name; that Taylor should furnish the $800 to pay for them, and that complainant should repay him with thirty-three and a third per cent. interest as follows: $264 in one year, $264 in two years, $264 in three years, and $1,064 in four years; and should covenant to convey the land to complainant on payment. It was further agreed that the payment

should be made at Chicago, and that the payment of $1,200 in one year should be taken in full satisfaction of the above sums, and of the $800 and interest. Taylor showed complainant a printed form, which he stated he required every person to execute, and should require complainant to execute.

Complainant, with the knowledge and approbation of Taylor, employed one Wade to bid off the half sections in Taylor's name, and complainant agreed to pay him one dollar for such service.

Wade, on 29th October, 1839, bid off the land in half quarter sections, in Taylor's name, at $1.25 per acre, the $800 was advanced by Taylor, the receipts were made out in his name; complainant paid Wade the dollar, and Taylor was not present at the sale.

At the conclusion of the land sale, a contract under seal was executed by Taylor and complainant in the printed form, in pursuance of the said agreement made before the lands were bid off, dated said 19th October, 1839, whereby complainant covenanted to pay the three sums of $264, and the $1,064, in one, two, three and four years, and Taylor covenanted to convey the lands to complainant upon the money and interest being paid as above mentioned.

Complainant continued in possession of the lands, and resided thereon, until November, 1846, claiming them as his property, subject only to the incumbrance of security for the loan aforesaid.

Patents were issued to Taylor; and about April, 1842, he died at New Orleans, having 4th September, 1841, made and published at New Orleans, a paper purporting to be his will, whereby he bequeathed pecuniary legacies to several relatives, payable out of his personal property; and he inserted a clause purporting to leave and bequeath the residue of his estate whatsoever to the defendant, Ferguson, of St. Louis, and James Duncan, of New Orleans, and appointed them and defendants, Farquhar, G. Porter, G. Taylor and W. Primrose, his executors.

The will was not attested by two witnesses, as required by statute of this State, nor by any witness whatsoever, so that it was insufficient to convey land or any interest therein lying in this State. The will was not admitted to probate in this State.

At Taylor's decease the first three installments only had fallen due, and no part had been paid; and after his decease there was no person in this State authorized to receive the money, nor was there any person authorized to release or convey the legal title to the land.

The directors of the loan company, on the 8th of Feb. 1845, filed in this Circuit Court their bill in equity, setting forth the

contract between them and Taylor, and that Taylor received from them a large amount of money for investment in the United States, with which he came to Illinois as manager; that defendant Ferguson, of St. Louis, when the bill was filed, was appointed accountant; that Taylor, at divers times, entered with those moneys divers tracts of land in Illinois, in Winnebago, Boone, McHenry, De Kalb, Whiteside, Rock Island, La Salle, Kane and Madison counties, specified in schedules, including the half sections purchased by complainant as aforesaid, amounting to fifty-three half quarter sections in Winnebago, forty-five in Boone, fifty-four in McHenry, twenty-seven in De Kalb, seventeen in Whiteside, twelve in Rock Island, fifteen in La Salle, twenty in Kane, and one in Madison; that Taylor, in direct violation of the agreement, purchased and took the title to those lands in his own name, and not in his and Ferguson's as manager and accountant, as he ought to have done, and thereby Taylor became trustee of the directors, and was bound to convey the lands as they might appoint; that after the purchase of the tracts, Taylor made several contracts in his own name for sale of portions thereof, which were outstanding and unperformed; that about the 4th Sept. 1841, Taylor, at New Orleans, made his will, appointing Ferguson one of said directors, George Porter, of Aberdeen, George Taylor, of 93rd regiment British army, William Primrose, of Harrisburgh, Pa., Ferguson and James Duncan, of New Orleans, his executors; that he made several bequests in money, specified in the said bill; and that the residue of his estate, of whatever kind, he left and bequeathed to Ferguson and Duncan, after paying debts and funeral expenses; that he directed his executors, in six months to sell sufficient of his personal property to pay the legacies, so as to leave Ferguson and Duncan in the undisturbed possession of the residue of his estate. A copy of the will was annexed. That about April, 1842, Taylor died at New Orleans, leaving Isabella Taylor, his mother, his said brother George, his sisters Ellspet Porter and Elizabeth Primrose, his only heirs him surviving, and sufficient personal individual estate to pay legacies, without resorting to real estate; that the will was, on the 22nd April, 1842, admitted to probate and record in New Orleans, but no letters testamentary had ever been granted, nor administration had; that after the probate, Duncan died at New Orleans, leaving heirs or devisees unknown to the directors. The directors insisted, that notwithstanding the devise to Ferguson and Duncan, the lands in equity belonged to them as directors and trustees of the company, and they had an equitable and legal right to require them to be conveyed as they might appoint, to be disposed of for the benefit of the company. They made Isabella Taylor, Elizabeth

Primrose and William Primrose, her husband, Ellspet Porter and George Porter, her husband, Ferguson and the unknown heirs and devisees of Duncan, defendants; required them to answer without oath, and prayed that the lands might be conveyed to Ferguson.

The defendants were brought in by advertisement only, and at April term, 1845, the bill was taken as confessed, and without proofs a decree was made, declaring that Taylor purchased the lands with the moneys of the directors as such directors, and in trust for them; that said persons named as his heirs were his heirs; that the real estate of Taylor was devised to Duncan and Ferguson; that the heirs of Duncan were unknown; that a conveyance of all the interest the defendants might have in any of the tracts ought to be made by them to Ferguson, in trust for the directors; that the trust in Taylor and his representatives for said directors, be established; that what Ferguson had by the devise be held by him in trust for the directors, for their exclusive benefit; and that defendants should, by 24th of April, release to Ferguson.

No release was made. James M. Wight was appointed commissioner, and in May, 1845, executed a deed in conformity to the decree, which was confirmed 19th of August, 1845.

Under color of that conveyance, Ferguson ousted defendant Tallmadge in November, 1846.

In 1848, Ferguson negotiated with defendant Robert Smith for the east half of the south-west quarter, and the east half of the north-east quarter of Sec. 35, Town. 45, north, Range 2 east of the third principal meridian, containing 160 acres.

About the same time Ferguson also made some agreement with defendant Montgomery for the west half of the south-east quarter of Sec. 34, and the north half of the east half of same quarter section, under which Montgomery went into possession.

On the 22nd November, 1849, Ferguson deeded to defendant Kirk, with general warranty, for a consideration expressed to be $320, the west half of the south-west quarter of Sec. 35.

About January, 1849, defendant Ralston negotiated with Ferguson for the south-west quarter of Sec. 34, and the west half of the north-west quarter of Sec. 35, and went into possession of those tracts, and has occupied them ever since, but complainant is not aware what agreement was made.

Within a year, or thereabouts, before filing of bill, defendant Dennis negotiated with Ferguson for the purchase of the south-east quarter of the south-east quarter of Sec. 34. Complainant is not aware what contract was made, and the land has been unoccupied.

Complainant avers and insists that it is not true, as alleged by the directors in their bill, and declared by the decree, that the two half sections described were entered and purchased with the moneys of the said company, or in trust for them; but complainant entered and purchased them for his own benefit, and they were paid for with his moneys, loaned of Taylor, and not with moneys of the directors; complainant had them bid off in Taylor's name to secure repayment.

The other tracts were in like manner purchased by divers persons, and paid for with moneys borrowed by them of Taylor; and complainant avers, that the allegations in the said bill, that the said lands were purchased with the moneys of the company, and in trust for them, are not only untrue, but false and fraudulent.

It is not true, as declared in the decree, that the real estate of Taylor was devised to Ferguson and Duncan; and he insists that the alleged will is palpably insufficient to convey real estate in Illinois, so that the said lands descended to the heirs of Taylor; and the complainant insists that the said allegation was fraudulently obtained to be inserted in the decree.

The alleged contracts with Taylor were none other than the contracts of complainant and others with Taylor, to secure to him repayment of moneys borrowed, with exorbitant rates of interest, and all of them were mortgage securities.

The bill, decree, and proceedings under it, were fraudulently set on foot by the said directors, unjustly and unlawfully to get the legal title to the tracts vested in a trustee in their behalf, so as to defeat the resulting trust and equity of redemption which the said purchasers had in the same, and to defraud complainant and the rest of them of their purchases. And complainant insists that the right of Taylor being only a mortgage interest, and the contract for the payment of the mortgage moneys not being assigned to the directors, the supposed conveyance of the legal title under the decree was nugatory and conveyed no right whatever, if it were otherwise legal.

It appears by said bill, and is true, that there was no executor or administrator of Taylor, or other person who could receive payment of the contracts with Taylor, or release them, so that if the transfer to Ferguson should stand, complainant is still liable to any executor or administrator of Taylor who may appear, without means of obtaining title, and the other said purchasers are in the same predicament.

If Taylor were the agent and trustee for the directors, and they were entitled to the proceeds of his operations, the only lawful and honest mode to avail themselves was to cause some person to administer in this State, collect the moneys due for the

loans, and to procure the heirs or devisees of Taylor to convey title, and to cause the administrator to account to them. The reason why they did not, and why they filed their bill was, they intended, by getting the legal title into a trustee for themselves, to defraud the complainant and the other purchasers of their equity of redemption, and, under color of having the legal title, to extort large and exorbitant sums not due, to get title, or if the purchasers refused or were unable to pay.

In pursuance of this plan, Ferguson, in September, 1845, demanded of complainant $2,385.60, for a conveyance of the two half sections, and upon complainant refusing, proceeded to oust him, and offered to sell to others.

The bill and decree were fraudulent in this, that the last installment in complainant's contract was not due at Taylor's decease, and he had not an opportunity to make payment to any representative of Taylor; and the other purchasers were in the same predicament.

Ever since the time for payment of the last installment, complainant has been willing and desirous to pay the $800, with legal interest, and get title, and he is now ready and willing, and offers to do it, and to pay any sum the court may decree.

Complainant was not a party to the bill of directors, nor were other purchasers, and he had no opportunity to defend his rights or prevent the decree, nor had the other purchasers, although according to rule, he and they were indispensable parties. The omission was fraudulent, and complainant insists that the decree was void as to him.

The defendants to complainant's bill, especially Robert Smith, Montgomery, Kirk, Ralston and Dennis, at all times since the entry of the half sections, had notice of the rights and claims of complainant, and of his possession of and residence upon the same under such claim.

On the 17th of June, 1850, Ferguson executed a deed of the half sections, except the quarter quarter section he had deeded to Kirk, with divers other tracts mentioned in the decree, purporting, in consideration of $1, to release them to defendant William Primrose, of St. Louis, with special warranty.

Charge that the contract was fixed to conceal usury, and give the contract the appearance of a sale and purchase.

By reason of the Sutphen suit, the directors and their agents becoming alarmed lest others might avail themselves of their equity of redemption, on the 8th of February, 1845, after proofs taken as aforesaid, filed their aforesaid bill in the Circuit Court of Winnebago county, and fraudulently omitted to make complainant and other purchasers parties, for the purpose of anticipating and forestalling them, and of defrauding and depriving

them of their equities of redemption, before they should be aware of the result or pendency of the Sutphen case, and thus prevent their redemption, and the directors obtained a decree by collusion with Ferguson and other defendants, to their bill.

Complainant's bill required defendants to answer under oath, in the usual form, and interrogates as to contracts of Smith, Montgomery, Ralston, Kirk and Dennis with Ferguson, and the payments made upon them; about claim, residence and possession of complainant, and the time when the defendants knew thereof; about their knowledge of Taylor's transactions and contract with complainant; whether, at the time of contracts, it was not a subject of common conversation in the neighborhood, that the complainant had entered the half sections as stated, and intended to insist on his right; whether they were not called "The Tallmadge lands," and whether Ralston did not come into the neighborhood of the lands and inquire into the title, and had not been told of complainant's possession and claims.

That said decree as to complainant and the half sections may be decreed fraudulent, null and inapplicable; that the conveyance of the half sections under it may be set aside, that complainant's equity of redemption may be declared, and account taken; a day be assigned for paying principal and interest into court for the use of the persons entitled to it, to be paid out when right to it is established; that Taylor's heirs, etc., and Ferguson and Primrose release and convey; and that possession be given; and for general relief.

The answer of Thomas Primrose admits the existence of a company in Scotland with directors, as stated in the bill, and that the business of the company was to invest their capital in property and securities, real or personal, in the United States, and that they contracted with William Taylor, as stated in the bill.

Said Taylor proceeded to the United States, located at the city of St. Louis, and carried on business for said company, and among other things, he made large investments of money in the purchase of lands in Illinois; attended the land sales at Galena, and there purchased large tracts of land, taking the title in his own name. That after the purchase, said Taylor made contracts with persons to sell them the lands purchased by him at said sales, but did not make loans to any person at that time.

Defendant denies having any knowledge or information of complainant ever having resided on the lands in question, or of having any dealings with William Taylor.

Admits that Taylor purchased the lands in controversy at the public land sale, and gave the contract set out in the bill, to complainant, but denies any loan having been made.

April 20th, 1846, a judgment was rendered in the Winnebago Circuit Court in favor of said Ferguson against said complainant in an action of ejectment, in consequence of which complainant abandoned said premises about November, 1846. Denies that complainant did the ordinary acts of ownership, such as cultivating, improving, etc.

Admits that Wm. Taylor died in March or April, 1842, having made a will as stated in the bill.

When Taylor died there were two installments due and unpaid on complainant's contract; from that time until the title of the lands became vested in said Ferguson, complainant might have paid either to Alexander Brand in Chicago, or to said Ferguson in St. Louis, who were authorized to receive the money due on said contract. Said complainant had not paid the taxes accruing on said land while he resided on it.

Admits the proceedings in chancery, decree, and conveyance to said Ferguson as stated in the bill, but that testimony was taken in the suit, and the proceedings were all in good faith, without fraud, and that complainant remained in possession of the land a long time after he had forfeited all right to the same by his contract.

Said Ferguson made a written contract with defendant Montgomery, dated June 26, 1848, to sell to him the west half of the south-east quarter of said Sec. 34, for the price of $480, payable $150 Nov. 1, thereafter; $165 Nov. 1, 1849, and $165 Nov. 1, 1850, with interest and the taxes; that said Montgomery paid all of the said purchase money prior to the commencement of this suit, except $114.63 which was paid Aug. 28, 1851, when a deed was executed to said Montgomery by this defendant, in whom the title then was. Montgomery had had possession of and had cultivated and made improvements and paid the taxes on said land since the date of his contract.

Said Ferguson made a similar contract with William Ralston, April 27, 1849, to convey to him the south-west quarter of Sec. 34, and the west half of the north-west quarter of Sec. 35, for $960, payable $320 down, $320 in one year, and $320 in two years, with interest and the taxes; that said Ralston at that time paid the $320, took possession of the land—paid afterwards, and before this suit was commenced, $358.40; May 5, 1851, he paid the balance, and Aug. 28, 1851, took his deed from defendant. He made a similar contract with defendant Kirk, Nov. 26, 1847.

June 27, 1849, Ferguson contracted to convey to Jas. E. Dennis the south-east quarter of the south-east quarter of Sec. 34, for $200; $50 was paid down, the balance payable, $75 in one year, and $75 in two years, with interest and taxes. Dennis

paid before the commencement of suit $114, and since $102.50, together with the taxes—has had possession since the date of his contract, and received his deed from defendant.

Defendant was not advised of the suit or proceedings in chancery until after the termination, but denies all fraud, and insists upon their legal effect to vest the title of the lands in the trustee appointed by the decree.

Complainant never paid or offered to pay the amount specified in the contract of sale of said Taylor, and after Ferguson became vested with the title, he brought a suit in ejectment against complainant, and obtained judgment, and complainant abandoned the premises, never having paid or offered to pay anything, even the taxes thereon. Soon after, Ferguson advertised the lands for sale until the lands were sold, and complainant took no steps to prevent a sale, or to assert his claims.

Ferguson conveyed the lands to defendant in good faith, and he never had any notice of complainant's claim until the commencement of this suit.

Defendant claims the benefit of the act entitled "An Act concerning conveyances of real estate," passed January 31, 1827, also an act of Congress entitled "An Act for the relief of purchasers of public lands," etc., passed March 31, 1830. Also that more than six years have elapsed since the making of the contract, before the bringing of this suit.

By the terms of the contract, Taylor or his grantees had the right to declare it forfeited, and Ferguson had so declared it long before the sale to said defendants.

The answer of William Ralston denies any knowledge of complainant's residence on the land in dispute, or of his desire or purpose to purchase it. Admits that it was originally entered by Wm. Taylor; that said Taylor died, and proceedings in chancery were had in behalf of David Chalmers et al. vs. Alexander Ferguson et al., to vest the title of the land in said Ferguson. On the 27th day of April, 1849, defendant purchased the land in question of Alexander Ferguson and Thos. Primrose for the sum of $960: paying for it $320 May 21st, 1849, and agreeing to pay $640 in two annual payments, with interest and taxes; said Primrose executing to him an agreement in writing to convey the land on payment of said amount. On the 26th day of May, 1850, defendant paid to Ferguson on the contract, $358.40, and May 5th, 1851, he paid the balance, $339.73, to Primrose, the grantee of Ferguson, and received from him a warrantee deed, dated August 28th, 1851.

Defendant entered into possession of the land about May 20th, 1849, and before he had any intimation of complainant's claim he had paid for purchase money $698.40, and for permanent im-

provements $320; and since service of the summons in this suit, $220 for improvements, and $22.02 for taxes.

Denies all knowledge of fraud in the chancery suit, and insists that it was instituted rightfully for the purpose of determining the title of the land, and defendant claims the benefit of the same as constituting a part of his chain of title.

Denies any knowledge of complainant having any claim to the land until the service of the summons and until defendant had paid out $998.40; at the time of the purchase the land was unoccupied and unimproved; defendant, before purchasing, carefully examined the public records of the county of Winnebago, which showed the title in said Ferguson, and there was no indication on record of complainant or any other person having any conflicting title or interest. Defendant claims the benefit of the statute entitled "An Act concerning conveyances of real property," approved January 31st, 1847, complainant not having had his contract with Taylor recorded within thirty days, nor before defendant's purchase.

Defendant also claims the benefit of the act of Congress entitled "An Act for the relief of purchasers of public lands," etc., passed March 31st, 1830. Defendant claims the benefit of the lapse of more than six years—Ferguson had declared the contract forfeited.

The answer of James E. Dennis admits that complainant some time resided on some part of the tract of land mentioned in the bill, but denies all knowledge of the existence, nature or extent of complainant's claim, or of his dealings with William Taylor.

June 27th, 1849, defendant bought of Alexander Ferguson the land in question for $200, paying down $50, and taking from him contract for a deed on the payment of the balance, with interest in two equal annual payments, together with the taxes.

Previous to the commencement of this suit defendant had taken possession of the land and had paid to Ferguson $114 of the purchase money, and afterwards he paid the balance, $102.50, to Thomas Primrose the grantee of Ferguson, and received from him a warrantee deed of it, dated April 22, 1851.

There was no improvement on the tract purchased by defendant; complainant had abandoned his residence in the neighborhood—the whole tract of land had been advertised for sale a considerable time before defendant's purchase.

In all other respects same as the answer of William Ralston.

The answer of James Montgomery states the purchase of the land being made by him June 24, 1848, and that he paid Nov. 18, 1848, $150; Nov. 21, 1848, $60; Oct. 2, 1850, $100; Nov. 1, 1850, $100; and the balance $114.63, Aug., 1851, and

received his deed. In other respects mainly the same as the answer of Ralston.

The answer of defendant Kirk shows that he purchased his land of Ferguson Nov. 22, 1848, and paid for it $320, and took his deed Nov. 2, 1849.

He built a house and made other permanent improvements on the land, to the amount of about $1,000. Previous to making the purchase, defendant had examined the records of the county and found no appearance of title in other person than Ferguson; and complainant had abandoned the land, and told defendant that he had abandoned his claim to it.

He admits the conveyance from Wight to Ferguson, and insists that the chancery proceedings were valid and cannot be impeached.

In other respects same as answer of Ralston.

Deposition of *Samuel Cook.* Witness is acquainted with the lands in question, and has been a good many years, and was as early as the winter of 1836 or 1837.

Should think there was some breaking done on the south-east quarter of south-west quarter Sec. 35, in the fall of 1836 or 1837. In 1837 or 1838, he broke some prairie on east half of south-east quarter Sec. 34, for Tallmadge. There was some fencing on the piece last described. There was a house on the west half of north-west quarter Sec. 35, previous to land sale in 1839.

