ERRATA.

Cruce v. *Cruce.* On page 50, 3rd line from bottom, read *heirs* for "kin."

Peak v. *Shasted.* On page 138, 18th line from bottom, read *Sloo* for "Slow."

Hinckley v. *Kersting.* On page 250, 13th line from bottom, read *endorsement* for "inducement."

Fidler v. *McKinley.* On page 326, 20th line from top, the period after the word "inflicted," should be a comma, and the following word, "considering,' should commence without a capital C, and that sentence should end at the word "breach."

Cook v. *Heald.* On page 430, 2nd line from top, read *corrective* for "correction."

Cook v. *Vreeland.* On page 436, 3rd line from top, read *lien* for "time;" 5th line from top, read *beyond* for "to;" and in the same line insert the word *limits* between "and" and "the."

Dawley v. *Van Court.* On page 462, 20th line from top, read *regarded* for "urged."

City of Pekin v. *Smelzel.* On page 469, 4th line from bottom, read *prohibited* for "limited."

Parmelee v. *Smith.* On page 623, 2nd line from top, read *in* for "of."

REPORTS

OF

CASES DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

AT

NOVEMBER TERM, 1858, JANUARY TERM AND PART OF APRIL TERM, 1859.

BY E. PECK,
COUNSELOR AT LAW.

VOLUME XXI.

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JUDGES OF THE SUPREME COURT.

CHIEF JUSTICE,

JOHN D. CATON.

ASSOCIATE JUSTICES,

SIDNEY BREESE.

PINKNEY H. WALKER.

TABLE OF CASES.

RULE OF COURT.

RULE 45. The time allowed for each argument, in cases before this Court, shall be restricted to one hour, unless otherwise specially permitted; but counsel may file, in addition, such written arguments as they may think proper.

RULES ADOPTED IN THE THIRD GRAND DIVISION,

AT APRIL TERM, 1859.

RULE 46. *Ordered*, No case hereafter shall be placed on the court docket for hearing, unless the record is filed within the first three days of the term, or within the further time allowed by the court for filing the record, except in extraordinary cases, the court, upon special application, may order a cause to be placed on the hearing docket. This rule shall not apply to the present term till the 27th day of the present month.

RULE 47. *Ordered*, That after the present term of this court, in all cases where the parties themselves, or their attorneys, shall furnish the printed abstracts required by the rules of this court, the clerk shall not be permitted to make any charge or tax any costs therefor, other than the fee allowed by law for filing the same.

Rule 48. *Ordered,* That when the parties or their attorneys shall so furnish abstracts in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words of the manuscript abstract, against the unsuccessful party not furnishing such abstracts, as costs to be recovered by the successful party furnishing the same, to be collected and paid to him as other costs.

Rule 49. *Ordered,* That there shall be advanced by the party filing abstracts, at the time of filing the same, on account of the taxable fees to the clerk, the sum of five dollars.

Rule 50. *Ordered,* That the foregoing Rules shall apply only to the Third Grand Division.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

NOVEMBER TERM, 1858, AT MOUNT VERNON.

STEPHEN R. ROWAN, Plaintiff in Error, *v.* JOSEPH BOWLES and REBECCA BOWLES, his Wife, and ALEXANDER KIRKPATRICK and ELIZA J. KIRKPATRICK, his Wife, Defendants in Error.

ERROR TO GALLATIN.

The allegations and proofs in chancery must correspond; and however clear the evidence may make a case in favor of a complainant, unless the bill has proper averments, he cannot have a decree.

Where a bill against an administrator avers exhaustion of personal assets, and the proof shows a misapplication of those assets, although a liability exists, a decree cannot be granted for the misapplication, unless the allegations and prayer shall be amended.

Affirmative relief should not be granted to co-defendants who have not asked it, not being in a condition to ask or receive it.

THE decree in this case was entered at October term, 1857, of the Gallatin Circuit Court. The opinion of Mr. Justice Breese furnishes a statement of the case.