Before the land sale, Tallmadge told me he claimed the two half sections, and I supposed he did, as no other person claimed to hold them. I claimed the whole or a greater part of the half sections, and sold it to Mr. Spoors for 1,000 rails in 1836 or 1837. Afterwards in 1836 or 1837, Mr. Spoors came to me with Tallmadge, and said if I would take him (Tallmadge) for the rails, he would give up the trade to him. I told him I would. Tallmadge furnished me the rails, and I considered the claim his. Tallmadge took possession in 1836 or 1837, built a house and put on the fencing before referred to, and lived on the premises with his family up to and for a number of years after the land sale. He commenced living on the land in the latter part of the year 1836 or 1837. (Answer objected to.)

The sale commenced in October, 1839. The notice was very short. Witness attended, and saw Taylor. He said to witness and to other settlers, he would enter their lands provided they would have them bid off in his name, and he would give a bond to deed after a certain number of years, in case they would pay him according to the stipulations in the bond. The rates as he gave them to me and some others, were that we should pay him $33 per year for each eighty, and at the end of the term $133. Taylor said to me and other settlers, that he would furnish us

the money to enter our lands for 33 per cent., if we would get the land entered in his name, and he would give us a bond for a deed. Taylor made such a contract with me and others in my presence. Was not present when Tallmadge's contract was made.

Witness has known defendant Robert Smith about ten years; Montgomery ten, Kirk twelve or fourteen, Ralston three, and Dennis eight or ten. They have all of them resided, except Ralston, in the neighborhood of the lands above referred to, since he became acquainted with them. Ralston has lived most of the time since I knew him on the premises above described.

It appeared in proof that there were two fields broke and fenced, and a house on the land in 1838. Tallmadge was living with his family in the house in 1838 or 1839. Both half sections, so far as he knew, were called one claim, and were called the Tallmadge claim.

That Robert Smith, Montgomery, Dennis and Kirk have resided in the immediate neighborhood of the Tallmadge lands. Kirk said he had bought eighty acres of the Tallmadge land, and had built a good house on it, and if Tallmadge got the land he would get a good house. The lands have always been called the Tallmadge lands.

John Dyer testified, that the two half sections were considered as one claim, and Asa Tallmadge was in possession of it, and claimed the same. He lived on the claim with his family as early as 1837, and had possession and lived on the premises up to and after the land sale.

That the loan to Tallmadge was to enter the land in question.

That Tallmadge resided on the lands after the land sale over three years.

That defendants Robert Smith, Montgomery, Kirk and Dennis have all of them, except Ralston, resided in the immediate neighborhood of the Tallmadge lands. Ralston lived about three miles from these lands previous to and up to the time he moved on the Tallmadge land, where he now resides.

One witness stated that he had some conversation with defendants Kirk, Ralston, Smith and Mongomery about Tallmadge's claim to the lands. Ralston said Tallmadge had forfeited his bond, and he did not think he could hold the land. He said Tallmadge had never paid any thing on the land, and had forfeited it, and he did not think he could hold it. The duplicate had been taken in Taylor's name, and he could hold it. Don't recollect what was said with Montgomery. Kirk seemed to carry the idea that Tallmadge stood a good chance to get the land back.

That when Tallmadge first went to Taylor, he said he wanted to hire money to enter the lands in question, and asked what terms he would enter it on, and what interest he asked. Tay-

lor said he should want thirty-three and one-third per cent. per annum for three years; said he would take the duplicate in his own name, and give him a bond for a deed. Tallmadge objected to giving so high a rate of interest, and tried to beat him down. Taylor said that was his rate, and would not let it go for a less rate; that he had the lands bid off in his own name, and gave bonds for deeds.

That the contract of sale from Taylor to complainant, was dated October 29, 1839.

Deposition of *Robert Montgomery.* James Montgomery resides about one mile from the Tallmadge land, and has lived there six or seven years. He is my father. Witness has lived with him since he resided there; Tallmadge had not left the lands when his father came into the neighborhood; and his father knew that Tallmadge lived on the land when he first came; don't recollect working on these lands, unless in the garden; his father got timber from the grove on the Tallmadge land, to build a house; don't know of whom it was purchased. Is acquainted with defendant Ralston; he was in the neighborhood but a few weeks before he purchased a part of the Tallmadge lands.

Deposition of *James Ralston.* William Ralston (defendant) is witness' father; he has resided on what is called the Taylor lands, about three years—the lands sometimes called the Tallmadge lands; he went there from about half a mile this side of Roscoe, in this county; he went to examine the lands before he purchased; thinks one or two days; Robert Smith, and John Smith, brother to Robert, went with him to show him the land. Defendant Ralston lived in Hamilton county, Ohio, before he moved to near Roscoe; left there four years ago last March, and had lived there about ten years.

George Pratt testified that he had been present at several times, at conversations between complainant and defendant Kirk; heard one at Kirk's house, in fall of 1851; heard them talk about this suit; heard each one say that they would not disturb each other about the property; that they should have no difficulty about the property; Kirk said he would not do anything to prevent complainant from getting the property, if complainant would not disturb him; Kirk said complainant ought to have some of the land or some pay; complainant said Kirk would not have any trouble from him, from the fact that he had told him to buy the land before he bought it; don't recollect what was said about future prosecution of the suit. Tallmadge said he would not disturb Smith; I think he said he would settle *with him;* he said Smith and Kirk were fine people, and he would not disturb them.

There is a stipulation of the parties attached to the record, that the bill of Tallmadge correctly sets out the original bill filed by said company; also the will of said Taylor; the deed from James M. Wight, commissioner, to said Ferguson, and the deed from Ferguson to said Primrose, and that the same were in evidence in the Circuit Court, as set out.

William Magoon testified that defendant Kirk was in possession of one eighty of the south half of Sec. 34 and west half of Sec. 35, Town. 45, Range 2. Montgomery of one eighty and forty, Dennis of one forty, and Ralston of some part. Complainant was in possession of the lands at the time of land sale. Mr. Tallmadge rode up with me from Rockford, to Mr. Kirk's house, and on the way we got into conversation about the land Kirk had bought, and at that time Tallmadge said to me that Kirk had told him he wanted to purchase that piece of land, and he said to him to go ahead and get it if he wanted it; this conversation was a year ago this fall.

Thomas Lake testified, complainant lived on some part of said land previous to the land sale in 1839; can't say when he left there; it was before Kirk took possession; understood he removed to the Kishwaukee, sixteen or eighteen miles distant; same lands are now occupied by Kirk, Michael, Ralston and Montgomery; the improvements on the lands at the time complainant left, consisted of a field that had been fenced, but the fence had been removed, and a house that he had lived in, of no value. Kirk has made improvements, worth $600 or $700; two-thirds broke, and a good frame house on it; enclosing and improving the land worth $200 to $300; these improvements have been made about three years. Ralston has built a house and enclosed a large field, about three years since; improvements worth $400 or $500. The house built by Kirk was a frame house worth about $300; the fence was worth $175, and the breaking $125; the estimate of Ralston's improvements was for his fencing and breaking.

Samuel Hovie testified that defendants Ralston, Kirk, Montgomery, Smith and Michael had occupied the lands for four or five years; complainant left them in 1846; were no improvements on the land when complainant left; witness estimates the improvements made by the defendants, about the same as the last witness; complainant took rails from that land; Tallmadge told witness once before he left the land, that Mr. Kirk had said to him, Tallmadge, that if he did not want to buy that land, he, Kirk, wanted to buy an eighty of it, and as near as I recollect, Mr. Tallmadge said he told him he might.

Wm. T. Kirk testified that he lived on the farm adjoining complainant, in DeKalb county; complainant had lived there

six or seven years last fall, and came there from his former place in Winnebago county; he was intimate with witness, and conversed freely about his affairs; he said he had once given up all hope of getting the land, but now was going to try for it; he had struck a new lead; this was about four years ago; he said Kirk was on the land and was improving it. Complainant was in the habit of visiting the lands frequently about five years since; he advised me to buy the quarter north of Kirk; about five years ago, witness said to complainant that Elisha Kirk wanted to buy the lot north of him; I do not recollect the precise answer he gave, but he said Elisha had better go and buy it, or something to that effect; he once said that there was an understanding between him and Elisha Kirk, that he should never disturb him.

Jason Marsh testified that he was attorney for Ferguson, in an ejectment suit against complainant; after judgment was rendered, complainant came to him and wished him not to issue a writ to get possession, for a certain time, and then he would leave voluntarily, to which witness consented.

Robert Smith testified that complainant told him that he was going to leave the land and go on to a claim he had on the Kishwaukee, and that witness might and had better buy it, if he wished to buy land; this conversation was in the spring of 1846, and he communicated it to the defendant Montgomery, before he purchased; also to defendant Kirk, soon after complainant told him, but he does not recollect whether it was before or after Kirk bought. Witness went over the land with defendant Ralston, before he purchased, and told him that Ferguson had the sale of it; Ralston was in the country about ten days before he purchased; there was no improvement on that part.

John Smith testified that he had known the land about eleven years; in the spring of 1846, complainant and defendant Smith, were walking over the land, and complainant told him if he was going to buy land, to go on and buy some of this, for he, complainant, did not intend to have anything more to do with it; complainant was then residing on the land; he remained there about six months afterwards; defendant Kirk went on to the land in 1846 or 1847; complainant moved to DeKalb county, and was in the habit of coming back into the neighborhood of the land for several years; he knew of the land being occupied and cultivated.

By the first decree it was ordered that the bill be dismissed as to defendants Kirk and Smith. That complainant be allowed to redeem the lands as against defendants Montgomery, Ralson and Dennis, by paying to them the moneys paid by them

before the filing of the bill, to Ferguson or Primrose, and for taxes paid by them, and the value of permanent improvements made by them before that time, charging them with the rent of the premises, and that it be referred to the master to take proofs and state an account.

It was finally decreed that defendant Ralston pay to complainant $396.70; being the amount for rents over and above the purchase money paid by Ralston, and that execution be issued for that sum May 1, 1858; that said Ralston convey said lands to complainant and give possession to him by said 1st May, or that a commissioner be appointed by the court to make the conveyance; that the defendant Dennis convey said land to complainant in the same manner; that defendant Montgomery make conveyance of his said land by the same time and manner, on condition of the said complainant paying him the said sum of $219.10 and interest by the said 1st May, and in case of default of complainant to make such payment, then he to be foreclosed of all equity of redemption in said premises; and that the complainant recover his costs against said defendants Ferguson and Primrose, and one-third of his costs against said defendants Ralston, Montgomery and Dennis severally. If Montgomery, Ralston and Dennis take appeal, complainant to have thirty days after it is disposed of, to pay balance to him.

From this decree there was an appeal by defendants Ralston, Montgomery and Dennis. Stipulation for the same record to be used by appellants and plaintiffs in error.

Errors assigned on the record by appellants are as follows:

In not requiring the complainant to bring the moneys into court, and in not dismissing the bill.

In not allowing the defendants' exceptions to the bill.

In allowing to complainant rents and profits on improvements made on said lands by defendants.

In rendering a decree for said lands to be conveyed to complainant, without requiring him to pay any purchase money.

In rendering a decree in favor of complainant against defendants Ralston, Montgomery and Dennis.

In rendering a decree for costs against defendants Ferguson, Primrose, Ralston, Montgomery and Dennis.

In not rendering a final decree in favor of defendants.

In not rendering a final decree in respect to the rights of defendants Ralston, Montgomery and Dennis, as against defendants Ferguson and Primrose.

JASON MARSH, for Appellants Ralston, Montgomery and Dennis.
JAMES M. WIGHT, for Appellants Ferguson and Primrose.

FRANCIS BURNAP, for Appellee.

CATON, C. J. Admitting that the original arrangement between Tallmadge and Taylor amounted to a loan of money, and that the title was made to Taylor in trust for Tallmadge, and to secure the money loaned, and it does not advance the case for the complainant in the least, till he brings home notice of those facts to the subsequent purchasers. The papers, on their face, show simply an entry by Taylor of the land at the land office, and afterwards, an agreement to sell the land to Tallmadge, on a credit of one, two, three and four years, making time of the essence of the contract. After the expiration of the term of credit, the payments not having been made, the parties holding the title of Taylor, brought ejectment against Tallmadge, and recovered of him the possession of the premises. After this, the present owners purchased the premises, paid the purchase money, took conveyances and possession, and made improvements, long before this bill was filed. It is unnecessary to examine whether the defendants purchased with a knowledge of the original contract of sale from Taylor to Tallmadge, for there is not in the whole of this record any fair pretense for saying that they had any notice of the secret parole understanding which would change it from an agreement to sell, into a security for a loan. If they were chargeable with notice of any thing, it was with the rights of the parties as they appeared on the face of the papers. If they knew that Tallmadge had a contract for the purchase of the land from Taylor, they also knew that he had forfeited all rights under that contract by not complying with its terms, and had even been ejected from the premises. If he had any equities, by which he was entitled to enforce a conveyance of the land, not apparent on the face of the papers, it was due to third persons that he should have interposed these equities in a proper mode at the time he was sued in ejectment. When he let judgment go against him in that action, without a pretense of either a legal or an equitable claim to the land, and without even a struggle,—when he afterwards abandoned the possession, and tore down the house, and carried off the fences, and left it without improvements,—when he proclaimed publicly that he intended to have no more to do with the land, and advised others to purchase of Ferguson and Primrose,—the subsequent purchasers certainly had a right to suppose that they were getting a title divested of any claim which he might have had to the premises.

The decree in this case will have to be reversed and the bill dismissed.

Decree reversed.

Asa Tallmadge, Plaintiff in Error, *v.* Elisha A. Kirk *et al.*, Defendants in Error.

ERROR TO WINNEBAGO.

See the preceding case for a statement of this.

Caton, C. J. This case is brought here by writ of error, by Tallmadge, upon the same record upon which the appeal was taken, in the case of *Ferguson et al.* v. *Tallmadge*, decided at this term, for the purpose of reversing that portion of the decree by which the bill was dismissed as to Kirk and Smith, two of the original defendants. So far from the court having erred in dismissing the bill, as to these defendants, we have in the case referred to, decided that it should have dismissed the bill as to all of the defendants. What has been there said is sufficient for both cases.

The decree must be affirmed.

Elias Nixon, Plaintiff in Error, *v.* Peter Weyhrich, Defendant in Error.

ERROR TO TAZEWELL.

In order to recover of the indorser of a note, it must be made to appear, that the maker was sued in good time, and that collection of the judgment against him was pursued with proper diligence; and if from the want of diligence the money was not, when it might have been, made from the maker, the assignor is released.

The diligence required in making the collection from the maker of the note, is such as a prudent man would use in the conduct of his own affairs.

If by the exercise of reasonable diligence, property of the maker of a note might have been found, sufficient to satisfy the debt, then the indorser is released.

This was an action of assumpsit, brought by Weyhrich against Nixon, at January term of the Tazewell County Court, A. D. 1858, to recover a sum of money against him as an indorser of a promissory note.

The plaintiff below sets out in his declaration that one Paul Goodale, on the 8th day of June, 1857, gave his note for the sum of $150 to said Nixon, payable on the 15th day of August, 1857, for value received; and that Nixon, before it became due, indorsed the note and then delivered it to the plaintiff; that at the first term of the court at which Goodale could be sued thereon, the plaintiff sued him and recovered judgment for the

sum named in the note, and that immediately thereafter, execution was issued on said judgment, against said Goodale, and delivered to the sheriff of Tazewell county, where Goodale resided, and that on the 23rd day of December, 1857, the sheriff returned the said execution, indorsed with the sum of $20.60, made by sale of horses, and no more property found; avers due diligence against Goodale, and that he could not collect the debt or any part of it, except the $20.60, and that therefore, the defendant, Nixon, was liable to pay him the amount of the note and interest, which he afterwards promised to pay, but which he refused to do; and the plaintiff added the common counts in his declaration.

The defendant pleaded specially, that since the suit was instituted against Paul Goodale, and the execution was issued against him, and the sale of the horses named, and on the day of the date of the execution, he had in said county, other property liable to said execution, consisting of lands and personal property; also, promissory notes and other sums due and owing to him, other and different property from the horses so sold, all of which the plaintiff, Weyhrich, then and there had notice, and that, therefore, he had not used due diligence and ought not to recover, and the defendant also plead the general issue.

On these pleas, the plaintiff, Weyhrich, took issue, and on the trial, read the record of a judgment in favor of Weyhrich on said note against Goodale, rendered at the October term of the Circuit Court of Tazewell county, 1857, for the sum of $155 and costs, and the execution issued thereon, with the indorsement, "came to hand the 2nd of November, 1857, and levied on one bay and one sorrel horse, 1st day of December, 1857; and received December 12th, on the within execution of sale of horses, $20.60; and no more property found," and showed that the same was then so returned by the sheriff. He then proved by the deputy sheriff, that he, (the deputy,) had called four times on Goodale, the said Goodale being a householder, residing with his family, at his residence, in Tazewell county, on the land hereafter named, and demanded property to satisfy the execution, and that Goodale turned out the property levied on by said execution, and so indorsed on it, and denied having any other property subject to execution, and that he knew of none.

On cross-examination, he said, there was other property, horses and wagons, in Goodale's possession, but Goodale represented that they belonged to other men, and that Goodale showed him some $1,200 worth of notes, on one and two years, which he said were on good men and that he would sell them to pay this debt to Weyhrich. The plaintiff further proved, by

one Parker, that as plaintiffs' attorney and at his instance, he made search of the records of the county, for real estate of Goodale, whereon to levy, and that he found two hundred and forty acres of land belonging to Goodale, subject to a mortgage of $3,200, which he thought, and so advised Weyhrich, was all the land was worth, but that he was not personally acquainted with it and did not know its value, and that he was advised that Paul Goodale lived on one eighty acre tract, and that he had paid $1,000 on the mortgage, and that the mortgagee had released the eighty acre tract from the mortgage. The note of Paul Goodale, dated 8th June, 1857, for $150, and indorsed by Nixon, the defendant, was read in evidence, and plaintiff rested.

Nixon then gave evidence, showing title in fee in Paul Goodale to the north-east quarter of Sec. 7, Town. 22 north, range 4 west, and the east half of south-west quarter of Sec. 25, Town. 22 north, range 5 west, subject to a mortgage dated October, 1856, for $3,200, to one Rupert, and that on the 21st day of September, 1857, $1,000 of the mortgage was paid by Goodale, and that one eighty acre tract of the quarter section was released by Rupert on the record, from the lien of the mortgage, on the 1st September, 1857.

The defendant then called one *Austin Melton*, who testified that he was well acquainted with the land named, that it was all good improved prairie, and was all worth from $25 to $30 per acre, and that Goodale resided on the eighty acre tract, and that he had three head of cattle, which he had raised, worth $60, and had a lot of hogs and farming utensils, but could not fix a value on them; one plow, worth eight dollars, and that he had two good horses and a new two-horse wagon, all together worth about $280, and one old two-horse wagon, worth ten dollars; that he lived a next neighbor to him, and that Goodale had all in his possession at his residence, and he used and claimed to own them ever since the witness knew them, which was about two years; no one else claimed them, and they were at his residence, in Tazewell county, at the date of the execution, and up to the time of the trial, and that these horses named by the witness were other horses, beside the ones levied on by the sheriff and sold under the execution.

Emanuel Purcell testified, that he knew Paul Goodale's property, and the horses and wagon named by the witness Melton; that the horses had belonged to Goodale about two years, and that the wagon was new; that Goodale offered to sell him one of the horses in the fall of 1857, and that the horses and wagon were worth about $285. He lived in the neighborhood, and never heard of any other person having the horses in possession or claiming them.

Stewart Hite, also a neighbor of Goodale, testified that he knew the cattle named by Melton, and the other property, and that the cattle and horses and the other property had always been on the farm of Goodale and in his possession, since he knew him, which was about a year; that Goodale had always claimed to own them, used and attended to them; that the cattle were worth about $60, and the horses and wagon were worth about $285, and that Goodale had also a set of harness for two horses. The witness knew of Goodale putting in winter wheat with a drill, on his farm, in the fall of 1857; he sowed about twenty acres, which, at the time of the trial, looked well, and that it was worth three dollars per acre. He knew the land named in the mortgage of Goodale to Rupert very well, it was good and improved prairie, and was worth now in cash $20 per acre, and would bring, on twelve months credit, $22.50 per acre, and was worth $20 per acre in cash, at the date of the execution; and that all of said property, real and personal, was, and had been since he knew it, in Tazewell county; and that the horses named by him were other than the ones levied on by the sheriff and sold under execution.

Tice Smith was called by plaintiff, who testified that in October, 1857, Goodale owed him a debt, and he took these horses on the debt; that he bought them in Pekin, where Goodale had brought them, and after the purchase he let Goodale keep them in his possession and take them home with him to use, Goodale agreeing to give him four dollars per month for the use, and that he had paid him for three months use of the team, which was, at the time of the trial, in Goodale's possession; which was all the testimony given in the cause.

The plaintiff asked the court to instruct the jury,

That if the plaintiff prosecuted the maker of the note at the first term after the note was due, and recovered judgment upon it at the said term, and had his execution issued to the sheriff of Tazewell county, (the county where Goodale resided,) and the sheriff returned the said execution, in whole or in part, no more property found, then the plaintiff is entitled to recover, unless the defendant had other property liable to execution, and that the plaintiff, or his agent, or his attorney knew of it.