N. L. FREEMAN, for Plaintiff in Error.

W. THOMAS, for Defendants in Error.

BREESE, J. The facts in this case, briefly stated, show that Rebecca Bowles, the wife of one of the defendants in error, Joseph Bowles, was the only child of James Reid, deceased,

and Eliza J. Kirkpatrick, wife of A. Kirkpatrick, was his widow. That Alexander Reid, also deceased, was the administrator of James Reid, and guardian of Rebecca; and that Stephen R. Rowan was appointed administrator on the estate of Alexander Reid, and in virtue of Sec. 70, of Chap. 109, title "Wills," became the administrator *de bonis non* on the estate of James Reid.

Bowles and wife, and Kirkpatrick and wife, exhibited their bill in the Gallatin Circuit Court on the 3rd of March, 1844, against Rowan, as such administrator, for an account, in which they obtained a decree, on the 2nd of November, 1853, for $3,963.51, in favor of Bowles and wife, and for $651.26, in favor of Kirkpatrick and wife, with costs of suit, as their distributive shares, respectively, of the estate of James Reid.

This decree being unsatisfied, Bowles and wife, on the 27th April, 1854, filed their bill against Rowan as administrator of Alexander Reid, the heirs at law of said Reid, and Alexander Kirkpatrick and wife, praying to subject the real estate of said Reid to its payment, alleging a want of personal assets with which to pay it.

A decree passed for the sale of the lands, and a commissioner was appointed to make the sale.

In this decree the court found that the personal estate was exhausted, and that Rowan, as administrator of Alexander Reid, had paid out $935.21 on claims in the *fourth* class, after he had notice of this claim of Bowles and wife, which was of the *third* class, the court reserving the question as to Rowan's liability to pay to them this amount, until it should be ascertained, from the commissioner's report, whether the proceeds of the sale would not be sufficient to pay their claim in full.

On the report of the commissioner coming in, it was found that the proceeds of the sale of the lands were insufficient to satisfy the decree. Thereupon Bowles and wife, by leave of the court, filed their petition, asking for a decree upon the question reserved, being Rowan's individual liability to pay over this amount of $935.21 out of his own estate. At a subsequent term, (October term, 1857,) the parties appeared, and were fully heard on the question. The court ordered and decreed that Rowan was liable to pay to Bowles and wife, and to Kirkpatrick and wife, their *pro rata* shares of the said sum of $935.21, with six per cent. interest from the 7th January, 1856, as having been improperly paid out by him as the administrator of Alexander Reid, deceased, on the claims in the fourth class, with knowledge of the existence of this third class claim, as found and declared by this decree; and the court ordered and decreed that Bowles and wife have and recover of Rowan,

$889, their *pro rata* of the aforesaid sum of $935.21, including the interest to the date of the decree, and that Kirkpatrick and wife have and recover of said Rowan the sum of $144, their *pro rata* of said sum, including interest, and their costs, and that they have execution therefor against the estate of Rowan, etc.

From this decree Rowan appealed to this court, and makes the objection that the finding in the decree of 2nd November, 1855, "that he had paid out $935.21 on fourth class claims, in his own wrong," is erroneous, insisting there is no allegation in the original bill of any such matter; and if there was, that there is no evidence to support the finding; and further, that the decree awards to Kirkpatrick and wife, who were co-defendants with him, Rowan, affirmative relief, when they were not in a condition in that suit to receive it, or to ask a decree against him.

It does not appear that this bill filed by Bowles and wife to subject the real estate of A. Reid to the payment of their decree was ever answered by Rowan or Kirkpatrick and wife. They made no resistance to it—the decree passed without objection from them. In the bill it is distinctly alleged, as ground for subjecting the lands to the payment of the decree, that there were no personal assets in the hands of Rowan to be applied to satisfy it, and Rowan does not deny it, nor is it denied. This is the whole case made by the complainants, and the only inquiry before the court, was the amount of the decree rendered in the suit for an account in 1853, and the existence of personal assets out of which to satisfy it.

The production of the decree established the first, and upon inquiring into the other fact it was made to appear that the assets really applicable to this decree had been exhausted by Rowan in the payment of claims of an inferior class, to the extent of $935.21. But this is no where alleged in the bill—it comes out incidentally. It has been decided in several cases by this court that a complainant must recover on the case made by his bill, and he cannot be permitted to state one case in the bill, and make out a different one in proof. The allegations and proof must correspond, mutually supporting each other. Although a good case may appear in the evidence, yet if it is variant from the one stated in the bill, the bill will be dismissed. *McKay* v. *Bissett et al.*, 5 Gilm. R. 505.

It is a settled principle in all cases that the allegations and proofs must correspond—that the latter must make out the former, and that a party will not be entitled to relief, although the evidence makes out a clear case in his favor, unless there are averments in the bill of the shape made by the evidence. *Morgan* v. *Smith et al.*, 11 Ill. R. 200. A party must stand or

fall by the case made by his bill. *White* v. *Morrison et al.*, ib. 366.

Now the case made by this bill is the exhaustion of the personal assets, the proof is that the administrator has misapplied $935.21 of those assets, and he is made individually responsible therefor. This would be all right, if the complainant had so charged in his bill, and had so prayed.

Again, affirmative relief is granted to Kirkpatrick and wife, who are co-defendants with Rowan, and a decree is passed in their favor without their asking for it, or being in a condition to ask for it, or to receive the relief accorded to them.

This is erroneous. The decree is reversed and the cause remanded, with leave to complainants to amend their bill.

Decree reversed.

The Illinois Central Railroad Company, Appellant, *v.* Tabitha Cox, Administratrix of Othneile Cox, deceased, Appellee.

APPEAL FROM UNION.

Where competent servants have been selected to perform a duty, one of them cannot recover against the master for the carelessness of a fellow-servant.

It will be understood that each servant who engages in a particular business, calculates the hazards incident to it, and contracts accordingly.

Where A. contracts to deliver wood to a railroad company, the company to furnish the equipment to move it, the men on the train to obey the orders of the contractor, one of the servants employed by him to load wood upon the car having been thrown off and killed: Held, that the parties were all servants of the company, and that no recovery could be had by the administratrix for his death.

This action was instituted by the appellee against the appellant, in the Union Circuit Court.

The declaration was in case, and contained five counts, setting forth that the appellant, being the owner of the Illinois Central Railroad, and the locomotives, engines and cars running thereon, did, by and through its servants and employees, so carelessly misdirect and mismanage a locomotive and cars, running on said railroad, as to carelessly, negligently and unskillfully cause a collision, whereby one Othneile Cox, who was employed as a servant on said cars by defendant, was killed; to the damage of the plaintiff of $5,000.

To said declaration the defendant pleaded *not guilty*, and a further plea, which is set out in the opinion.

Upon these pleas issue was taken; and the cause was tried at May term, A. D. 1857, of the Union Circuit Court, before PARRISH, judge, and a jury.