That under the issue in this case the defendant must not only prove that the said Goodale had other property liable to execution, but that the plaintiff knew it, or his attorney—and if the defendant fails to prove that the plaintiff knew of said Goodale having said property, they must find for the plaintiff, even if they believe he had property liable to execution, out of which the debt might have been made. Which instructions were given by the court, and excepted to by the defendant.

The defendant asked the court to instruct the jury,

That if the jury believe, from the evidence, that Goodale had in his possession, liable to execution, personal property in said county which belonged to him, while the execution was in the hands of the officer, sufficient to satisfy the same, they will find for the defendant.

If the jury believe, from the evidence, that Paul Goodale had real estate in said county sufficient to satisfy the said execution, liable to execution, while it remained in the hands of the officer, they must find for the defendant.

If the jury believe, from the evidence, that Goodale sold the horses and wagon to Smith absolutely, and still kept possession of them, the sale is absolutely fraudulent and void, as against all creditors, and that they still remain subject to the execution, notwithstanding the sale.

If the jury believe, from the evidence, that the sheriff demanded property of Goodale to satisfy said execution, it was his duty to turn out the same to the sheriff, and if he did not then do it, he could not afterwards, if the property had been levied upon by the officer, claim it, under the statute, as exempt from execution.

The court then modified the first, by adding, "if they are satisfied that the plaintiff knew of said property;" and modified the second instruction of the defendant, by adding, "if the jury are satisfied that the plaintiff knew of said property;" to which modifications the defendant objected, and the court overruled the objection, then gave them all as modified, to which modification the defendant excepted; and the plaintiff also excepted to the giving of the defendant's instructions.

The jury found for the plaintiff, $151.85. The defendant then moved the court to set aside the verdict and for a new trial, because,

The finding of the jury was contrary to the law and evidence.

The finding of the jury was contrary to the instructions of the court.

The instructions of the court, given for the plaintiff, are contrary to the law, and the court improperly modified the defendant's first and second instructions.

The court overruled the motion to set aside the verdict and for a new trial, and rendered judgment for the plaintiff for $151.85, to which the defendant excepted.

B. S. Prettyman, for Plaintiff in Error.

A. L. Davison, for Defendant in Error.

CATON, C. J. This was an action brought against Nixon, as the indorser of a promissory note. The proof shows the recovery of a judgment against the maker, upon which an execution was issued, which was returned satisfied in part, and no property found to satisfy the balance. The proof in the case tends very strongly to show that the maker, at the time the execution was in the hands of the sheriff, was in the actual, open and notorious possession of an abundance of property, both real and personal, subject to the execution, out of which the amount thereof might have been made. The court instructed the jury that the plaintiff was entitled to recover in this action, unless he knew the maker had property out of which the balance due on the execution might have been made. This instruction we think was wrong. The statute, giving the right sought to be enforced by this action, is this: "Every assignor or assignors, or his, her or their executors or administrators, of every such note, bond, bill or other instrument in writing, shall be liable to the assignee or assignees thereof, or his, her or their executors or administrators, if such assignee or assignees shall have used due diligence by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill or other instrument in writing, as against his, her or their heirs, executors or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof. *Provided*, that if the institution of such suit would have been unavailing, or that the maker or makers thereof had absconded or left the State, when such assigned note, bond, bill or other instrument in writing became due, such assignee or assignees, or his or her executors or administrators, may recover against the assignor or assignors, or against his or their heirs, executors or administrators, as if due diligence by suit had been used." It was admitted, by the instructions asked and given for the plaintiff, on the trial below, that the simple institution and prosecution of a suit to judgment, and the issuing of an execution against the maker, was not necessarily and of itself, conclusive evidence of due diligence to collect the amount of the maker, for the court instructed that if the plaintiff knew of property belonging to the maker, out of which the money might have been made, then he had not used due diligence, and could not recover in this action. So far as it went this was undoubtedly right, but it did not go far enough. The plaintiff was bound to prosecute a suit against the maker, with due diligence, not only to judgment but also to satisfaction. The intention of the law is that the amount shall be made of the maker, if by reasonable diligence that can be done. Due diligence means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct

of his own affairs. If for the want of such diligence the money is not collected of the maker, it is designed that the loss should fall upon the holder and not on the assignor. And this should be so. The hands of the assignor are tied up; he has no control over the proceedings or the execution. Were the rule otherwise, by the neglect of the holder the loss of the debt might be thrown upon the assignor, for although he should go and pay up the amount at once, before he could get judgment against the maker to indemnify himself, the property which was ample when the first execution was out, might be beyond his reach. The instruction should have been, if the plaintiff, by reasonable diligence, might have known of property of the maker sufficient to satisfy the debt, then he could not recover.

The judgment must be reversed and the cause remanded.

Judgment reversed.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

NOVEMBER TERM, 1858, AT MOUNT VERNON.*

THOMAS L. COTTON, Plaintiff in Error, *v.* LEWIS REED *et al.*, Trustees of Schools, etc., Defendants in Error.

ERROR TO HARDIN.

However regular all anterior proceedings of a school teacher up to the time of presenting his schedule to the school directors, may be, under the law of 1855, unless the schedule is properly certified and presented in proper time, the payment for his services cannot be enforced against the trustees of schools by bill in chancery; if there is any remedy, it is by mandamus.

THE facts of this case are fully stated in the opinion of the court.

J. M. WARREN, for Plaintiff in Error.

LOGAN & ALLEN, for Defendants in Error.

WALKER, J. The facts of this case show that complainant taught a public school, and did all things required of him by the law to entitle the schedule of his school to allowance and payment out of the school fund. He had obtained the proper certificate of qualification, kept a regular schedule and presented it properly certified by him, to one of the directors of the school district, two days before the first Saturday in October. The director to whom it was delivered, also examined and certified

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* The remainder of the decisions of this term will appear in volume twenty-one.

to its correctness, as required by law, but neither of the other directors, owing to their absence, certified to its correctness before that day, nor was it presented to the township treasurer by that time. The defendants, as trustees of schools, refused to allow it or order its payment, because it was not filed with their treasurer by the day required by law. And the complainant, by his bill, seeks to compel the defendants to allow and order the payment of the money due him on this schedule by the township treasurer.

We have the question presented, whether the time is material when the teacher's schedule shall be certified and filed with the township treasurer, to entitle it to payment out of the public school fund. The act to establish and maintain a system of free schools, approved the 15th of February, 1855, Sess. Laws, p. 68, was in force when complainant was employed, taught this school, and the schedule was returned, and by it the rights of the parties are governed. The 50th section of that act provides the mode of certifying teachers' schedules, by the teacher and at least two of the directors, and when certified as prescribed, requires that they shall be filed with the township treasurer of schools by the directors. The 51st section, p. 70, provides that such schedules so certified shall, at least two days before the first Saturday of April and October, be delivered to the township treasurer. The 36th section, p. 61, after enumerating the funds to be distributed, provides that they shall make distribution, first, to the township treasurer, two per cent.; second, for the payment for the books of the treasurer, if anything be due for that purpose; third, for the payment of the expenses of dividing common school lands; fourth, "The balance they shall appropriate on the several schedules certified and returned from each school in the township according to law, in proportion to the number of days certified on such schedules respectively to have been taught since the last regular return day fixed by the act or trustees of schools."

The duties and powers of trustees of schools in the distribution of the school fund, are regulated by legislative enactment. In that respect they have no discretion whatever. They must distribute this fund at the time, and to the persons and for the purposes directed. They are compelled to pursue the requirements of the law. The language is peremptory that the schedule must be examined, corrected and certified by two directors or a committee appointed for that purpose, and filed two days previously to the first Saturday in April and October, and that the fund shall be distributed on the schedules certified and returned from each school in the township, according to law. This schedule wholly fails to comply with this requirement,

either as to the certificate or return. And the language employed leaves no doubt that the legislature intended that these provisions should be complied with to authorize money to be apportioned to the payment of teachers. If this requirement may be dispensed with, we can see no reason why any other provision of the act may not be disregarded. That such requirements should be imposed is perhaps necessary to protect the fund from waste, and may have been the considerations which influenced the legislature in adopting them. But we in this act find no authority either for the trustees of schools or the courts to disregard these provisions. And if the legislature shall be satisfied that such requirements work hardship and injustice, they will doubtless apply the corrective.

But it is urged that a court of equity should entertain jurisdiction and grant the relief sought, upon the grounds of accident. In an examination of the numerous authorities to which we have had access, we have been unable to find any authority to relieve a party from an officer's neglect in performing his duties. In such cases the officer is liable to the party injured, in an action at law for damages, and such remedy at law is complete. In this case all that is claimed as an accident, was no more than a neglect of duty by the directors. They had the power to appoint a committee to examine, correct and certify this schedule in their absence. This was a duty easily performed, and no reason is given for its non-performance. This is not the kind of accident against which courts of equity relieve. It was not an unavoidable accident, but on the contrary the means to avoid it were simple and easily performed, and were not employed. We are not able to perceive that a court of equity can entertain such jurisdiction.

But if the defendants had failed to perform a duty imposed upon them as officers, by the law, they may be compelled to its performance by a writ of *mandamus*. Courts of equity have no such power, and must leave the party to his legal remedy, by writ of *mandamus*, or action against the persons charged with the non-performance of duty which has produced the injury. 5 J. Ch. R. 232. Though the complainant in this case may be wholly blameless, and may have performed his entire duty, we think he is not entitled to relief in the mode sought, and that the court below committed no error in dismissing his bill, and the decree of that court must be affirmed.

Decree affirmed.

Thomas G. S. Herod *et al.*, Plaintiffs in Error, *v.* Michael K. Lawler, Administrator of John E. Hall, deceased, Defendant in Error.

ERROR TO GALLATIN.

Under the twenty-third section of Chapter 26, of Revised Statutes of 1845, entitled "Costs," if a fee bill is improperly taxed, the court is not required to quash the fee bill, or to impose any fine or penalty on the clerk, beyond the forfeiture of his fees of taxation, and the refunding of the amount wrongfully received on the fee bill.

Under the twenty-seventh section of Chapter 41, of Revised Statutes of 1845, entitled "Fees and Salaries," the clerk will only be required to restore the money collected on the illegal item.

The clerk may properly charge for the entry of each order or judgment under the same caption, when said judgments or orders might have been properly entered under separate captions.

This was a motion made in the Circuit Court of Gallatin county, against John E. Hall, as clerk of said court, to quash two fee bills, made out by said clerk, in a certain cause which had been determined in said court, wherein Herod and Colvard were plaintiffs, and Milton Bartley, administrator of Samuel Seaton, deceased, was defendant.

The fee bill of plaintiffs' costs contains the following items:

Filing 18 papers	.90
Entering plaintiffs' attorney's appearance	.10
Entering suit on docket three times, 30; two continuances, 40	.70
Issuing five subpœnas, 1.75; four witness' affidavits, 40	$2.15
Appeal bond, 50; entering demurrer to plea, 20	.70
Entering demurrer to amended plea	.20
Motion for new trial, 20; overruling same, 20	.40
Entering order for appeal, 20; swearing nine witnesses, 45	.65
Entering judgment, 25; entering satisfaction of judgment, 15	.40
Issuing execution, 40; docketing, 10; ent'g return, 10; filing, 5	.65
Making and entering bill of costs, 30; certificate and seal, 35	.65

To this fee bill is attached a certificate of the clerk and the seal of the court.

The fee bill of defendant's costs contains the following items:

Filing fifteen papers, 75; eight witness' affidavits, 80	$1.55
Ent'g appearance of administrator, 20; leave to amend pleas, 20,	.40
Issuing five subpœnas, 1.75; suggesting death of defendant, 20	1.95
Exceptions to deposition, 20; leave to amend pleas, 20	.40
Leave to withdraw pleas, 20; order for writ return, 20	.40
Order for detention damage, 20; swearing one witness, 5	.25
Making and entering bill of costs	.30
Certificate and seal	.35

To which is also attached a certificate and the seal of court.

The aggregate amount of said two fee bills is $91.10, for which an execution issued.

The return on the execution shows the payment of the costs.

The order of the court, in the cause in which the fee bills and execution issued, shows that there is contained in one entry the following:

The plaintiffs file their demurrer to the pleas of no property in the plaintiffs, No. 2; of property in the defendant, No. 3, and of property in James Layton, No. 4; the demurrers to said pleas Nos. 2 and 3, sustained, with leave to amend said pleas, and demurrer to plea No. 4 disallowed; defendant, by leave, amends pleas 2 and 3, and demurrer to said amended pleas; said demurrer disallowed, and plea No. 3 withdrawn.

The plaintiffs asked the court to quash said fee bill, for the following erroneous charges, to wit:

Certificate and seal	.35
Certificate and seal	.35
Entering demurrer to pleas	.20
Entering demurrer to amended pleas	.20
Leave to withdraw plea	.20
Leave to amend pleas	.20

The court, at the December term, 1854, found the item of 35 cents in each fee bill to be erroneous, and ordered the clerk to repay to plaintiffs the amount of such overcharges, seventy cents, and fined the clerk two dollars. The plaintiffs excepted.

N. L. Freeman, for Plaintiffs in Error.

T. B. Tanner, for Defendant in Error.

Walker, J. It appears from the record in this case, that plaintiffs entered a motion in the court below, to quash a fee bill and a cost bill, which had previously accrued in a cause in which they were plaintiffs, and Milton Bartley, administrator of Samuel Seaton, deceased, was defendant. On the hearing, the court held that the charge of thirty-five cents in each bill, for certificate and seal, was improperly charged, and ordered the clerk to pay the same to plaintiffs, and imposed upon him a fine of two dollars.

The plaintiffs insist that the court erred in not quashing the fee bills, and ordering the clerk to pay the amount of them to plaintiffs, because they contained the charges for certificates and seal, which were struck out.

In determining this question, it becomes necessary to examine some of the provisions of the statute regulating the taxation of costs in legal proceedings.

The twenty-third section in Chapter 26, R. S. 1845, page 129, provides that if any person shall feel himself aggrieved by the taxation of any bill of costs, by the clerk, he may apply to the court in which the proceeding was had, to tax the same according to law. And it also provides, that if the court shall find charges allowed for services not rendered, or for which the person charged is not liable, or any item overcharged, the court shall correct such taxation; and if the party aggrieved shall have paid such wrongful charge, the clerk shall forfeit all his fees for taxation, and shall pay to the party aggrieved the amount paid by reason of such wrongful charge. There is no provision in this section which requires the court to quash the fee bill, or to impose any fine, or that imposes any penalty on the clerk, beyond the forfeiture of his fees of taxation; nor does it require the court to compel the clerk to pay the whole amount of the fee bill to the party aggrieved, but only the amount he may have wrongfully paid on the fee bill. If the proceeding was had under this section, no error is perceived, of which the plaintiffs have any right to complain.

But it was insisted that the proceeding was had under the twenty-seventh section of the Chapter of Revised Statutes, entitled "Fees and Salaries," page 249. That section requires that the fee bill complained of, must have been paid, or replevied in the manner specified, before the court can proceed to quash it, impose the fine, and render a judgment for any amount. In this case there is an entire absence of proof that these bills of costs were either paid or replevied. It appears from the evidence, that the execution in the original suit was satisfied, but the return of the sheriff on it, in no way refers to the cost bills, and there is no other evidence of their payment, or that they were ever in his hands. And if the proceeding is under this section, as it gives a penalty, its provisions must be complied with before these penalties can be recovered.

But if the requirements of the statute had been satisfied, we do not think the clerk is liable to the party aggrieved for the whole amount of the bill of costs, when it may include an erroneous item. The section requires the court, when the case is presented in the manner provided, to inspect the fee bill; "And if it appear that any item or charge is contained in said fee bill, not authorized by law, or for services not actually rendered, the said judge shall proceed to quash such fee bill and bond, if one be given; and if the money has been collected thereon, he shall order the clerk to restore the same, and shall impose a fine on such clerk, in favor of the party injured, of not less than one dollar nor more than three dollars, for every item erroneously charged in said fee bill by said clerk." The whole question

turns upon what the phrase, "and if the money shall have been collected thereon," has reference to in the preceding portion of the section. It necessarily refers to a payment on the fee bill, or upon the item erroneously taxed, as it can have no other. The object of the two provisions is to prevent the taxation and collection of costs not authorized by law. By the one the court is, on motion, required to retax; and by the other, if items are erroneously charged, to quash the fee bill. By the first, the court is required to inflict, as a penalty, the costs of taxation; and by the latter, a fine of not less than one dollar and not more than three dollars, for each erroneous item charged. And the first requires the money, if paid on such a charge, to be returned to the party injured, and the latter the money "collected thereon." The striking similarity of the two provisions affords strong reasons to conclude that the legislature, by the latter intended to repeal no provision of the former, although they added other provisions, and give in terms other penalties. And we are unable to perceive any reason why such a difference should be made as is claimed. The injury resulting to the party paying the wrongful charge is the same. Both provisions, although in different chapters and adopted at the same time, and for the same purpose; and as there is no mistaking the meaning of the provision of the cost act, the provisions of the fee bill law should not be held to repeal its provisions, unless the language was clear. And that the provision of the last named section may as well be construed to require only the restoration of the money collected on the illegal item, as of the whole fee bill. And being susceptible of such construction, it should be given, rather than impose so heavy a penalty as the payment of the entire fee-bill, when it is doubtful whether such was the legislative intention.

It is again insisted that the court below erred in not quashing the fee bill, because it contained several separate items for entering different orders of the court in one paragraph under the same caption. The paragraph out of which the charges complained of originated, contained the judgment of the court on three several demurrers to pleas, granting leave to amend pleas and granting leave to withdraw pleas from the files. Each of these judgments of the court might have been entered under its own caption and in a different paragraph, and have been a full and complete judgment. But we are referred to a portion of the seventh section of an act of 1849, Sess. Laws, p. 78, amendatory to an act entitled "Fees and Salaries," which is this: "For entering each order or rule of court for continuance, default to plead, or any order actually entered in the progress of a suit, and counting the whole entry as one," the clerk may charge twenty cents. This provision clearly allows the clerk to

charge for each order or rule actually entered, counting each whole entry as one order. We are unable to perceive that an order or rule of the court is not as entire and complete, when fully entered in the same paragraph with other orders or rules, as if it were under a separate caption and in another paragraph. The legal effect is the same, the entry of the order is just as whole and complete in the one case as in the other. The object of the legislature must have been to prevent the clerk from making more than one charge for each order or rule of court, and not to compel him to enter each of such orders in a separate paragraph. We perceive no force in this objection.

Upon the record in this case, we discover no error for which the judgment of the court below should be reversed, and are of the opinion that it should be affirmed.

Judgment affirmed.

The City of Chicago, Relator, *v.* George W. Colby, Respondent.

APPLICATION FOR A MANDAMUS.

The second section of the act entitled "An Act to amend the charters of the several towns and cities in this State," approved March 1st, 1854, repeals so much of the act of 1851, as empowered the common council of the city of Chicago to order a sale of real estate to enforce the payment of assessments.

Special assessments and taxes are different, and the same rule of construction where the words are used in statutes, will not be indiscriminately applied to these terms.

The language used in the case of the *City of Chicago* v. *The Rock Island Railroad Company*, *ante*, page 286, qualified and explained.

The act of February 14th, 1857, amendatory of the city charter of Chicago, repeals the second section of the act approved March 1st, 1854, aforesaid.

The Cook County Court of Common Pleas and the Circuit Court have jurisdiction to render judgments for taxes and assessments; but the County Court, unless extraordinary powers have been conferred upon it, has not.

The grounds of this application for a mandamus, are stated at length in the opinion of the court.

Scates, McAllister & Jewett, for Applicant.

E. Anthony, for Respondent.

Walker, J. The petition for mandamus in this case alleges, that on the 5th day of October, 1855, the common council of the city of Chicago ordered that a survey be made, and notice

given, that the city intended to proceed to take so much land as would be necessary for the extension of La Salle street from its terminus on Madison street on a straight line through blocks 95, 96, 97, 116, 117, and 118, to Jackson street. And that the city surveyor proceeded forthwith to survey, mark out, plat and record in a book which had been provided for that purpose, the improvement and real estate required to be taken for that purpose. That due notice of the intended proceeding was given in the corporation newspaper, published in the city of Chicago, on the 20th day of October, 1855, for ten consecutive days. That afterwards, on the 12th day of November, 1855, and the 10th day of January, 1856, by an order of the common council, three reputable, discreet and disinterested freeholders of the city were duly elected by ballot, as commissioners to ascertain the damages and compensation due the owners respectively of such real estate as should be taken and appropriated for the opening La Salle street from Madison to Jackson street, in accordance with the survey, and to assess the amount, with the costs upon the real estate benefited by the improvement, as nearly as might be, in proportion to the benefits resulting to each parcel of ground. That the commissioners were qualified on the 16th day of January, 1856, and gave notice by advertisement in the corporation newspaper, that they would, on the 24th day of January, 1856, meet at the supervisors' room in the court-house in Chicago, at 10 o'clock, A. M., for the purpose of hearing testimony, and of examining into the damages and benefits resulting from such improvement. That the common council, on the application of the commissioners, on the 18th day of February, 1856, extended the time for them to report, for forty days, and afterwards, on the 24th day of March, 1856, further extended the time to report, fifteen days. That they made and returned the assessment roll of all lots or real estate damaged or taken, and all the lots and real estate deemed benefited by theimprovement, to the common council, and the same was filed in the city clerk's office on the 5th day of April, 1856. That the common council caused due notice of the assessment to be given by advertisement in the public newspapers of the corporation for ten days, that all persons interested might be and appear on the 21st day of April, 1856, before the common council, and make objections thereto, and that the common council would then and there revise and confirm the assessment roll; that on that day the common council did revise the same, and on the 9th day of June following, confirmed the assessment in every particular, and ordered that a warrant issue for its collection; that a warrant issued, directed to the city collector of assessments for the south division of Chicago for the years 1856 and 1857,

which bears date the 17th day of June, 1856, and was under the hand of the Mayor and the seal of the city. That George W. Colby was duly elected city collector of special assessments for the south division of the city of Chicago for the years 1856 and 1857, and qualified as such, and entered upon the duties of his office, and was, when the warrant issued, qualified and acting as such collector; that the warrant was delivered to him to execute, and that he entered upon the collection of the warrant and collected divers sums of money of the owners of the lots so assessed, amounting to $23,913.03; and that he was unable to collect the remainder of the assessment, and on the 21st day of July, 1856, made return of the warrant that he had demanded payment of the several owners of the lots so assessed, and that they had not paid the same, and that he had not been able to find personal property subject to the payment thereof, and unsatisfied as to all of the assessments not marked "paid." And that the common council then made an order of sale of the several lots, and parts of lots, and tracts of land, so assessed, for the amount assessed severally and unpaid on each, and that the warrant was redelivered to Colby, commanding him to sell the several tracts, lots, and parts of lots, for the collection of such unpaid assessments. That he advertised the lots, tracts, and parts of lots for sale for the assessments; that before the day fixed for the sale of the same under the order, to wit, the 6th day of September, 1856, the Board of Supervisors of Cook county sued out of the Cook County Court of Common Pleas a writ of injunction against the city of Chicago and Colby, restraining them from further proceeding to sell the real estate assessed to Cook county as block ninety-nine, being the court-house or public square, and they were further restrained by a writ of injunction issued from the same court, bearing date on the 29th day of January, 1857, at the suit of Volney E. Roscoe, from selling lots 3, 4, 6, 7, and 8, in block 109, for such assessment, and that other injunctions were threatened by other owners, if the collector proceeded to make sale; and to avoid further expense, it was agreed, that no further sales should take place until these cases were determined, and that the other assessments should abide the event of these suits. That the injunctions in those cases have been dismissed; and that petitioner has applied to Colby to proceed and sell the property, and collect the assessments, but that he neglects and refuses to make sale under the order of the common council.

By agreement of the parties, Colby enters his appearance, and waives the service of an alternative writ of mandamus, and makes return as if such a writ had issued and he had been duly served, and by his return he admits all of the material facts charged in

the petition, and agrees that if the court shall be of opinion that the facts warrant it, a peremptory mandamus may issue as though the return was to an alternative writ.

The question presented by this record is, whether Colby, who was the special collector of assessments, is authorized, under the order of sale made by the common council, to sell the land, lots and parts of lots, to satisfy the assessments severally due and unpaid, on this warrant. In determining this question it will be necessary to examine the provisions of several legislative enactments. By the provisions of the act of 1851, amendatory to the city charter, Chap. 8, Sec. 8, page 159, the authority is conferred upon the common council to direct the sale of real estate for the non-payment of taxes and assessments, by an order entered of record. Under this provision the common council had the right to make the order in this case, unless the provision of the act of 1851 was repealed by the act of the 1st of March, 1854; Scates' Stat. p. 201; the first section of which enacts, "That in all cases where taxes assessed on real estate by the corporate authorities of any city or town in this State, except in the city of Chicago, are not paid within the time fixed by the corporate authorities of any such city or town, it shall be lawful for the collector of any such city or town, after giving notice of such application, by advertisement, at least thirty days previously to such application, in some newspaper published in said town or city, or if no newspaper should be published in said town or city, then by posting up printed or written notices of such intended application in at least four of the most public places in such town or city, to apply to the County Court of the county in which such delinquent real estate may be situated, and cause judgment to be entered against such delinquent real estate for the amount of taxes due and unpaid, and costs," etc. And it further provides, that when the County Court shall render judgment, it shall issue its precept or order to the collector of such city or town, directing him to sell said real estate at public auction, etc. By the second section it is provided, that "In all cases where assessments have heretofore been made, or where assessments may hereafter be made, by the corporate authorities of any town or city, in this State, on any lot or real estate in such town or city, for the purpose of improving any street, sidewalk or alley in front of such lot or real estate, or for any purpose whatever, either by ordinance, resolution or other proceeding, and such assessment is not paid within the time fixed by the order, resolution or ordinance making such assessment, the corporate authorities of the several towns and cities in this State, may apply to the County Court of the proper county for judgment against said lot or real estate for the

amount of said assessment and costs; and the County Court, on such application being made, shall render judgment against such lot or real estate for the amount of said assessment and costs, and shall issue its precept to the sheriff of the proper county, commanding him to sell said lot or real estate, or so much thereof as may be necessary to pay said judgment and costs, in the same manner and with like effect as if sold upon execution at law," etc.

This latter act in no way affects the power of the common council to order the sale of real estate for the collection of taxes. The first section relates to taxes alone, and excepts the city of Chicago from its provisions, while the exception in terms is omitted in the second section. It was urged that by implication the exception extends to the second section also, as the same reason and necessity existed for its exception in the one as in the other. If the second section was in relation to the same subject matter, and only made some further provision in regard to it, the position would doubtless be correct. But the first section relates alone to taxes, while the second refers to assessments for the improvement of streets, sidewalks and alleys. This court has held that a special assessment is not a tax. *Canal Trustees* v. *The City of Chicago*, 12 Ill. R. 406. And the same distinction is again recognized in the case of *Higgins* v. *The City of Chicago*, 18 Ill. R. 281. Then if a tax and a special assessment are different things, no rule of construction would authorize us to hold that the same exception was intended to apply to the second section, that is expressed in the first, but on the contrary the fact that the city of Chicago is expressly excepted from the provisions relating to taxes, and is not referred to in the provision relating to assessments, raises a strong presumption that it was not intended to be excepted in the second section. The language employed in the second section is, likewise, comprehensive, in terms embracing all cities and towns in the State, and we think, in the absence of such an exception, the city of Chicago must be held to be embraced in its provisions. It then follows that the second section of the act of March 1st, 1854, repeals so much of the act of 1851, as empowered the common council to order a sale of real estate to enforce the payment of assessments; and any order for such purpose, made by them after the act of March, 1854, went into operation, would be unwarranted and inoperative.

The language used by this court, in the case of *The City of Chicago* v. *The Rock Island Railroad Company*, *ante*, p. 286, is too broad, and should have been limited to all orders of sale made by the common council prior to the time the latter act took effect. The language employed on that occasion was,

"That the act of 1851 was in force when the assessment was made and confirmed, and when the warrant was issued, and for several months after its return day. Colby, under that act had the undoubted right to return this warrant and procure an order of sale from the common council at any time before the passage of the act of February, 1857." That decision was made without any reference to the act of March, 1854, the statement appearing from the facts of that case that the warrant had not been returned, and it did not appear that the common council had ever granted an order for the sale of this real estate, while these facts do appear in the present application. That decision should be limited in so far as it holds that the common council had power to order a sale, or the collector to sell the property under such an order, after the adoption of the act of March, 1854, and so far as it holds the act of 1857 in force after the adoption of the former named act.

The question is then presented whether the act of March 1st, 1854, was repealed by the act amendatory of the city charter of Chicago, approved 14th February, 1857. By section 27 of that act, Scates' Stat. p. 892, it is provided that there shall be no special collectors of revenue and assessments appointed by the common council, other than assistants to the city collector, who shall in all cases be the principal in the treasury department.

The 40th section, ib. p. 902, provides that, "If from any cause the taxes or assessments charged in said assessment warrants are not collected or paid on lands or lots described in said warrants on or before the first Tuesday in January ensuing the date of said warrants, it shall be the duty of the collector to prepare and make report thereof to some court of general jurisdiction to be held in the city of Chicago, at any special vacation or general term thereof, for judgment against the lands, lots or parcels of land, for the amount of taxes, assessments, interest and costs respectively due thereon. And he shall give ten days' notice of his intended application, before the first day of the said term of the said court, briefly specifying the nature of the respective warrants upon which such application is to be made, and requesting all persons interested therein to attend at such time; and the advertisement so published shall be deemed and taken to be sufficient and legal notice, both of the aforesaid intended application by the collector to said court for judgment, and a refusal and demand to pay the said taxes and assessments."

The 87th section, ib. p. 911, repeals all parts of the act of which it is amendatory, and the several acts amending the city charter as are inconsistent with, or are repugnant to, its pro-

visions, but provides that all acts and parts of acts not inconsistent with its provisions shall remain in full force.

Then is the second section of the act of March, 1854, inconsistent with the provisions of the act of February, 1857, as regards the mode of collecting these assessments? The former act requires the corporate authorities to make application for an order of sale, and that such application should be made to the County Court, and the order should be applied for after the time limited by such city or town, for the payment of such assessment, had expired; and that the precept should issue to the sheriff, to be executed in the same manner as executions at law: while by the provisions of the latter act, the collector is authorized to apply for a judgment, and his application must be made to a court of general jurisdiction, to be held in the city of Chicago; and he can only apply for an order of sale for the assessments that remain due and unpaid on the first Tuesday in January ensuing the date of the warrant; and it also requires the process for the sale of the property to issue to the collector. Thus it is seen that the provisions of these enactments are clearly inconsistent and repugnant, as to the time when the application shall be made, the court that shall order the sale of the property, and the person who shall enforce the order of sale; consequently the act of February, 1857, repeals that of March, 1854, so far as it relates to the city of Chicago.

We held in the case of the *City of Chicago* v. *The Rock Island Railroad Company*, that the city collector was alone authorized, under the act of February, 1857, to apply for an order for the sale of real estate to enforce the payment of assessments. We do not perceive any reason to be dissatisfied with that decision, and are disposed to adhere to that construction. That act requires the collector to apply to a court of general jurisdiction in the city of Chicago for an order of sale. That the Circuit Court of Cook county is such a court, none will doubt, and we have held that the Cook County Court of Common Pleas is such, and we have no doubt either of these courts have jurisdiction to render judgment for taxes and assessments. But the County Courts of this State, as they are generally organized, are not courts of general jurisdiction, and unless by the organization of the Cook County Court, it has such general jurisdiction, it could not order the sale of property for the non-payment of taxes and assessments under the act of 1857; and we have been referred to no law conferring general jurisdiction on that court.

The application for a peremptory mandamus is denied.

Writ of mandamus refused.

Daniel Myers, Administrator of Simon Albert, deceased, Plaintiff in Error, *v.* John Malcom, Administrator of Joseph Malcom, deceased, Defendant in Error.

ERROR TO MARION.

The declaration made by a deceased party while living with a step-son, that he intended to give the step-son a note he held against him, does not give the step-son a legal claim to have the note surrendered to him, nor is it any defense to an action upon it.

Where parents have been living with a step-son, it is proper for a jury to decide, upon all the facts, whether the parents were to pay for their board, or whether they were living upon the hospitality of their relatives.

John Malcom, administrator of Joseph Malcom, deceased, sued Simon Albert on a note given by him to Joseph Malcom. Suit before Probate Court, and judgment for plaintiff below for $61.48. Defendant appealed to Circuit Court, and died. Daniel Myers, administrator of Simon Albert was made a party, and the cause was heard before Breese, Judge, and a jury, at August term, 1857. Verdict for plaintiff below for $108.57; motion for new trial denied; judgment for plaintiff.

The note sued on was as follows:

One day after date I promise to pay Joseph Malcom, the sum of one hundred dollars and seven dollars and fifty cents, for value received of him this April the 13th, 1855. Witness my hand and seal.

SIMEON ALBERT. [SEAL.]

There was a set-off by defendant as follows:

Malcom to Albert,	Dr.
To money paid going to Missouri	$200.00
To money paid for teams going to Chester	5.00
To use two teams seven days, at $2.50 each	35.00
To boarding and washing from first of April, 1855, to September, 1855, six months, at $16 per month	96.00
To same from October 1st, 1855, to February, 1856, four months, at $16	64.00
To 110 boards	1.00
	$401.00

Levi Albert testified for the defendant below, that he went with Malcom and Albert to Missouri and back; Albert paid *all the expenses there and back.*

Thomas Saunders. Knows that Albert went to Chester after goods for Malcom and himself—gone five or six days—went with two teams—one Simon Albert's and one Levi Albert's—*Malcom and wife* staid with Albert from first of May, 1855, until last of August or first of September, 1855, at another time

from March to September 1856—at one time four months, at another six months; board was worth $2.00 to $2.50 each, per week; Malcom and wife were very old and feeble, did nothing, were a great deal of trouble, etc. Don't think they contributed anything to support of family; old lady required a good deal of waiting on.

Hiram Torrey testified to same fact as last witness, and says further, their board worth $2.50 each, per week; saw two teams start to Chester; gone a week; teams worth $2.25 or $2.50 per day; one team Simon's, other Eli Albert's.

Eli Albert testified that Simon Albert went to Chester for old man Malcom's things, with two teams, one was Simon's, the other *witness's;* witness charged Simon for his team, $2.50 per day; gone a week.

Robert Malcom said he moved old man Malcom to Simon's, (defendant) in December, 1856; that old man died February, 1857; the old man wanted to go to Simon's, and Simon took him.

Anise Malcom. Knows that old man Malcom and wife boarded at Simon Albert's two months, from December, 1856, until in February, 1857; don't know what it was worth.

Mary Moore. Old man Malcom said he intended to give the note to Simon.

WILLARD & HAYNIE, for Plaintiff in Error.

S. L. BRYAN, for Defendant in Error.

CATON, C. J. The first item of set-off claimed in this case, is satisfactorily answered by the fact, that the intestate Malcom loaned the money to Albert to bear the expenses to Missouri, and for that money the note was given, upon which this action was brought. This circumstance conclusively shows, that it was the understanding of the parties, that Albert was to bear those expenses. As to the items for board of Malcom and wife, and transporting his goods from Chester, the question was fairly put to the jury by the instructions of the court, whether those services were intended by Albert as a gratuity to his father-in-law or not, and they have found that they were so intended, and we think that finding warranted by the evidence. We do not deem it necessary to review the evidence in the case at length, which leads to this conclusion. The relationship between the parties prepares the mind at once to believe, that Albert was extending towards his step-parents, when taking care of them in their old age, a gratuitous and grateful hospitality, rather than keeping them for the mercenary consideration of dollars and cents. The declaration made by Malcom, while there, that he intended to

give this note to Albert, shows that a sense of the relationship between them, and the kind attention and hospitality which he was enjoying from his son-in-law and daughter, were present to his mind, and of itself rebuts the idea that he supposed he was there as a boarder. We may regret that the old gentleman died before he executed this intention, but that cannot alter the legal question presented. Such declared intention created no legal claim in Albert to have the note given up to him, and no defense against the note in the hands of the administrator. The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

The Ohio and Mississippi Railroad Company, Plaintiff in Error, *v.* Sidney Dunbar *et al.*, Defendants in Error.

ERROR TO MARION.

A railroad company cannot relieve itself from liability by leasing its road; especially so where the power to lease is not expressly given by the charter.

Where parties hire the use of cars from a railroad company, to be employed in transportation of freight, to be laden as the hirers choose, the company does not incur any risk as to the mode adopted in loading the cars.

Common carriers are not liable for losses occasioned by an inherent defect of the article causing its destruction, nor for the loss of weight in cattle transported by rail; but every reasonable effort must be used to deliver property at its destination in proper time, and an omission to perform this duty creates a liability; and all proximate damages resulting from a neglect of it, may be recovered.

Plaintiffs below (defendants here,) filed their declaration in an action of "trespass on the case," containing three counts.

1st count demurred to, and demurrer sustained.

2nd count. That plaintiffs below, on, etc., at, etc., delivered to defendants a certain lot of hogs, viz., two hundred and forty-two, of value $2,000, at Salem, to be carried thence to Illinoistown, to be there safely and securely delivered for plaintiffs, and in consideration of certain rewards, etc., defendants undertook, and then, etc., promised they would carry and convey said hogs from, etc., to, etc., and there safely and securely deliver said hogs for said plaintiffs, and that they would furnish a suitable number of cars, to wit, five, and that they would start from the station house on the next morning, to wit, January 26th; avers that defendants received said hogs, etc., and did not furnish said cars, nor did they start on the next morning, nor safely and securely deliver the same at Illinoistown, etc.; refused to furnish cars; did not start for seven days; and so carelessly and

negligently did defendants conduct themselves, that thirty head of hogs, being crowded, etc., in pens and on cars, died and were lost, in consequence of the failure aforesaid. Plaintiffs lost a large amount of money, etc., by shrinkage, and hire of hands, from the time of delivery to defendants, to delivery to plaintiffs; expenses in renewing engagements, etc.

3rd count. That in consideration that plaintiffs had then, etc., delivered to defendants certain, to wit, two hundred and forty-two pork hogs, to be carried, etc., (as in second count,) and delivered to plaintiffs, for certain rewards, etc., the defendants undertook and promised to carry said hogs from, etc., to, etc., and there deliver the same for plaintiffs, in a reasonable time then following. Averment that defendants received the hogs, etc., but did not in a reasonable time, carry and convey said hogs from, etc., to, etc., and there deliver the same, etc., within said reasonable time, but neglected and refused so to do; in consequence whereof, plaintiffs lost thirty head of hogs and a large sum, to wit, $600, in loss of weight and trouble and expense, after the lapse of said reasonable time, in watching hogs in pen; were forced to lay out money, $100, to renew engagements, etc. Conclusion in case *ad damnum*, $1,500.

Defendants plead, 1st, general issue in case; 2nd, general issue in assumpsit; 3rd, a special plea. *Actio non*, because before the 25th January, 1856, or the accruing of the causes of action, in plaintiffs' declaration, defendants had hired and let their road, with fixtures, engines, cars, machinery, etc., to one G. W. Jenks, who, at the time when, etc., had entire control over the whole, and by his agents, etc., completely managed the same, free from control of defendants, and that the contract, etc., if any such was made, was with Jenks and his agents, then lawfully in possession and control of said road. Verification, etc.

Demurrer to third plea sustained; defendants stand by third plea; issue joined; jury, and trial; verdict for plaintiffs, $371.72. Motion for new trial overruled, and judgment on verdict; excepted to, and bill of exceptions signed.

F. A. Blair, defendants' witness, was station agent at the time plaintiffs came to the Salem station; that he was the only person who was authorized to make contracts for shipment of freight; never made any contract to ship hogs; would not do it. The company charged so much ($18.50) per car; have seen cars as closely loaded as these were; do not consider hogs in care of company till on cars; we could not have got the hogs away sooner than we did. It was extremely cold; had to keep men to bail water for passenger trains.

Andy Harmon was at station, working for defendants, when plaintiffs came with hogs; never made any contract with them; freight trains run very irregularly; very cold; water froze in tanks and pumps; impossible for us to get them off before we did; hogs put in cars by plaintiffs' consent. I stated at the time, the hogs were shipped at owner's risk, and the company would not be responsible for loss by crowding, but the owners must run that risk themselves; that they had the car at so much and loaded it as they pleased. I have seen more hogs in same cars than plaintiffs put in; they went well enough; freight trains ran no further than to Sandoval; the reason was, there was no water except at Carlyle, and they could only take water enough to run to Sandoval and back to Carlyle, and if they came to Salem they got out of water.

Verdict, $371.72. Motion for new trial, overruled and excepted to.

Errors assigned:

1st. The court erred by proceeding to try the foregoing cause, without an issue joined.

2nd. The court erred by proceeding to try issue joined upon the plea of *not guilty* in case, and *non-assumpsit* filed in this cause.

3rd. The court erred in sustaining plaintiffs' demurrer to defendants' third plea.

4th. The court erred in refusing to carry demurrer back to plaintiffs' declaration, and sustaining it to said declaration.

5th. The court erred in admitting testimony for plaintiffs.

6th. The court erred in refusing to allow testimony offered by defendants, to go to the jury.