Upon said trial, the plaintiff introduced *Green Bridges*, who testified that he was present when Othneile Cox was killed, which was on the 9th day of February, 1855. He was killed by a train of cars running on the Illinois Central Railroad, which were, at the time, engaged in hauling wood. The circumstances under which Cox lost his life were about these: In the morning before he was killed, we all got on the train, and went down the road from Anna after a load of wood. When the cars were loaded, they were started. Cox and myself were standing together on the cars, for a time, after which I moved my position to another place on the cars, in front, rather, of where Cox was standing. Cox was standing up against the wood with his face turned towards the rear of the train. The train was running rather fast, and just as we came to a train on the side track, I turned my head and saw the wood on the cars tumbling off. The wood struck the cars on the side track, which shoved it back against Cox's leg, and tripped him up and threw him off the cars. The moment I saw him fall, I hallooed as loud as I could to have them stop the train, but the train still went on. I saw a young man standing in front of me on the train; I then motioned my hand to him. The young man immediately pushed open the door of the caboose car, and the conductor came running out of the caboose car, and asked what was the matter. I informed him, and he wheeled right round and ran back and whistled, and the train was stopped; we ran back to where Cox was thrown off, and there lay Cox, dead. He was covered with mud, as if he had been rolled over in the mud for some little distance; one of his feet was nearly cut off; his thigh was broken so that the bones stuck out; there were cuts over each eye, and a large gash on the back of his head, so that we could see his skull bone. Cox never moved after I went back. I was well acquainted with him. Witness stated that Cox left children and also a widow, the plaintiff in this suit. The locomotive and cars upon which Cox was at the time he was killed, were called the Illinois Central Railroad Company's. The engineer's name was Travis; the conductor's, Wight. The wood hauled was used along the line of said railroad. The wood that knocked Cox off, was knocked off the train by running against another train. It looks as if the conductor and engineer might have seen the car standing upon the side track if they had looked out. Our speed was not slacked up as we came to the switch. Do not know Travis's character as an engineer; if he was drunk, I do not know it; did not see

him drink; do not know that he was in the habit of drinking. The wood was not over the edge of our cars.

Cross-examined. Bennett was a contractor on the road to furnish wood. Bennett and Scott had the locomotive and cars under their control for that purpose. They sent the train where they pleased. I thought that Cox was employed by Bennett; that we were all employed by him. Can give no opinion as to competency of conductor or engineer. Had known Cox five or six years; he was industrious, but sometimes drank too much liquor.

Bennett was hauling wood for the company; taking it to stations along the road for the company.

Philip Cruse testified that he had known Cox eight or ten months. Cox's family were dependent upon his labor for a living. Witness drank with Travis between seven and nine o'clock on the morning of the day that Cox was killed—thought that he was a little tight.

The defendant introduced *Wm. W. Bennett*, who testified as follows: At the time that Cox was killed, I was a contractor on the road. My business was to furnish wood to the company, and build fence. Mr. Scott, my partner, and myself, had charge of the train off of which I suppose Cox was thrown and killed. We had charge of the train, and the men on the same had to obey our orders. Mr. Cox was in our employ at the time. We sent the train out that morning. I had known Travis at least eight months before Cox was killed. He was regarded as one of the best engineers on the road; that was his character. He was skillful, careful and competent. I regarded him as a very superior man in that business. I had known Wight for three months. He had been very successful, and bore a good reputation as a conductor. Cox was generally a sober man, but would sometimes get drunk. My contract with the company, as to furnishing wood, was this: It was to be furnished at a certain price, and the company were to furnish a train of cars, locomotive, engineer, conductor and fireman, and the balance of the hands necessary. Mr. Scott and myself were to furnish ourselves. They did furnish us a conductor, engineer and fireman. Cox was in our employ at the time of his death. It was only a few days at a time that the train was furnished us, when we would call in all the hands needed.

Bennett and Scott were always held responsible for the management of the train, by the superintendent, and the officers that the company furnished us were subject to our direction and control. We could stop them at any time.

The jury found the defendant guilty, and assessed the damages at one thousand dollars. A motion for a new trial was

overruled. The court rendered judgment in favor of plaintiff, for the sum of one thousand dollars and costs of suit. The defendant appealed to this court, and now assigns the following causes of error:

That the verdict was against the law and the evidence.

That the verdict was against the instructions of the court.

That the court erred in refusing to grant a new trial, and in rendering judgment.

J. M. Douglas and Isham N. Haynie, for Plaintiff in Error.

R. S. Nelson, for Defendant in Error.

Breese, J. This action is brought under the first section of the act entitled, "An act requiring compensation for causing death by wrongful act, neglect or default," approved Feb. 12, 1853. Scates' Comp. 422.