7th. The court erred in giving improper instructions to jury, for plaintiffs.

8th. The court erred in refusing proper instructions asked by defendants.

9th. The court erred in overruling defendants' motion for new trial, and entering judgment for plaintiffs, on verdict of jury, and against defendants.

Wherefore defendants pray that said judgment be reversed, set aside, annulled, made void, and a new trial granted, etc.

I. N. Haynie, for Plaintiff in Error.

S. N. Bryan, and R. S. Nelson, for Defendants in Error.

Walker, J. In this case, numerous exceptions were taken on the trial below, but we shall confine our attention to those only which were urged in the argument. We are asked to re-

verse the judgment of the Circuit Court, because the plaintiffs' demurrer to defendants' third plea was sustained. That plea alleged, as a defense to the action, that the defendant had, prior to the 25th of January, 1856, leased their road, engines, cars, machinery and fixtures, to G. W. Jenks, who had entire control of the road, free from any control of the defendants, and that the contract, if any such were made, was with Jenks and his agents, and not with defendants. This plea presents the question, whether an incorporation of this kind has the legal capacity to lease its corporate property and franchises, so as to be relieved from liability to the public for injuries sustained and damages resulting from breach of contract entered into by the lessee.

The question seems to be new, and we have been referred to no authority sustaining the position, nor have we been able to find any. And in determining this question, it may be well to advert to some of the general principles which govern bodies of this character. They undoubtedly derive all of their privileges, as well as their existence, from the power that creates them; and we must look to their charter for their power to act. The privileges of such bodies must be either expressly or impliedly granted. The rights and privileges legally exercised by them are exclusive in their nature, and for that reason they should be held strictly to act within the powers granted. It will not do to say that it is more convenient, more profitable to the company, or that it would render the company less responsible, to act in a particular manner, that we may infer such authority. Power to act in a particular manner, can only be inferred when such act is necessary to perform an object expressly authorized, and the mode of its performance is not specified; or when the exercise of the power claimed is necessary to accomplish the object of the company's creation. When these bodies accept their charters, they are held to enter into a contract with the State, to discharge all the duties imposed, and to exercise the rights and privileges conferred on them, in the manner prescribed. And they must be held to a performance of this contract in precisely the same manner as is required of individuals.

The sixteenth section of the charter of this company, (Private Laws, 1851, p. 94,) authorizes them to borrow money, in such sums as may be necessary, for finishing and operating their road; to issue and dispose of the bonds of the road for money so borrowed; to mortgage their corporate property and franchises, or to convey the same by deed of trust, to secure the payment of any debt contracted by the company for such purpose. While these powers are extensive, it will hardly be con-

tended that they confer any power to lease the property and franchises of the road, so as to release the company from liability for the non-performance of duties devolving upon them as a corporation. We are unable to perceive that it is necessary that they should lease the road and franchises, to perform any act expressly authorized by their charter, or to effectuate the objects of its creation. Other sections of their charter authorize them to make, ordain and establish all by-laws, rules and regulations necessary to carry out the powers conferred; to regulate the manner of transportation of persons and property; the width of their track; the construction of wheels; the form and size of the cars; the weight of loads, and all other matters and things respecting the use of the road. It will be observed that the legislature has been specific in the enumeration of the powers granted, but in them all, we nowhere find any, either expressly or impliedly giving this power to lease their road so as to release them from liability. If such leases may be made, and the effect claimed results from them, railroads may avoid all liability to the public. And if such leases should be to irresponsible and reckless persons, the remedies for wrongs inflicted, duties omitted, and contracts violated by the lessee, would not be worth pursuing. That the legislature intended to confer such power on these companies, we do not believe. And we therefore think the court below committed no error in sustaining the demurrer to the plea. But we do not undertake to determine whether a railroad may make such a lease as would authorize the lessees to run and use such roads or not, as that question is not presented by the record in this case.

Exceptions were taken to the giving of plaintiffs' instructions. The second of these is, "That if the jury believe, from the evidence, that the plaintiffs, for the want of a sufficient number of cars, were compelled by necessity to ship in four cars, which were insufficient, the fact of the agent telling them that they shipped at their own risk, does not relieve defendant from liability for failing to supply the proper number of cars." If this property freighted on defendant's road, is to be governed in all respects by the rules governing common carriers, and plaintiffs' having hired cars to freight these hogs, will not have any effect on the rule, then the instruction was properly given. But it must be admitted that plaintiffs had the right by contract to hire the use of cars to freight their hogs from Salem to Illinois-town, and to load the hogs in such manner as they might choose. And by doing so the company could incur no risk as to the mode plaintiffs adopted in loading the cars. That would be entirely under their control, and they would be responsible for their want of judgment in so doing. There was evidence in this case

without any conflict, that plaintiffs had hired cars of the company to ship these hogs, at eighteen dollars and fifty cents for each car, and that while loading them they were informed that they loaded them at their own risk. If this evidence was true, we think the plaintiffs, when they had contracted for more cars than were furnished, should have insisted upon the contract, and if they did so, they would have the right in a count on this contract to recover for the damage sustained by its breach. But under the counts in the declaration in this case, plaintiffs had no right to recover damages for a breach of such contract. And we are therefore of the opinion that this instruction should not have been given.

The sixth instruction is this, "The court is asked to instruct the jury, that if they believe, from the evidence, that defendants ordered the plaintiffs to put their property in the cars for transportation from Salem to Illinoistown, then the defendants are liable as common carriers for all damages done to property of plaintiffs while in their care and possession; and if the jury believe, from the evidence, that by the delays, carelessness or negligence of defendants, the plaintiffs, without their fault, have sustained damages, they should find for the plaintiffs and fix the damages according to the evidence of the case." The doctrine seems to be well settled that common carriers are not liable for losses occasioned by an inherent defect of the article causing its destruction. Addison Contracts, 807. And this principle applies to live stock in so far as they are liable to decrease in weight from this mode of transportation, and this instruction should have been so modified, and with that modification it would have been proper. The defendants, after receiving the property, were bound to use every reasonable effort without delay to deliver it at its place of destination, and failing to do so, were liable as common carriers for the damages resulting from such neglect of duty. The law implies such a promise on their part. But this liability would only extend to immediate and proximate damages, growing out of the non-performance of their implied contract, and not to such as are remote or contingent. If plaintiffs had a contract for the sale of these hogs at St. Louis, and the defendants, by their unnecessary delay, rendered it necessary for plaintiffs to go to St. Louis to get the time of delivery extended, we see no reason why, as the damages are specially laid in the declaration, that they should not be recoverable. But the evidence as presented by the bill of exceptions leaves it doubtful whether there was a contract requiring the delivery of the hogs at an earlier date than they arrived at their destination; or whether the extension might not have been obtained by other less expensive means than by going there in person.

We are unable to perceive any objection to the other instructions given, as they seem to correctly announce the law of the case.

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

Judgment reversed.

The Ohio and Mississippi Railroad Company, Plaintiff in Error, *v.* William E. Middleton *et al.*, Defendants in Error.

ERROR TO MARION.

Where a party proceeds to trial upon a replication, which he insists is not an answer to his plea, without demurring to, or moving to strike it from the files, he will be held to have admitted its sufficiency.

In declaring on a contract executed by an agent, the contract may be described as having been signed by the principal, or by his agent for him.

When it is doubtful whether the contract was intended to bind the principal or the agent, extrinsic evidence may be received to ascertain the intention.

The ratification by the principal of a contract of the agent, amounts to a waiver by the principal of a want of authority in the agent.

This was an action of "trespass on the case on promises" by defendants in error against plaintiff in error. Declaration contained three counts. Damages, $500.

1st count, is upon a *special contract*—charged and averred to have been made by plaintiffs, by Wm. P. Whittle, their agent, who signed said contract by B. B. Thomas, his agent—to the effect following: That the said plaintiffs below agreed to dig a well for the use of the Ohio and Mississippi Railroad Company, defendants below, at the side track to be laid out by defendants below, at Middleton depot, in Marion county, Illinois. Well to be dug twelve feet in diameter, until rock of sufficient strength is reached to support a wall one foot thick—of height to reach surface—and was to be built as directed by the engineer in charge of the work at that point. Then the well was to be ten feet in diameter until water was reached of sufficient quantity for the purpose aforesaid—said well to be dug and walled as required by engineer in charge of the construction of the work, for the following consideration, to wit: $10 per foot for the first twenty feet dug and walled as required, etc.; $12 per foot for the second twenty feet; $15 per foot for the third twenty feet; and $3 per foot additional for each twenty feet thereafter. Defendants were to furnish a force pump and a chain pump, if

necessary, to keep water out of well while at work—furnishing pumps *discretionary* with defendants' engineer—plaintiffs not bound to dig more than one hundred feet, nor bound to finish well if life endangered by the *gas* or *damp;* this to be decided by defendants or their engineer. Averment that in consideration of plaintiffs' (below) promise to perform, etc., defendants undertook and promised to fulfill their part, etc. Averment of performance by plaintiffs below, under inspection of engineer in charge, and approved by him; that it was dug deep enough to supply sufficient water, etc., and was so determined by said engineer, and all of said work was approved by said engineer, and received by him for said defendants below as completed. Averment that said contract was executed by Whittle, by B. B. Thomas, on defendants' behalf. No breach to first count, and no averment that it was delivered to plaintiffs.

2nd count, For that, etc., defendants on the 16th of February, 1855, made, etc., and delivered to said plaintiffs their certain other contract, in writing, dated February 16th, 1855, which said contract, etc., the said plaintiffs aver, was executed on the part of said defendants, and at the special instance and request of said defendants, by the agent of said defendants, Wm. P. Whittle, signed and abreviated thus, "Wm. P. Whittle, by B. B. Thomas," in consideration of the promises of defendants, and on behalf of defendants, and at special instance of defendants, etc., the plaintiffs agreed to dig a well for the use of defendants, at the side track to be laid out by said defendants by the said Wm. P. Whittle, or his assistant, at a place in Marion county, called Middleton depot; said well to be dug twelve feet in diameter till they struck rock, etc., sufficient to support wall one foot thick, etc., to be built as directed by the engineer in charge, etc., then ten feet in diameter until water sufficient for the use of Ohio and Mississippi Railroad Company was found; said well to be dug and walled as required, etc., for the following consideration: $10 per foot for first twenty feet; $12 per foot for second; $15 per foot for third; and $3 additional for each twenty feet thereafter—that is to say, $3 additional to the last named sum of $15 per foot. And it was further agreed that if water sufficient to retard the digging of said well was found, and not sufficient for the purposes named, etc., then defendants were to furnish plaintiffs a chain pump free of charge, to be furnished, however, at defendants' discretion, etc. Further that plaintiffs should not be bound to dig more than one hundred feet, etc., and were not bound to finish the same if gas or damp endangered life, to be decided by defendants. Plaintiffs aver that they, at special instance, etc., of defendants, and

upon the consideration, undertaking and agreement of said defendants in said contract, executed said contract. Plaintiffs aver that they dug well fifty-four feet, and were then notified by defendants not to dig any deeper, because there was water sufficient, etc., and thereby completed, walled and finished said well, and *delivered possession* to defendants, and it was, on the 1st of November, 1855, *accepted* by defendants. Averment that defendants broke their agreement in this, to wit: That plaintiffs found water sufficient to retard digging and not sufficient for the use aforesaid, and notified defendants thereof; that the engineer in charge declared a pump necessary, and said defendants then, etc., promised to furnish a chain pump, as bound, etc., by said contract. Averment that defendants failed to furnish a chain pump, etc., whereby an action accrued to plaintiffs, to demand, etc., $400.

3rd count, Indebitatus assumpsit, on 1st April, 1856, for digging and walling well, $500—common conclusion; damages, $500.

Defendants plead general issue, and joinder, and three special pleas as follows, to wit:

Special plea, to 3rd count, to wit: That the work, etc., was done under a written contract between Wm. P. Whittle and said plaintiffs, dated 16th February, 1855, and that other than under said contract they never dug any well at Middleton depot, or elsewhere, for use of said road, etc.

2nd special plea to 1st count, *actio non*, because the work therein (1st count) mentioned, if done at all, was under a written contract with Wm. P. Whittle, and not otherwise, etc. Verification, etc.

3rd special plea to 2nd count, *actio non*, because the chain pump was to be furnished under agreement between Whittle and plaintiffs, and was to be so furnished at Whittle's discretion, and not by defendants.

Replication as to 2nd, 3rd and 4th pleas, *precludi non*, because they say, that by virtue of the said contracts in the said plaintiffs' declaration mentioned, in manner and form as therein set forth, the said defendants did undertake and promise as alleged therein in the said declaration, etc.; conclusion to the country, etc.

No issue joined on this by defendants.

B. B. Thomas testified, for plaintiffs below, that in December and January, 1855, he was assistant engineer under Wm. P. Whittle, on the Ohio and Mississippi Railroad; that said Whittle authorized him to sign his (Whittle's) name to an agreement with plaintiffs, to dig a well at Middleton station, on the Ohio and Mississippi Railroad; witness did not write the agree-

ment, except the latter clause; witness had a minute in a memorandum book of what he wrote. Mr. Whittle did not give witness written authority.

Witness was then asked by plaintiffs, "for whom he executed the contract sued on, whether for Whittle or the company." Defendants objected to the question, court overruled objection; witness stated that he believed he executed or signed Whittle's name for the Ohio and Mississippi Railroad Company, as the well was for the use of the company. Defendants excepted to decision of court, in overruling their objection, and admitting said testimony at the time. Plaintiffs then offered the following instrument in evidence, being the instrument alluded to by witness Thomas, viz:

STATE OF ILLINOIS, }
CLAY COUNTY. } An Article of Agreement, made and entered into the fifth day of January, A. D. 1855, by and between W. E. Middleton, and L. L. Morgan, of the first part, and William P. Whittle, (res'd. engineer, on Ohio and Mississippi Railroad,) of the second part, that party of the first part hereby covenant and agree to dig a well for the use of the Ohio and Mississippi Railroad, at the side track to be laid by the said party of the second part or his assistant, in Marion county, Illinois, known as the Middleton depot; said well to be dug as follows: twelve feet in diameter, until they strike rock of sufficient strength to support a wall one foot thick, and of sufficient height to reach surface of the ground, (and to be built as directed by the engineer in charge of the work,) then the party of the first part shall dig but ten feet in diameter, until water is found sufficient for the purpose named above; said well to be dug and walled as required by the engineer in charge, for the following consideration, to wit: The party of the second part, hereby covenants and agrees to pay the said party of the first part ten dollars for each foot for the first twenty feet dug and walled as required by the engineer, and twelve dollars for the second twenty feet, fifteen dollars for the third twenty feet, and three dollars per foot additional for each twenty feet thereafter. And the party of the second part further agrees, that if the said party of the first part shall find water sufficient to retard the digging of said well, and not sufficient for the purpose named in this contract, then said party of the second part will furnish said first party with a chain pump free of charge, but it is the understanding of the said parties, that it shall be left to the discretion of the second party, when said pump is necessary that *he* shall furnish it at *his* discretion, it being understood that the said party of the first part shall not be bound to finish said well, if the damp or gas shall arise sufficient to endanger the lives of persons employed to do such work; said party of the second part shall decide whether or not such is the case, or if it is or shall be dangerous for such hands.

Witness the hands of said parties, at Xenia, this the sixteenth day of February, A. D. 1855.

WM. E. MIDDLETON.
L. L. MORGAN.
WM. P. WHITTLE,
By B. B. THOMAS.

Witness, C. D. BROWN,
WM. ELSTON.

Defendant objected to the introduction of said instrument as evidence; the court overruled the objection, allowed it to be read, and defendant excepted, etc.

B. B. Thomas, continuing, stated that he made two estimates of work done on Ohio and Mississippi Railroad, and returned them to Whittle, and I suppose they should go to Walker, engineer in chief; believe work was done by plaintiff on well. Witness said he remembered no payment, but presume he made a payment; might have taken a receipt and it might have gone to Whittle; *I received the money from him*, Whittle; was not properly the *person to pay money* for said company, on said work. Witness had made payments several times for Whittle on contracts for Ohio and Mississippi Railroad Company, and other payments; Mr. Whittle told me to do so; paid some on trestle work for the company, I believe, of money received from Whittle. To all which testimony defendant objected, and moved court to exclude it, but court overruled motion, and defendant excepted.

There was a verdict for $635; remittitur of $332 by plaintiffs; motion for a new trial, and in arrest, overruled by the court, and judgment entered for plaintiffs for $303, to all of which defendants excepted.

Errors assigned:

The court erred in admitting testimony objected to by defendants below.

The court erred in refusing to sustain motion of defendants below to exclude evidence.

The court erred in entering judgment for plaintiff below, against defendants below.

The court erred in proceeding to trial without issues on defendants' special pleas.

Wherefore, etc., plaintiff in error prays that the same be set aside, reversed, etc., and judgment arrested, etc.

Isham N. Haynie, for Plaintiff in Error.

S. L. Bryan, for Defendants in Error.

Walker, J. The appellant urges the reversal of this judgment upon the ground that the appellee's replication is no answer to appellants' special pleas. The declaration counted on a contract of appellant, and the filing of the general issue put the appellees upon the proof of the contract declared on, or under the common count, the proof of a contract of appellant, either express or implied. They could not recover on the contract of another person. These pleas alleged that the work

sued for was performed under a contract with Whittle. If these pleas amount to anything, it is an argumentative denial that the contract sued on was that of the defendant, and that fact was directly traversed by the general issue. These pleas, only in a different form, traversed what had been put in issue by the plea of non-assumpsit, and the replication only reaffirmed what had been averred in the declaration. And whether it was an answer to the pleas or not, could make no difference, as neither it, or the pleas, in the slightest degree changed the right of either party, under the issue already formed. And the appellant having proceeded to trial under this replication tendering an issue to the country, and having failed to demur or to move to strike it from the files, must be held to have admitted its sufficiency. This objection is not well taken.

It was again objected that the agreement was improperly admitted in evidence under the declaration in this case, because it was not signed by the company. It is a rule of pleading, that in declaring on a contract executed by an agent, that the contract may be described as having been signed by the principal himself, or as signed by his agent for him. *Nickleson* v. *Croft*, 2 Burr. R. 1188–9. It then becomes necessary to determine whether this contract was that of the defendant, or that of Whittle. It seems, from the evidence in the case when taken together, that the intention of the parties was to bind the company, and not Whittle.

But it is insisted that the court could not receive extrinsic evidence to explain that intention, and that the instrument alone could determine the question. The principle is familiar, that the contract made by the agent as such, is the contract of his principal, and that the former is the instrument by which the contract is effected, and he is not clothed with any legal interest in it, which can render him responsible on the agreement, although in some instances he may sue in his own name. 1 Chit. Pl. 34. And it has been held, that where an agent fails to disclose that he is acting merely as an agent, and the principal is unknown, the latter may, when discovered, be sued on the agreement. 1 Chit. Pl. 39. To bind the principal by the contracts of his agent, it is not material whether they are verbal or in writing, unless required to be in writing by the statute of frauds, the question being, to whom was the credit given, to the agent or to the principal. If, from the agreement itself, it clearly appears that the intention was to bind the agent and not the principal, the agent is held to be liable. But when from the whole instrument there is doubt whether it was the intention to bind the principal or the agent, courts have held that extrinsic evidence may be received to ascertain the intention.

In the case of *The Mechanics' Bank* v. *The Bank of Columbia*, 5 Wheat. R. 326, the Supreme Court of the United States held, where the cashier of the Mechanics' Bank had drawn a check on the Bank of Columbia, signed by him, in his own name, without any addition to indicate that he signed it officially, that as it was doubtful on its face whether it was an official or a private act, parol evidence was admissible to show that he signed it in his official character. In that case the circumstances appearing on the face of the check, which must have been relied on to create the doubt, were, the making it payable *to order* instead of *to bearer*, and its bearing date, "Mechanics' Bank of Alexandria," as there is nothing else distinguishing it from ordinary checks drawn by individuals. The court say, "The only ground on which it can be contended that this check was a private check, is, that it had not, below the name, the letters *cas.* or *ca.* But the fallacy of the proposition will at once appear from the consideration, that the consequence would be that all of Paton's checks must have been adjudged private. For no definite meaning could be attached to these letters without the aid of parole testimony.

"But the fact that this, on its face, appeared to be a private check, is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief that it is a corporate and not an individual transaction; to which must be added the circumstances that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from by the substitution of *to order* for *to bearer*. The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction," etc. "But it is enough for the purposes of the defendants to establish that there existed, on the face of the paper, circumstances from which it might reasonably be inferred that it was one or the other."

"It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the exercise of the duties of a general agent, the liability of the principal depends upon the facts, 1st, That the act was done in the exercise; and 2nd, Within the powers delegated. The facts are necessarily inquirable into by a court and jury, and this inquiry is not confined to written instruments," etc. "But to any act with or without writing, within the scope of the power or confidence reposed in the agent."

The agreement in the case under consideration, certainly presented on its face as many circumstances to indicate that it was the agreement of the defendant, or to create a doubt as to whether it was theirs, or was that of Whittle, as the case in the *Mechanics' Bank* v. *The Bank of Columbia.* This instrument describes Whittle as the "resd" engineer of the road. Again, the plaintiffs agree and bind themselves to dig a well for the use of the company, at the side track to be laid by the party of the second part or his assistant, at Middleton depot; the wall of the well was to be built as directed by the engineer in charge of the work, and in another portion of the contract plaintiffs agree to dig and wall the well as required by the engineer. If this language in the agreement does not bear the construction, that the contract was entered into on behalf of, and with the intention of, binding the company, it most clearly leaves it in doubt, whether it is their contract or that of Whittle. And viewing it either way, it was not error to receive parol evidence to explain what was intended by the parties. It is true, that the name of the company was not signed to it; but we have seen by the case of the *Mechanics' Bank* v. *The Bank of Columbia*, that the want of their signature can make no difference, when it appears from the instrument to be their contract, or when it is from its face left in doubt, and extrinsic evidence shows it to have been entered into on their behalf by their authorized agent. And that such signature was not material, was held in the cases of *Hodgson* v. *Dixter*, 1 Cranch R. 345; *Bank of Columbia* v. *Patterson's Administrator*, 7 Cranch R. 299; and *Randall* v. *Van Vechten et al.*, 19 J. R. 60.

Thomas testifies, that Whittle, when he gave him instructions in regard to closing this contract with appellees, said the chain-pump was to be furnished by the company, and that he believed Whittle directed him to sign his name on behalf of the company. James Higgins testified, that Wyman, the paymaster and agent of the company, told Middleton to come to Xenia, and he would send an engineer and have the work measured and settle for it. Pleasant Middleton testifies, that a man, whose name he did not know, was at Salem settling and giving notes, and seemed to be acting as agent in settling debts for the company, offered to give Middleton two hundred dollars and settle the matter. Charles Higgins testifies, that a man, whose name he did not know, came on the cars, and left a force pump, to be put in the well. D. J. Middleton testified, that a man came and measured the well, and left. All of these circumstances seem to render it almost certain, that the company considered the contract as made with them and not with Whittle. But it is not material whether they were legally bound by the contract when

it was made or not, even if Whittle had no authority to bind them by the agreement, the work was performed for them, and they by their various acts adopted and ratified the contract. Had they not ratified it, then his authority should have been shown, to have held them liable. 19 John R. 60.

The objection, that Whittle could not delegate his authority to Thomas, may be disposed of in the same manner. The ratification of the contract waived that objection, even if it had been well taken, which we by no means admit. As Thomas in closing this contract exercised no discretion, but only followed the instructions given him by Whittle. And in doing so, he was no more than Whittle's scrivener to draw the contract, and procure the signatures of appellees. And having only followed the specific directions of Whittle, he cannot be said to have had power delegated to him by the agent of the company. If so, every employee and common laborer of the company, who does not make his contract with the directors, acts under a delegated power from their agents, and this will not be claimed.

Besides all this, the whole of the circumstances of this case, from the time the contract was entered into to the time suit was brought, together with the question of authority of the agent, the ratification of the contract and the reception of the work, were, by the instruction of the judge who tried the case, left to the jury, and the evidence warranted their finding. For these various reasons the judgment should be affirmed.

Judgment affirmed.

Justice BREESE having tried this cause in the court below, took no part in this decision.

WILLIAM K. CARR, Adm'r, etc., Plaintiff in Error, *v.* ZADOC CASEY *et al.*, Defendants in Error.

ERROR TO JEFFERSON.

Where the complainant in a bill in chancery dies, and a decree is entered abating that suit, and the administrator of the deceased complainant files another bill in the Circuit Court which is pending, if a writ of error is sued out, intended to reverse the judgment abating the first suit, the writ of error will be abated on a plea filed showing the facts.

THE plaintiff's intestate, Nancy Dotson, filed her bill on the chancery side of the Jefferson Circuit Court, complaining of the defendants for overreaching her in a contract for her share of

her sister Sarah Piggot's estate, made with said Zadoc and Thomas, by a suppression of the facts, and also for other reasons stated at length in the bill.

The complainant, Nancy, died after the filing of the bill, and at a term of the Jefferson Circuit Court, her counsel moved the court to continue the cause, announcing to the court the death of his client, the said Nancy, and asking the court to continue the cause, with leave to revive the same in the name of the administrator, when it should be ascertained. Whereupon the defendants in error entered a cross-motion to dismiss the suit. The court overruled the motion of complainant's counsel, and sustained defendants' motion, and dismissed the bill.

The plaintiff in error assigns for error, the order of the court dismissing bill and refusing to continue cause with leave to revive in the name of the administrator—also, overruling the motion of counsel for complainant, Nancy, and sustaining motion of defendants, and brings the cause into this court by writ of error.

To this writ of error a plea in abatement was filed, setting forth the facts as stated in the opinion of the court.

To the plea in abatement to the writ of error, there was a demurrer.

R. S. Nelson, for Plaintiff in Error.

Davis & Wingate, for Defendants in Error.

Caton, C. J. Pending this suit in the Circuit Court, the complainant died, and the Circuit Court entered a decree abating the suit. The administrator of the deceased complainant then filed another bill in the Circuit Court, which is still there pending. Afterwards he brought this writ of error to reverse the decree abating the first suit, and the defendant in error has filed a plea in abatement in this court, showing these facts, to which a demurrer is filed, which presents the question for our consideration. We think the plea good, and that the demurrer should be overruled. By filing another bill for the same cause of complaint, the complainant acquiesced in and approved of the decree abating the former suit. While that suit is pending in the Circuit Court, and he is there calling upon the defendant to answer the matters complained of, he shall not be at liberty also to bring him into this court to defend the decree by which alone the complainant was placed in a position authorizing him to file the bill now pending. The demurrer must be overruled and the writ of error abated.

Writ abated.

JOHN D. P. HUNGATE, Appellant, *v.* ROBERT W. RANKIN *et al.*, for the use of Thomas A. Apperson, Appellant.

APPEAL FROM CLAY.

Where, by an agreement, both parties are mutually bound, each to the other, to perform at the same time; as the one to deliver hogs, and the other to pay for them on delivery; neither can sue on the contract until the property is delivered, or until the price therefor is ready and offered to be paid, or a reasonable demand for the delivery of the property.

The admissions of a nominal plaintiff will be received to bind a beneficial one, if they were made in the presence of a beneficial plaintiff, and he does not contradict them. And if the nominal plaintiff acts as agent, the beneficial plaintiff will be bound by the admissions of the agent, within the scope of his authority.

THIS was an action of trespass on the case on promises, tried by the Clay Circuit Court, without the intervention of a jury, founded upon the following written contract:

CLAY COUNTY, ILL., July 28th, 1857.

I, John D. P. Hungate, have this day sold to R. M. Rankin and L. Fulkhonser one hundred and seventy-five head or more, of well-fatted hogs—one hundred and fifty of said hogs to weigh two hundred pounds and upwards, twenty-five to weigh one hundred and eighty pounds; said Rankin & Co. to receive said hogs between the 1st and 10th of December, on the farm of said Hungate, and pay $4.25 per hundred gross, $800 in gold, the balance in currency.

JOHN D. P. HUNGATE.
R. M. RANKIN.

Receipt on the back:

Received on the within contract, $200.

JOHN D. P. HUNGATE.

Also assigned, August 26th, 1857:

Received of T. A. Apperson, $200, for the within contract and above receipt.

R. M. RANKIN.

The testimony of defendant was in substance as follows:

George Monical being called, testified, that he knew Rankin, one of the plaintiffs, and the defendant; that he heard Rankin say there was a plot laid to break the contract with the defendant, on the morning of the 10th of December, 1857; that it was arranged to go to defendant's house late in the evening of that day, but not in time to weigh the hogs; thought they did not intend to take the hogs, but wanted to break the contract with defendant; that he knew the hogs of Hungate—he had 200 head on the ninth of December last; that he bought 180 head of hogs from Hungate a short time after Rankin was

there; the hogs were well fatted; 140 weighed 200 pounds and upwards; some twenty or thirty weighed 180.

Dr. Bougher testified, that he heard Rankin say, a day or two ago, that it was understood when they went to defendant's house, that they would not take his hogs, but wanted to break the contract.

John Connelly testified, that he lived in the neighborhood of defendant; that he had 19 well-fatted hogs, which weighed between 200 and 300 pounds; that he had sold them to defendant, to apply on his contract with plaintiff; that on the 9th and 10th days of December they were subject to the order of defendant. He had seen the hogs of Hungate; they were a good lot of well-fatted hogs.

David Shields was then called, and testified, he lived within a mile of defendant; had 45 head of well-fatted hogs, which he had sold to Hungate to apply on his contract with Rankin; that the hogs were subject to the order of Hungate, when Rankin was there; that the hogs would weigh over 200 pounds; that Rankin came to his house when the sun was about one hour high, on the 10th of December, and told him that Hungate did not have the hogs weighed, and he would not take them.

Margaret Monical testified, that she was at the house of Hungate on the 10th day of December last; that late in the evening Rankin and others came to the house of defendant, and asked him if he had the hogs weighed, and defendant said he had not, but that he would weigh them, if there was time, but he thought it was too late in the evening to get through; that the hogs were handy, and he wanted him (Rankin) to take them under the contract. Rankin refused to take the hogs because they were not weighed. Hungate proposed to commence weighing them, but Rankin said he had not time to get through before night.

The plaintiff (Rankin) called *Mr. True*, who testified that he went with Apperson and Rankin to the house of Hungate, on the 10th day of December last; that he went on the request of Nichols, who was to get the hogs from Apperson; that he and Apperson went to the house of Rankin on the morning of the 10th of December, and that they and Rankin rode over to the house of Hungate in the afternoon; that they got to the house of defendant about the middle of the afternoon on the 10th of December, and Rankin demanded the hogs of defendant, and asked him if they were weighed, and Hungate said not, but that he could weigh them, and that the hogs were ready, but thought there was not time to weigh them that evening; but said he would commence and get through as soon as he could.

Saw Rankin and Apperson together through the day of the 10th; thinks they were conversing about the contract with Hungate; that the understanding was not to take the hogs, if they could break the contract made with Hungate, who appeared anxious that they should take the hogs, and wanted to commence weighing them that evening.

Whereupon the court proceeded to render judgment for the plaintiff for two hundred dollars. And the defendant, by his attorney, entered a motion for a new trial.

The court overruled the motion for a new trial, and rendered judgment against the defendant for two hundred dollars. Defendant excepted.

Silas L. Bryan, and E. L. Howett, for Appellant.

A. Kitchell, for Appellees.

Walker, J. By the provisions of this agreement, the parties were mutually bound, each to the other, to perform their several undertakings at the same time. The terms of this agreement require the appellant to deliver the number and kind of hogs specified, between the first and tenth days of December, and the appellees to pay the contract price for them when delivered. Appellant was not bound to deliver them until the appellees should pay for them, nor were appellees bound to pay until they received the property. The performance of these acts being mutual and dependent on each other, the appellant could not maintain an action for a breach of contract until he delivered the property, or was ready and willing and offered to deliver, within the time limited by the contract, nor could appellees insist upon a breach of contract unless they were ready and willing and offered to perform their part of the agreement within the same time. *Greenup* v. *Stoker*, 3 Gilm. R. 213; 1 Saund. R. 33.

The evidence shows that appellant, on the ninth and tenth days of December, had two hundred head of well-fatted hogs; that soon after that time he sold of those hogs one hundred and eighty head to Monical, who testifies that one hundred and forty of that number weighed over two hundred pounds, and that twenty or thirty of the remainder of them weighed over one hundred and eighty pounds. Of the weight of the remainder of the lot there is no evidence, except that when Rankin made the demand, appellant informed him that he had the hogs convenient, and no objection appears to have been made either to the number or weight. Other portions of the evidence show that appellant, previous to that time, had purchased from Shields

forty-five head, weighing from two to three hundred pounds each, and had also purchased of Connelly nineteen head, weighing over two hundred pounds each, all of which were conveniently situated in the neighborhood, and were subject to appellant's order on the tenth of December. The evidence shows that when Rankin and Apperson went to appellant on the tenth of December to demand the hogs, he offered to commence weighing and delivering them, and to continue until it was completed. At that time Rankin made no objection that the hogs were not all on appellant's farm, and there is nothing in the evidence from which we can infer that they could not have been there by the time those on his farm were weighed and delivered, if it had been necessary to deliver them to fill his contract. From this evidence we are not prepared to say that appellant was not ready and willing to perform, or that he did not offer to perform his part of the contract.

The objection made at the time, was, that appellant did not have the hogs weighed when the demand was made, and this is urged as a breach that should entitle appellees to recover. The evidence shows that Rankin and Apperson had determined not to receive the hogs, and delayed going to appellant, on the tenth of December, until it was too late to deliver the hogs. There was no evidence that they were ready and willing to pay for and receive the hogs if they had been weighed when they were demanded. But the determination formed by them not to receive the hogs, and the delay in going for the purpose of preventing a delivery, very clearly indicates that they were not willing and ready to perform their part of the agreement, and no offer to perform was attempted to be shown. And unless appellees were ready, willing and offered to perform, they have no right to recover for a failure on the part of appellant to tender the hogs. Appellees were equally bound to tender the money as appellant was to have tendered the hogs.

It was urged that the admissions of Rankin should not have been received to bind Apperson, the beneficial plaintiff. He was undoubtedly bound by what was agreed between him and Rankin before they went to demand the hogs, and he is likewise bound by the statements of Rankin in his presence, in reference to the contract, which he failed, at the time, to contradict. And the evidence of the understanding had between them on the tenth of December, before going to appellant, was a circumstance from which a jury might have inferred an agency, and if Rankin was acting as his agent in this matter, he should be bound by the admissions made by the agent within the scope of the power delegated, while engaged in carrying out the ob-

ject of the agency. We are, therefore, of the opinion that the court did not err in admitting this evidence.

The judgment of the court below should be reversed, and the cause remanded for further proceedings.

Judgment reversed.

JESSE WILLIAMS, Appellant, *v.* JOHN CONLEY, Administrator, etc., Appellee.

APPEAL FROM CLAY.

The proceeding authorized by the ninetieth section of the statute of Wills, was not designed to aid in the collection of debts due to estates; but for the purpose of obtaining the possession of the identical articles, or the identical money, which belonged to the deceased in his lifetime.

THIS case is stated in the opinion of the court.

S. L. BRYAN, and E. L. HOWETT, for Appellant.

A. KITCHELL, for Appellee.

CATON, C. J. This was a proceeding under the ninetieth section of our statute of Wills, which is in these words: "If any executor, or administrator, or other person, interested in any estate, shall state upon oath to any court of probate, that he believes that any person has in his possession, or has concealed or embezzled any goods, chattels, moneys, or effects, books of account, or any evidences of debt whatever, or titles to land belonging to any deceased person, the court shall require such person to appear before it by citation, and may examine him on oath touching the same, and if such person shall refuse to answer such proper interrogatories as may be propounded by the court, or person interested as aforesaid, or shall refuse to deliver up such property or effects as aforesaid upon a requisition, being made for that purpose by an order of the said court of probate, such court may commit such person to jail until he shall comply with the order of the court thereon."

Williams was cited to appear before the probate court upon an affidavit, stating that he had money in his possession belonging to the estate of John Conley, deceased, and in answer to interrogatories, showed that his wife, who was a daughter of the deceased, had received a pocket-book from her father before

his decease, which contained money, a part of which he had paid to one Maxwell for his trouble in taking care of the deceased. What became of the balance of the money, does not appear. Conley died a few days after the pocket-book was given to Mrs. Williams, and two years before the examination on the citation. Williams supposed that the money was given to his wife as a present. There is no probability, nor do we presume, that the court found, that Williams still had the money in his possession in specie, although it is undoubtedly true, that he was indebted to the estate for the amount received by his wife of her father for safe keeping. We think the statute quoted was not designed to afford the means of collecting debts due to estates, but for the purpose of obtaining the possession of money, books, papers, or property, which remained in specie, and which was capable of being identified and pointed out. Unless Williams had the identical money in his possession which had been received by his wife, the court could not properly order him to pay it over to the administrator, nor would it be possible for him to comply with such order. The payment of other money to an equal amount, would not be a compliance with the statute, nor of a proper order of the court made under the statute, any more than it would be to deliver one horse, when he had received another. We think the court misconstrued the statute, and its judgment must be reversed and the cause remanded.

Judgment reversed.

Harvey T. Pace, Plaintiff in Error, *v.* County Commissioners of Jefferson County, Defendants in Error.

ERROR TO JEFFERSON.

In order to exempt a building erected for a school-house from taxation, under the revenue law of 1853, it should be held by the school directors, under such title as will give them the right to possess and control it at all times for the use of the district.

The facts of this case are fully stated in the opinion of the court.

Nelson & Johnson, for Plaintiff in Error.

Tanner & Casey, for the County.

WALKER, J. From the record in this case, it appears that the plaintiff was the owner of a school-house, built on his land, with his own means, in the town of Mt. Vernon. That the same was listed for taxation for the taxes of the year 1856, by the assessor, without the same having been returned by the plaintiff, and that he was the owner of the property when it was listed, and so continues. That plaintiff built the house for a female school, and it is well adapted to the purpose; that a school was kept in it the two first years after its erection, by a female teacher who was regularly examined by the board of school directors of the district, who granted her a certificate of qualification as a teacher, as required by law; and that she also obtained a certificate of good moral character in due form; that she was employed to teach the school by plaintiff, who received the tuition bills and public school funds; that the school was under the superintendence and control of the school directors of the district, and regular schedules of the school were kept. That plaintiff paid the teacher for her services the sum of three hundred dollars per annum, and furnished her board and lodging during the continuance of the school. That no other school was ever kept in this house, and it has been unoccupied for four years, and ever since the close of the school. That plaintiff has offered to rent it for a common school, but the school directors have never applied to rent it of him for that purpose.

The County Court held that the property was subject to taxation, from which decision plaintiff appealed to the Circuit Court of Jefferson county, when, upon a trial of the case, that court affirmed the judgment of the County Court, and plaintiff prosecutes this writ of error to reverse that judgment.

It will be proper to refer to the provisions of the revenue laws in force at the time this property was listed, to determine whether it was exempt from taxation. The 3rd section of the revenue act of the 12th of February, 1853, Scates' Stat. p. 1029, provides, "That all property described in this section, to the extent herein limited, shall be exempt from taxation; that is to say, 1st, All lands donated for school purposes, not sold or leased. All public school-houses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such building necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit."

Then to bring this property within the exemption of this enactment, it must have been either donated for school purposes, or a public school-house. It was not contended that the acts of plaintiff amounted to a donation of the property for school

purposes, nor does anything he did imply such an intention. He at no time conveyed or even proposed to convey it to the directors or other school officers. And the fact that he offers to rent it, rebuts the presumption of any such intention. And it shows that he desires to derive a revenue from this property, which of itself is a strong reason why it should be held liable to taxation.

Then was it a public school-house? To constitute it such, it must be property under the immediate control of the school directors. They should hold it in such a manner that they can use it at all times for the use of public schools, independent of the will or action of other persons. They should hold it either in fee or by such other estate as would give them the right to possess and control it at all times for the use of the district. The fact that it may have been once used by them for the purposes of a public school, does not of itself give it the character of a public school-house after it ceases to be so used. This is private property, under the exclusive control of the owner, and may at any time he chooses be converted to any purpose he may deem proper, and the school directors would have no pretense of a right to object. They have not the remotest interest in the property, and before they can have, they must acquire it by purchase or donation from the owner. They occupy to this property the same relation, as directors, that they do to any other private property. It may become a public school-house by purchase or lease, and so may any other property when procured for the purpose.

Notwithstanding the plaintiff has acted with a liberality in advancing the cause of education that is highly commendable, it does not, as we think, bring this property within the exemption of the statute.

The judgment of the Circuit Court should therefore be affirmed.

Judgment affirmed.

Jackson Farrar, Assignee of William F. Watson, Plaintiff in Error, *v.* Benjamin P. Hinch, Adm'r *de bonis non* of Sylvester Eveleth, deceased, Defendant in Error.

ERROR TO GALLATIN.

In an action upon notes given for a patent right, for which a deed was executed, expressing the consideration for the notes, it is incompetent for the defendant to show by parol evidence that anything else than was expressed in the deed was to be conveyed by it.

The law presumes that the contract between the parties expresses the whole agreement between them.

THIS cause was brought into the Gallatin Circuit Court, at the June term, 1856, of said court, by Jackson Farrar, assignee of William F. Watson, on appeal from the County Court of Gallatin county, from a judgment rendered in said County Court against said Farrar, who was the plaintiff in that court, and Winder Bailey, administrator *de bonis non* of Sylvester Eveleth, who was the defendant. The judgment of said County Court was rendered at January term, 1856.

Before the June term, 1856, of the Gallatin Circuit Court, said Winder Bailey departed this life, and at the said June term of said court the death of said Bailey was suggested, and Benjamin P. Hinch, as administrator *de bonis non*, is made a party to this suit, and was duly summoned to the October term, 1856, of said court.

At the October term, 1857, of the Gallatin Circuit Court, this cause was tried by a jury, WESLEY SLOAN, judge, presiding. The jury found for the defendant, Benjamin P. Hinch. Motion was made for a new trial, and in arrest of judgment. The court overruled the motion, and entered judgment for defendant for costs, etc.

The bill of exceptions shows that the plaintiff introduced the following notes in evidence, to wit:

$1,000. SHAWNEETOWN, ILL., July 13th, 1853.

Twelve months after date I promise to pay to the order of William F. Watson, one thousand dollars, for value received, negotiable and payable without defalcation or discount. (Signed) SYLVESTER EVELETH.

Upon the back of which note was the following indorsement, to wit:

I assign the within note to Jackson Farrar for value received.

(Signed) WILLIAM F. WATSON.

$250. SHAWNEETOWN, ILL., July 13th, 1853.

On or before the first day of January next, I promise to pay to the order of William F. Watson, two hundred and fifty dollars, for value received, negotiable and payable without defalcation or discount.

(Signed) SYLVESTER EVELETH.

Upon the back of which said note was the following indorsement, to wit:

I assign the within note to Jackson Farrar for value received.

(Signed) WILLIAM F. WATSON.

$250. SHAWNEETOWN, ILL., July 13th, 1853.

On or before the first day of April next, I promise to pay to the order of William F. Watson, two hundred and fifty dollars, for value received, negotiable and payable without defalcation or discount.

(Signed) SYLVESTER EVELETH.

Upon the back of which note was the following indorsement, to wit:

I assign the within note to Jackson Farrar for value received.

(Signed) WILLIAM F. WATSON.

To the introduction of which said notes the defendant objected, which objection was overruled, and the defendant excepted, and the said notes were read to the jury in evidence. The plaintiff then rested.

Whereupon the defendant introduced in evidence the following indenture, made and executed by William F. Watson and Jackson Farrar (plaintiff,) by William F. Watson, attorney, to Sylvester Eveleth, to wit:

WHEREAS, James M. Clark, of the city of Lancaster and State of Pennsylvania, did obtain letters patent of the United States for improvements in combining grinding and bolting machines, known as James M. Clark's Patent Portable Flouring Mill, which patent bears date May 13th, 1851; and whereas the said James M. Clark did, for a consideration to him in hand paid, on the 10th day of September, 1851, lawfully assign, sell and set over all the right, title and interest which he had in said invention, as secured to him by said letters patent for, to and in the United States, to Thomas M. Clark; and whereas, Jonathan H. Smith, William F. Watson and Jackson Farrar did, on the second day of April, 1852, obtain of said Thomas M. Clark all the right, title and interest which he had in and to the counties of Alexander, Pulaski, Massac, Pope, Hardin, Union, Jackson, Randolph, Perry, Franklin, Hamilton, White, Wabash, Edwards, Wayne, Jefferson, Washington, Marion, Clay, Rock Island, Lawrence, Crawford, Jasper, Effingham, Fayette, Montgomery, Shelby, Christian, Cumberland, Clark, Edgar, Coles, Moultrie, Macon, Piatt, Champaign, Vermillion, Scott and Calhoun, all in the State of Illinois.

And whereas, the said William F. Watson and Jackson Farrar did, for a valuable consideration, obtain the exclusive interest and title of the said Smith in the said counties, as will more fully appear by reference to deed of the 26th May, 1852, and recorded at Washington City, in liber Y, T, page 268, of transfers of Patents. And whereas, Sylvester Eveleth is desirous of obtaining an interest therein. Now this Indenture witnesseth, that the said William F. Watson and Jackson Farrar, for and in consideration of the sum of fifteen hundred dollars, to them in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, sold and conveyed, assigned and set over, and by these presents do grant, assign, sell and set over to said Eveleth, all their right, title and interest in the said invention, as secured to them by said deeds, for, to and in the counties of Gallatin, White, Saline, Williamson, Franklin, Hamilton, Jefferson, Wayne, Edwards and Wabash, in the State of Illinois, for his own use and benefit, of his heirs and assigns, to the full end of the time for which said letters patent were patented, as fully and entirely as the same would have been enjoyed by us, if this assignment and sale had not been made. In testimony whereof, we have hereunto set our hands and affixed our seals this 12th day of July, 1853.

WILLIAM F. WATSON. [SEAL.]

D. T. HAZEN. JACKSON FARRAR, [SEAL.]

Per WILLIAM F. WATSON, Attorney.

Whereupon the said defendant introduced D. T. Hazen, the subscribing witness, who stated that William F. Watson signed and executed the said deed for himself and the said plaintiff. The said defendant then offered to read the same in evidence, to which the plaintiff objected, which objection was overruled; to which the said plaintiff excepted, and the same was read in evidence. Defendant then introduced said D. T. Hazen and others, to show that Watson had verbally agreed to deliver a mill, as described in the assignment, to be exhibited, to induce purchases.

The jury found for the defendant. A motion for a new trial was denied.

The plaintiff in the court below brought this writ of error.

Milton Bartley, for Plaintiff in Error.

J. Olney, and N. L. Freeman, for Defendant in Error.

Caton, C. J. Assuming that the defendant's proof established that the notes in controversy were given for the consideration expressed in the deed of assignment of the patent right, executed by Watson and Farrar to Hinch, the defense relied upon was not in the least advanced thereby. That defense was, that Watson had also agreed to deliver a mill within a specified time, with the patent, and as a part of the sale thereof. As there was a deed executed at the time of the sale, showing what was sold for the consideration of the fifteen hundred dollars mentioned in the deed, which was all the right, title and interest of the grantors in the invention, within certain specified counties, it was incompetent to prove, by parol evidence, that anything else was to be conveyed for the consideration mentioned in the deed. The law presumes that the deed speaks the whole intention of the parties, and the evidence tending to show that Watson also agreed to deliver a mill, was incompetent. But even if such proof were competent, we think it quite insufficient to show that such was the agreement, as a part of the sale of the patent. It may be that there was a separate agreement, by which the defendant agreed to buy of Watson a mill, and that the mill was never delivered, but there is not a particle of proof tending to justify the inference that those notes were given for such mill. If they had any connection with this transaction at all, they were given for the consideration of the sale of the patent right, and for aught that appears, the defendant has enjoyed the benefit of that unmolested. The verdict was wrong, and the judgment must be reversed and the cause remanded.

 Judgment reversed.

Samuel S. Taylor, Appellant, *v.* George Taylor *et al.*, owners of the steamboat H. D. Bacon, Appellees.

APPEAL FROM ALEXANDER.

a An action for money had and received, may be maintained, whenever the defendant has obtained money of the plaintiff, which in equity and good conscience the defendant has no right to detain.

All the acts of an agent, performed under the direction of his principal, and within the scope of his agency, will bind the principal, and will be regarded as his own acts.

The above entitled cause was instituted by the appellees against the appellant, prior to the April term of the Alexander Circuit Court, A. D. 1856, and was tried before Parish, Judge of said court, without a jury, at the October term, 1856, of said court.

The declaration was in assumpsit, upon the common money counts; among them a count for "money had and received," to which the defendant pleaded "non-assumpsit," and on which issue was joined.

Upon trial, the plaintiffs introduced as a witness, *William A. Hacker*, who testified that he was and had been for some time acquainted with defendant, but was unacquainted with plaintiffs. He thought that Samuel S. Taylor was the United States mail agent at Cairo, in the fall of 1854; witness was appointed Mr. Taylor's successor in 1855, and received the books and papers from him.

The plaintiffs next introduced *Thomas J. Wood* as a witness, who testified that he knew the steamboat H. D. Bacon, and some of the plaintiffs, if not all, and also was acquainted with defendant, and had been for some years; defendant acted as mail agent in the fall of 1854; so acted in November and December of that year, but did not act personally in that capacity. When he first took charge of the business, Mr. Candee acted in his place; but in the spring of 1854, myself and others, constituting the firm of T. J. Wood & Co., having fitted up the Patrick Henry, (a steamboat,) as a wharf-boat, commenced doing a forwarding, storage and commission business, and made an arrangement with defendant to transact his duties as United States mail agent, to receive and forward the mails, pay all transportation charges, ship the mails, and the like; we fitted up a room on the boat for the mail matter, and our clerk did all the business; we paid the clerk $75 per month, and have understood that defendant also paid him something; we continued to do so until the spring of 1855; and did all the business during the fall of

Q 41 Ills 241
50 Ills 130

1854, in the month of November as well as December; Mr. Taylor did not give his personal attention to the mail matters, except to see that the clerk did his business properly; if any money was paid or charges advanced for the H. D. Bacon, it was to our clerk, who did the mail business; we did the business with the H. D. Bacon, and all other mail boats, at that time.

The plaintiffs next introduced the deposition of *Arthur Stewart*, taken in Pittsburgh, Pennsylvania, who testified as follows: He was not acquainted with either of the parties to the foregoing suit; that to the best of his recollection, the H. D. Bacon carried the United States mail from New Orleans to Cairo, in the month of November, 1854; and the steamboat Yorktown, from Cairo to Louisville; that the Bacon's charges for said services were $80, and the Yorktown's, $20; witness paid the charges of the H. D. Bacon to the mail agent at Cairo, which was $80; paid in the month of November or December, 1854, to the best of witness' recollection.

The plaintiffs next introduced the deposition of *A. D. G. Consol*, taken in New Orleans, who testified as follows: Knows the plaintiffs, and has for over two years; knows that George Taylor, John Lowrie and Martin Burke were the owners of the steamboat H. D. Bacon, in the months of November and December, 1854, so far as he is informed; that the mail agent at New Orleans shipped on board the H. D. Bacon, a mail, consisting of a a number of mail bags, consigned, per way bill or contract, to the postmaster at Louisville, Kentucky, the mail to be delivered at the different offices mentioned in said way bill, between New Orleans and Cairo; and the mail bags for the offices between Cairo and Louisville to be delivered to the mail agent, for which he was to pay to the steamboat H. D. Bacon the sum of $80. The mail was delivered to the mail agent at Cairo; at the time of delivering the mail, the way bill had been left at one of the offices below; the mail agent said he would forward the mail, and pay the H. D. Bacon her portion, $80, on her return. On the return of the boat, he said the way bill had been received in time to accompany the mail, and was all correct; that he had not the amount in the office at the time—that he was short of funds, or something to that effect—that he would pay it on the upward trip of the boat; on the upward trip of the boat, witness made inquiry and learned that he was absent. On the same trip that the Louisville mail was delivered to him, and not paid for, the Bacon had another mail for St. Louis, consigned to the postmaster at that place, which was signed by the Cairo agent, for the number of bags entered on the bill at Cairo, which was recognized, and regularly paid for by the postmaster at St.

Louis. The amount to be received for carrying said mail was $80; that was the amount usually paid for carrying the mail from New Orleans to Cairo; the mail agent at Cairo agreed to pay the charge of $80 for carrying said mail; this promise induced us to leave the mail and go on without it.

The foregoing was all the evidence. The court rendered a verdict for the plaintiffs for $80 and costs.

The defendant entered his motion for a new trial, which was overruled by the court, and judgment accordingly entered. Defendant appealed to this court.

I. N. Haynie, for Appellant.

R. S. Nelson, for Appellees.

Walker, J. It seems that there can be no reasonable doubt, that the clerk of T. J. Wood & Co. was the agent of appellant. The evidence shows that he so acted, and was recognized as such, in the performance of the various duties of mail agent. Appellant had employed the firm of T. J. Wood & Co. to discharge these duties, and they assign them to this clerk, and it appears that he acted under the direction of appellant. Wood testifies that appellant did not give the business his personal attention, further than to see that the clerk did the business of the agency correctly. Whether the clerk was originally employed by Wood & Co., or by appellant, can make no difference, if he recognized him as his agent.

The other witnesses testify that the business was transacted with the acting agent, at Cairo, and this clerk performed these duties, as the evidence shows. It then follows that all the acts of this agent, performed under the direction of appellant, or within the scope of his agency, must bind appellant, and be regarded as his own. And if this clerk received money to pay to appellees, and that was a part of the duties devolving upon the mail agent, then his receipt of the money must be regarded as that of appellant. It would seem from the evidence, that he contracted with Wood & Co., to receive and forward the mails, to pay transportation charges on them, etc.; and it seems that a part of the duty of the mail agent was to pay the price of transportation of these mails, and it is only reasonable to suppose that the Government had arrangements by which the means came into his hands for the purpose, and that the receipt of such money was as much a part of the agent's duty as that of forwarding the mails after they were received.

It appears from the evidence, that when the mail was brought from New Orleans to Cairo, that the boat transporting the

New Orleans mail from that point to Louisville, paid the charges for bringing it from New Orleans to Cairo, and had the money refunded to it by the postmaster at Louisville; and the money advanced by the Louisville boat, upon receiving the mail, was paid to the boat to which it was due, for bringing it from New Orleans to Cairo. And in this manner the money passed through the hands of the acting mail agent at Cairo, as a part of his business. And Stewart, the captain of the Yorktown, testifies that he paid to the agent at Cairo eighty dollars, to be paid to the H. D. Bacon, for bringing the Louisville mail from New Orleans to Cairo, at the time that mail was delivered to him, and the agent promised to pay it to the H. D. Bacon. The evidence also shows that when the H. D. Bacon left that mail at Cairo, the way bill had been left at some point below and the charges of the boat for bringing it, for that reason, could not be paid. But this agent agreed, that on the return of the boat, the next trip, he would pay the money, and on the return of the boat he said he had received the way bill, which was all correct, and he would pay the eighty dollars on the next return of the boat, but when it did return, he was inquired for, but was absent. The evidence fails to show that the money was ever paid.

It then remains to inquire, whether appellant is liable to pay the money thus received by his agent. It is the well recognized doctrine, that the action for money had and received may be maintained, whenever the defendant has obtained money of the plaintiff, which in equity and conscience he has no right to retain. And in Comyn's Digest, title Assumpsit, letter E, it is said: "If money be given to A, to deliver to B, that B may have this action." And Roll's Abridgment and Hardress R. 321, are referred to as authorities. This doctrine seems to be recognized by more modern authorities, both in this country and in Great Britain. *Hall* v. *Marston*, 17 Mass. 578; M. and S. 578; 1 Chit. Pl. 387. When money has been thus received, the law implies a promise to pay, notwithstanding there was no privity between the parties. *Buckner* v. *Patterson*, Litt. Sel. Ca. 234. We are satisfied with the doctrine as recognized by these authorities, and are disposed to follow them. They are based on principles of equity, and are well calculated to promote justice, by avoiding circuity of action, and cutting off useless litigation.

We are unable to perceive any error in this record, for which the judgment of the Circuit Court should be reversed, and therefore the same should be affirmed.

Judgment affirmed.

The Illinois River Railroad Company, Plaintiff in Error, *v.* Henry Zimmer, Defendant in Error.
The Same, Plaintiff in Error, *v.* John W. Casey, Defendant in Error. *

ERROR TO TAZEWELL.

Although a railroad charter requires that each subscriber shall pay ten per cent. at the time of his subscription, on a suit against a subscriber to enforce payment of a subscription, it need not be averred in the declaration that such per centage was paid. Such fact is a matter of averment in defense.

The fact of non-payment of such per centage would not relieve the subscriber from liability.

An act of incorporation may be amended by the legislature, and if the amendment is accepted by the directors, the stockholders under the original act, unless otherwise stated, will be held liable. The only question for consideration, is, whether the value of the stock as an investment will probably be benefited thereby.

An acceptance of an amendment to a charter may be manifested, by the stockholders, by the managers of the company, or by user of and action under such amendments.

These were actions of assumpsit brought by the Illinois River Railroad Company, at the January term of the Tazewell County Court, 1858, to recover sums of money of defendants as subscribers to the capital stock of said company.

The plaintiff sets out in its declaration, that on the 11th day of February, 1853, the legislature of Illinois incorporated the said company for the purpose of building a railroad from Jacksonville, in Morgan county, to La Salle, in La Salle county, which was approved by the Governor the same day, and became a law of the State of Illinois; also, that afterwards, to wit: on the 1st March, 1854, the legislature passed another law, amendatory to the above law, which was approved the same day, and became a law; and afterwards, on the 29th January, 1857, the legislature passed another law, entitled, "An Act to amend an act to amend the charter of the Illinois River Railroad Company," which was approved January 29th, 1857, and became a law; and afterwards, on the 16th day of February, 1857, the legislature passed an additional act, entitled, "An Act to amend an act entitled an act to construct a railroad from Jacksonville, in Morgan county, to La Salle, in La Salle county, which last act was approved 16th February, 1857, of which several acts the declaration makes profert, and avers that the several acts were in force at that time, and that there having been sufficient amount of the capital stock of said railroad company subscribed, according to the provisions of said charter, on the

* These cases were heard at Ottawa, April Term, 1858.

6th day of September, 1856, the said company became duly organized under the provisions of the several acts first above mentioned, by the stockholders electing the officers, etc., and that the defendant assented to the said organization; and that the defendant, on the 13th November, 1856, for the purpose of constructing said railroad, among others, subscribed to the following agreement, to wit: "Know all men by these presents, that we, the undersigned, do hereby subscribe the number of shares of the capital stock of the Illinois River Railroad Company, hereinafter set opposite our names respectively, and in consideration of our mutual subscription to said company, for the purpose of building said road, and of the premises herein, do severally agree to pay to the said Illinois River Railroad Company the amount of capital stock hereinafter subscribed by us and set opposite our names, and pay all demands to the said company when called for, according to law, by said company." Dated Pekin, November 13th, 1856. And the said plaintiff avers that the defendant subscribed his name for ten shares, amounting to $1,000, and that the company accepted his subscription, by means of which he became liable to pay plaintiff according to the terms of said subscription, and that at the meeting of the directors of said company, at Jacksonville, on 2nd December, 1857, the directors passed an order requiring that subscribers who resided in Tazewell county, or whose subscriptions were made payable there, should pay on the 1st January, 1858, $65 per share on each and every share so subscribed, and they should on the 1st Monday in each month thereafter, pay $5 on each share, until all was paid, and that the payment should be made to Joshua Wagenseller, or B. S. Prettyman, and that they should give twenty days' notice of time and place where such payments were to be made, by publication in some newspaper published in Pekin. The plaintiff avers notice, by publication, as required by the last made order. Plaintiff avers that on the 1st day of January, 1857, the said defendant paid to the said plaintiff, on said subscription, two installments on said subscription, to wit: $10 on each share, and also avers that the defendant made his subscriptions in Tazewell county, and that Wagenseller and Prettyman attended at the time and place given in said notice, to receive payment; plaintiff avers that by reason of the premises the defendant became liable to pay the sum of $650, or $65 on each share so subscribed, to which declaration was added the common counts; the plaintiff also files a copy of account sued on.

The defendants pleaded the general issue to all but the first count.

To the first count the defendant demurs, and assigns for cause of demurrer,

1st. There is no allegation in the declaration that the defendant paid ten per cent. on his subscription.

2nd. It does not appear that the $1,000,000 has ever been subscribed to the capital stock.

3rd. It does not appear in the declaration, that the call on which the suit was brought was general upon all the stockholders, but it appears the call was partial and only upon part of the subscribers.

4th. It appears from the declaration and the laws therein referred to, that the plaintiff has procured and adopted such amendment to its charter as will enable the plaintiff to build any and any such part of the railroad and run the same, as the plaintiff may see fit, and leave the plaintiff under no obligation to ever finish and complete said road from Jacksonville to La Salle, and authorizing the plaintiff to finish and complete any portion of said road on the route which may be laid off as a division, and abandon any other part of said road.

5th. It appears from the declaration and the laws therein referred to, that said company has procured such an amendment of its charter as allows the company to take subscriptions to stock, on any credit that may be contracted for, and payable in property, labor or any other thing, thereby enabling said company to sell its stock upon terms much more favorable to new than old subscribers, and because the declaration and the laws referred to therein, show that the said company have procured and adopted an amendment to the charter of the company, by which subscribers are required to pay calls named by said company on a notice of twenty days, instead of a notice of ninety days, as the charter provided when the defendant subscribed, and that the said declaration is in other respects informal and insufficient.

The court entered the following judgment: And now again come the parties, and the court having fully considered the special demurrer to the declaration, and having been fully advised in the premises, it is ordered that the demurrer be sustained for the special causes, No. 3 and 4; thereupon the plaintiff asked and obtained leave to amend its declaration, which being done, adding the averment of the payment of ten per cent. on each share subscribed by the defendants, and afterwards, and the cause being again submitted to court, the court rendered judgment for costs against said plaintiff; to all which orders and judgment the plaintiff excepted.

The pleadings in each case were similar, except showing that one of the defendants subscribed for two and the other for ten shares of stock.

W. THOMAS, N. H. PURPLE, and B. S. PRETTYMAN, for Plaintiff in Error.

DAVISON & PARKER, for Defendants in Error.

CATON, C. J. The first question which we shall consider upon these demurrers, is that which is raised by the objection that the declarations do not aver that the defendants, at the time they made their subscriptions, paid in the ten per cent. as required by the first amendment to the charter which was in force at the time the subscriptions were made. Admitting that in order to make the subscriptions obligatory on the defendants, it was necessary that they should have paid the ten per cent. at the time of subscribing, we are of the opinion it was not necessary to aver that fact in the declaration. The liability arises, *prima facie*, upon the subscriptions, and if any fact exists which may defeat that liability, the defendants should plead that fact in defense. But waiving this question of pleading, we are clearly of opinion that the mere fact of the non-payment of the ten per cent. at the time of subscription would not render it void. If the commissioners, at the time the subscriptions were made, saw fit to give time upon the part which should have been paid down, they could not, for that reason, be permitted to refuse to the defendants the stock, when they should pay it in obedience to the call of the company for it. If the company violated its strict duty in giving them time on the first payment, they could not be allowed to take advantage of that wrong and refuse the subscribers the benefit of the stock, when they should offer to pay for it. So, on the other hand, the defendants cannot be allowed to take advantage of the indulgence extended to them when they made their subscriptions, for the purpose of repudiating them. This indulgence is a most ungracious defense, which should not be allowed, unless it is strictly required by some inflexible rule of law. Good faith to other subscribers, who may have been induced to take stock on the strength of these very subscriptions, requires that the defendants shall go on with them in the execution of the enterprise. Good faith to the creditors of the company, who had a right to look to the list of subscribers, to determine whether the company was worthy of credit, imperiously demands that those, who by their subscriptions induced the credit, shall be compelled to contribute to the fund from which they are to receive their pay. *Wight* v. *Shelby Railroad Company*, 16 B. Monroe, 5; *Vermont Central Railroad Company* v. *Clayes*, 21 Vermont R. 30.

The other questions raised by the demurrer all depend upon the right of the legislature to pass the amendments of 1857,

and whether those amendments have been adopted by the company and have become a part of its charter.

We shall first examine the several objections to the provisions of these amendments as they are supposed to affect the individual stockholders.

At the time the defendant subscribed for the two shares of the capital stock of the company, the charter required ninety days' notice to be given of calls for payment on the subscription, before the same could be made payable. By the amendment of the charter, a notice of but twenty days was required. This, it is insisted, is a change of the terms of the contract, which could not be made without the express individual consent of the defendant. The language of the subscription is this: "Know all men by these presents, that we, the undersigned, do hereby subscribe the number of shares of the capital stock of the Illinois River Railroad Company, hereinafter set opposite our names respectively, and in consideration of our mutual subscription to said company, for the purpose of building said road, and of the premises herein, do severally agree to pay to the said Illinois River Railroad Company the amount of capital stock hereinafter subscribed by us, and set opposite our names, and pay all demands to the said company, when called for according to law, by said company." It will be seen that by the terms of this subscription, it is not in terms made payable upon calls with notice of ninety days, but the subscribers agree to pay "when called for according to law, by said company." When this subscription was made, the defendant knew that the charter of the company was not unalterable. He knew that it might be amended by the legislature, and that the company might accept such amendment, when that would become the law of the company; and he agreed to pay the money when called for, in pursuance of such law. If the ninety days' notice were deemed essential, and designed to be made a condition precedent to a legal liability to pay the money, it should have been inserted in express terms in the agreement of subscription, when the condition precedent would have to be performed before the liability would become complete.

There is in this case the same implied reservation of the right to change the law, and thus vary the precise extent of the liability, that there is in case of official bonds given by public officers and their sureties, conditioned that they shall faithfully perform the duties of their office according to law. In that case it is well settled that new or additional duties may be imposed upon the officer, so as they are germain to the office, and the sureties are bound for his faithful performance of those new duties, although the extent of their liability is thereby increased

beyond what it was when they executed the bond; and this too, notwithstanding the great strictness which is usually observed in favor of sureties. *Governor* v. *Ridgway*, 12 Ill. R. 14; *Bartlett* v. *The Governor*, 2 Bibb R. 586.

This is not one of those cases where the provisions of the law are by implication incorporated into the contract, and constitute a part of it, unless we also introduce into the contract by implication, that other principle of law by which the right to the legislature and the company is reserved to change the provisions of the charter, as the public good and the interests of the company at large may require. And this principle disposes substantially of all the other objections which grow out of the amended charter, for all that is complained of was authorized by these amendments. Even admitting that but for the amended charter, it was necessary to aver that one million of dollars should have been subscribed before an organization was authorized, the first amendment of 1857 recognizes the company as a legally existing corporation, and cured any defect of that character. And, surely, there was no implied condition in the contract of subscription, that no organization should take place, with the sanction of the legislature, upon a less subscription than was originally required.

The objection that by the amendments to the charter, the company was authorized to build the road in sections, and not build it at all upon a part of the original route, has been fully disposed of by the decision of this court in the case of *Sprague* v. *Illinois River Railroad Company*, 19 Ill. R. 174.

It is also objected that the call is not general upon all the subscribers to the stock, but is confined to subscribers in Tazewell county. This was expressly authorized by the first amendment of 1857, when, as was the case here, the money was to be devoted to the construction of that portion of the road which lies in that county. We are not prepared to say that this is beyond the legislative power to permit. That this provision was for the public good, is demonstrated by the passage of the amendment, and that it was promotive of the interests of the company at large, is to be inferred from the fact that it has been adopted by the company; and we may well imagine a state of things where justice to these very defendants, as well as all other subscribers, required that the money which they should pay on these subscriptions should, in good faith, be exclusively devoted to the construction of the road in the vicinage of the subscribers.

And so of the authority granted by the amendment to the charter, to take subscriptions, and receive payment therefor upon different, and, it may be, more advantageous terms than those upon which the original subscriptions were taken. It

is not difficult to suppose a case where such a course was indispensable to save what had already been expended in the prosecution of the enterprise. If that was the only means, or the best means, by which money could be raised to complete the road, and thus make available what had already been done, no one will doubt that it was for the common good of all that it should be done. It is no new thing in business affairs that sacrifices have to be made to save an inadequate investment from a total loss. Suppose in the same state of case, the legislature had authorized the company to issue bonds, convertible, at the will of the holder, into stock, and to sell them at ninety cents on the dollar, or even unconvertible bonds, the same hardship would have been done to the original subscribers, and yet a transaction so familiar as that would be questioned by no one. In either case, those who come in at the last to help out an embarrassed concern, have the advantage of those who came in at first, while the first subscribers might have had the advantage of the last had the enterprise promised so well that the stock had commanded a premium. The first who engage in such an enterprise are entitled to the chances of a rise, and must take the chances of a fall.

Although the fifth special cause assigned in the demurrer admits that these amendments to the charter have been adopted by the company, it has been urged against the declaration that it does not aver that fact, and in fine, it has been insisted that no amendment, which could affect any individual shareholder injuriously, could be adopted by the company, so as to be binding on him, without his consent, and this suggestion requires a moment's consideration.

As was said in the case of *Sprague* above referred to, the law will not admit the idea that any one acquires an interest, or subscribes for stock in an incorporated company, from any ulterior considerations, or in view of any incidental advantages beyond the value of the stock as an investment. Every shareholder must look for the promotion of his individual interest to the advancement of the general interest of the concern; and whatever advances that general interest, must necessarily be held to be a promotion of his interest. Each shareholder has a right to expect the cordial co-operation of all his co-shareholders in everything which tends to promote that general good. No one should be permitted to turn traitor to the concern, and set up an individual interest as hostile to it. No one can be known in the concern except by the stock which he represents, and all must be presumed to have a single eye to the enhancement of the value of that stock. These are general considerations which must be ever borne in mind in considering of amend-

ments to charters of incorporations. If an amendment is promotive of the general interest of the company, it is necessarily promotive of the individual interest of each shareholder, to the extent of his shares in the company; and any company has an undoubted right to accept any amendment to its charter which it believes promotive of the objects and interests of the company. Of this the company is necessarily the judge, and those who represent and act for the company, so long as they act with an honest purpose and a *bona fide* intent, must be held to have acted for the best, or at least their action must be sustained, as obligatory upon the company, the same as in the exercise of any other discretionary power with which they are vested, although it may turn out that they may have erred in their judgment. They are no more likely to err in this than in the exercise of any other important power with which they are invested.

There are various modes by which amendments to charters may be accepted by corporations, or rather by which such acceptance may be established, either for or against the corporation. The first, and perhaps the most satisfactory, is where an amendment is asked for in a general meeting of the shareholders, or where an amendment, after it is passed, is accepted by a majority in interest at such a meeting. But this is not the only, nor indeed the most usual mode, in this country of accepting amendments to corporate charters. This is generally done by the board of directors, who are for the most part vested with all the corporate powers of the company. We know of no case where it has been questioned that the board of directors have power to accept an amended charter, while that power has been expressly asserted in at least two different cases by this court. *Barret* (reported *Banit*) v. *The Alton & Sangamon Railroad Company*, 13 Ill. R. 508, and *Sprague* v. *The Illinois River Railroad Company*, 19 Ill. R. 174. Indeed, upon examination, it would probably be found that not one in twenty of the amended or even original charters under which corporations in this State are now exercising their franchises, has ever been accepted by a formal vote of the stockholders at large, and probably a majority have never been adopted by a formal vote even of the board of directors, but have been accepted by user alone, which is another and the most common mode of accepting an original charter by the corporators, and even of amendments thereto, both of which stand upon precisely the same footing in point of law. In neither case does the act of incorporation become the law of the corporators, prescribing the extent of their rights and the measure of their liabilities, till they have accepted its benefits and consented to

be bound by its liabilities. If they claim the one, they must submit to the other. This is an acceptance of a charter or an amendment thereto, and may be done by user. We may illustrate this by referring to our general statute, providing for a mode of condemning the right of way for public works, which statute also imposes certain obligations upon companies constructing such works. Suppose a railroad company already in existence at the passage of this general law, proceed to condemn land for its road way, it would thereby adopt such portions of that law as are applicable to it, and subject itself to the burdens therein imposed; while, if it refrained from availing itself of the benefits of the law, it might in no way be subjected to its provisions. We shall refer to but one case to show the application of this rule of accepting an amendment of a charter by implication or user. It is that of *The Lincoln and Kennebeck Bank* v. *Richardson*, 1 Greenl. R. 79. There the defendant was sued by the bank on a stock note, and was a stockholder in the bank, making the case precisely like this in every substantial feature. The action was not brought till the charter of the bank had expired, but its existence had been revived and continued by an act amendatory of the charter. It was admitted on all hands that the amendment was inoperative till it was accepted by the corporation, and there was no evidence of such acceptance except the bringing of the action. The court said: "By bringing the present action the plaintiffs have declared their acceptance of the new powers granted by the extending or revivor act of December 14, 1816, and of course are liable to be sued by their creditors as well as empowered to enforce payment by their debtors. It would be a harsh and unjust principle which would compel them to pay their debts because they have accepted the new powers, and yet deny them the use of legal process to enable them to collect the funds necessary for the purpose. If it should be urged, as it has been, that there is no assent on the part of the debtors of the bank of the extension of the charter, and that the bringing of this suit, though it may be proof of acceptance on the part of the bank, is not so on the part of Richardson, it may be replied, in addition to what has been before observed, that it appears by the agreement of the parties that the note in suit is a stock note, and of course Richardson is a stockholder. He is then bound by the act of acceptance on the part of the directors, the prosecutors of this action. The stockholders are bound by their official acts within the limits of their ordinary duties." It would be difficult to find a case more precisely in point in all respects to the one before us, than this is, unless it be that of *Foster* v. *The Essex Bank*, 16 Mass. R. 245. We deem it un-

necessary to enlarge upon a point so well settled. Exceptional cases may no doubt be found, where a majority of the shareholders in number and interest have denounced and opposed an amendment so soon as they learn of its enactment, and the acts of user are limited and equivocal, as in the case of *Commonwealth ex rel.* v. *Cullen*, 13 Pa. State R. 133. But the general rule is as stated above, that acts of user under an amendment to a corporate charter, for which no authority can be found except in such amendment, and which amendment is supposed in good faith to be beneficial to the corporation, are evidence of an acceptance of such amendment by the corporation, and make it the law of the corporation and binding upon all its members. If the act of acceptance by the board of directors or other controlling power, is prompted by sinister motives and not with a single eye to the general good of the company, it becomes fraudulent, and for that reason void, and might as such be repudiated by the corporators or shareholders. But nothing of the sort appears in this declaration, nor has there been even an intimation of it on the argument.

Here the declaration makes express reference to these amendatory acts as conferring authority to bring these actions. Indeed the very act of making this call on less than ninety days' notice, and bringing this action within that time, is a distinct and unequivocal act of user under these amendments of 1857, for only in the provisions of those laws can any authority be found for these acts. And this brings the case precisely within the case referred to in 1 Greenl., to which might be added, were it necessary, an unlimited number of authorities.

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into Lake Michigan. This grant did not create the obligation to do all these acts; and the city would not be liable to any party in damages for the non-performance of these permitted acts, unless it commences some of them and does them in so improper a manner that injury results therefrom. *Goodrich et al.* v. *City of Chicago*, 445.

6. If a party receives damage resulting from a sunken hulk in the harbor, he cannot recover of the city, because the city has not exercised the powers conferred upon it to clear out the harbor. Ibid. 445.
7. The second section of the act entitled "An Act to amend the charters of the several towns and cities in this State," approved March 1st, 1854, repeals so much of the act of 1851, as empowered the common council of the city of Chicago to order a sale of real estate to enforce the payment of assessments. *City of Chicago* v. *Colby*, 614.
8. Special assessments and taxes are different, and the same rule of construction where the words are used in statutes, will not be indiscriminately applied to these terms. Ibid. 614.
9. The language used in the case of the *City of Chicago* v. *The Rock Island Railroad Company*, *ante*, page 286, qualified and explained. Ibid. 614.
10. The act of February 14th, 1857, amendatory of the city charter of Chicago, repeals the second section of the act approved March 1st, 1854, aforesaid. Ibid. 614.
11. The Cook County Court of Common Pleas and the Circuit Court have jurisdiction to render judgments for taxes and assessments; but the County Court, unless extraordinary powers have been conferred upon it, has not. Ibid. 614.

CLAIM AND COLOR OF TITLE.

1. Where there is a contract for the sale of land unexecuted, it makes no difference so far as claim and color of title is concerned, whether the taxes are paid by the vendor or vendee, or by the assignee of either. *Darst* v. *Marshall*, 227.
2. Where a party had a contract for a deed of land, to be delivered when he should make certain payments, the contract providing also that he should repay the taxes assessed after a certain date, which contract was assigned by the vendor as the payment of money, and the assignee of the contract paid taxes for three years, and until the deed was delivered; when the party purchasing paid those taxes and all others for a period of seven years, during all which time he was in actual possession, this established such a claim and color of title as would defeat an action of ejectment brought by any other claimant. Ibid. 227.
3. A judgment for taxes is fatally defective, if it does not show the amount of tax for which it was rendered. The use of numerals, without some mark indicating for what they stand, is insufficient. *Lawrence* v. *Fast*, 338.
4. The separate record book of judgments for taxes should be so kept, as without reference to the general record, it could furnish a full exemplification of a judgment. Ibid. 338.
5. A party who interposes the benefit of limitation, derived under the ninth section of the twenty-fourth chapter of the Revised Statutes, to an action of ejectment, must show that the payment of taxes, and the color of title, were by and in the same person. Payment of taxes by different persons, for seven years, one of whom had only a contract for a conveyance, is insufficient. *Dunlap* v. *Daugherty et al.* 397.

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JUSTICES OF THE PEACE.

1. The court will take notice of a summons issued by a justice of the peace, and of the indorsements thereon, if set out in a bill of exceptions; and if the judgment is for a greater amount than is claimed on the back of the summons and interest, it is erroneous and will be reversed. *Chicago, Burlington & Quincy Railroad Company* v. *Minard*, 9.
2. A, being the holder of a note against B, to a larger amount than what A owes B, A may give credit for the amount due to B, so as thereby to reduce the demand of A against B, to a sum within the jurisdiction of a justice of the peace, although the money was not then demandable by B, from A. *Korsoski* v. *Foster*, 32.
3. In a proceeding before a justice of the peace, technical accuracy in the form of the judgment, whether it be in debt or for a penalty, will not be held indispensable. *Pendergast* v. *City of Peru*, 51.
4. A party, when sued before a justice of the peace, is not bound to set off unliquidated damages. Such a practice would invest justices of the peace with a jurisdiction beyond the statutory limits. *Bush* v. *Kindred*, 93.
5. An affidavit before a justice of the peace, which states that a defendant withholds his money or secretes his property from the officer, so that the debt cannot be levied, is insufficient to authorize the arrest of the debtor. *Gorton* v. *Frizzell*, 291.
6. Where a suit is pending before a justice of the peace, arbitrators may be chosen, and a judgment rendered upon their award; but unless a suit is pending, a justice cannot acquire jurisdiction. Because a justice of the peace prepares a submission to arbitrators, the Circuit Court does not thereby get jurisdiction of the controversy by an appeal. *Shirk* v. *Trainer*, 301.
7. In order to authorize the testimony of a plaintiff under the statute, in a suit originating before a justice of the peace, where a defendant refuses to be sworn, he must make affidavit that he has a claim or demand against the defendant, and that he has no witness by whom, or other legal testimony by which, to establish it. *Lee* v. *Quirk*, 392.

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KIDNAPPING.

1. In a case of kidnapping, it is not necessary that physical force be used; it will be sufficient to show that the mind was operated upon, by falsely exciting the fears, by the use of threats, or other undue influence, amounting substantially to a coercion of the will, as a substitute for violence. *Moody* v. *The People*, 315.
2. In coming to a conclusion in such a case, the jury should take into consideration the condition of the person kidnapped, her age, education and condition of mind, and all the circumstances connected with the transaction, as detailed by the proof. Ibid. 315.

LANDLORD AND TENANT.

1. Where, in an action of covenant upon a lease, the parties lessors being some of them, *femmes covert*, the lease is set out in *hæc verba*, the peculiar interest of the *femmes covert* is exhibited by the lease, without any special averment; and the lessees having admitted a special interest in these parties by taking the lease, are estopped from denying it. *Doggett* v. *Norton et al.* 332.

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2. Where one party is to deliver to another three hundred bushels of corn, and points to a crib in which it is, which is accepted, and two wagon loads are taken out of it, this constitutes a good transfer of title. Ibid. 443.

TOWNS AND CITIES.

1. A copy of a city ordinance, certified in conformity with the charter, is proper evidence of the existence of such ordinance, in a suit where the city is a party. *Pendergast* v. *City of Peru*, 51.
2. In a suit for violating a city ordinance, by selling liquor without a license, if the defendant stated that the city charged too much for license, and that he could not afford to pay the license, and pleads guilty to the charge of violating the ordinance, it will be held that the fact is established that he had not a license, that he had sold liquor, and that his plea of guilty had reference to that offense, although the ordinance contained other provisions of prohibition and other penalties. Ibid. 51.
3. To prove the existence of a corporation, it is sufficient to produce the charter, and prove acts done under it, and in conformity with it. Written proof that all the preliminary steps, etc., were taken, is not necessary. *Town of Mendota* v. *Thompson*, 197.
4. A corporation, acting as such, cannot be questioned collaterally on the ground that it has not complied with its charter. Ibid. 197.
5. A municipal corporation is not dissolved because, at its organization, persons not eligible were elected trustees. If their authority is questioned, it should be by *quo warranto*. Ibid. 197.
6. A trial of the speed of a horse, upon a wager, within the corporation limits of a city, where there is an ordinance against fast driving, is such an act against good morals as will preclude a court of justice from enforcing a payment of the wager. *Nash* v. *Monheimer*, 215.
7. It is not necessary, in order to find a defendant guilty of selling spirituous liquors in contravention of a city ordinance, that the liquor was handed to persons who asked for it, and that it was paid for, or charged to some one. *Kimball* v. *The People*, 348.
8. Where a statute directs that assessments for city improvements shall be made upon real estate in any natural division of the city benefited thereby, it is a limitation on the powers of the commissioners not to go out of a natural or obvious division, to make assessments; but having selected the area, then to assess such property in it, for taxation, as will most likely be benefited. *City of Ottawa* v. *Macy et al.* 413.
9. A notice to parties interested in the property assessed, which conforms to the law under which the city is incorporated, and to the city ordinance in that

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