That section is in these words: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

This action is brought by the widow of Othneile Cox, alleged to have been killed by the negligence of the defendants, in running their train. The declaration contains five counts, to each of which a separate demurrer was interposed, which was sustained by the court, and the plaintiff took leave to amend each count. To this amended declaration, and to each count thereof, the defendants again interposed a demurrer, which was sustained to all the counts except the first — to that it was overruled.

The first count is as follows, omitting the formal parts: "For that whereas heretofore, on the ninth day of February, in the year of our Lord one thousand eight hundred and fifty-five, and in the lifetime of the said Othneile Cox, who is deceased, at the county of Union and State of Illinois, the said defendants being then and there the owner of, and in the possession of the Illinois Central Railroad and the locomotives and cars thereon, did then and there by their agents, employees and hands, and by their negligence, carelessness and unskillfulness, and wrongful act of the same, kill, by running their said cars and locomotive on,

against, and over the body of the said Othneile Cox, the intestate and husband of the said plaintiff, thereby, then and there by the said wrongful act, negligence, carelessness and unskillfulness of the said defendant, causing the death of the said Othneile Cox, contrary to the form of the statute in such case made and provided, and to the damage of the said plaintiff as such administratrix, of five thousand dollars;" concluding with profert of the letters of administration.

To this count the defendants pleaded four pleas, not guilty and three special pleas. To the second, third and fourth, the plaintiff demurred, and the court sustained the demurrer as to the second and fourth, leaving the first and third pleas, on which issues of fact were made up.

The third plea is as follows: And for a further plea in this behalf, the said defendants say, *actio non*, because they say that the said locomotive, steam engine and cars, in the plaintiff's declaration mentioned, were driven upon, and against, and came in collision with the said cars, locomotives, steam engines upon which the said Othneile Cox then was, in manner and form as in the said declaration is alleged, solely by and through the carelessness, negligence, unskillfulness and default of the said servants of the defendants in the declaration mentioned in that behalf, and for want of due care and attention by them, and not through any other negligence, unskillfulness, default or want of due care and attention, and the said engines and cars in the declaration in that behalf mentioned, were respectively under the guidance, government and direction of the said several servants of the said defendants in the declaration mentioned, and of no other person or persons, and that the said Cox at the said time when, etc., was also a servant and in the employment of the said defendants in said declaration in this behalf mentioned, upon their said railroad; and that the said carelessness, negligence, unskillfulness and default, and want of due care and attention of the said servants of the said defendants in the declaration in that behalf mentioned, at the said time when, etc., and were wholly unauthorized by the said defendants, and were entirely without the leave or license, knowledge, sanction or consent of the said defendants; and concluding with a verification.

There is no formal replication to this plea. It is traversed in brief, by the words: "Traverse and issue to the country." To give this the force and effect of a formal replication, it will be seen that it traverses the fact that the locomotive and cars were under the guidance and direction of the defendants' servants; that the deceased was one of those servants; that the defendants did not authorize such carelessness, negligence and unskill-

fulness. This must either be considered as a general traverse, or regarded as a nullity, and a repleader awarded, but the parties have treated it as a general traverse, and it will be so considered.

Under the plea of not guilty, it is incumbent on the plaintiff to make out his case, substantially as stated in his declaration. He was required to show that the defendants were in the possession and owners of the railroad, and locomotives and cars thereon, and that by their agents, employees and hands, and by their negligence, carelessness and unskillfulness, and wrongful act, by running their said cars and locomotive on, against, and over the body of said Cox, they thereby caused the death of Cox; and the pleadings bring up the question whether the deceased, being the servant of the defendants, and they the common master of many servants, all engaged at the same time in the same business, are answerable "for the wrongful act, neglect or default" of one of the servants, by which another servant is injured.

The declaration does not state in what capacity the deceased was on the train—whether as a passenger, or as one of the servants or hands, but the special plea affirming that he was one of the servants, and which fact is put in issue by the general traverse, is established by the proof. We shall consider, for the purposes of this case, that all the parties, as well Bennett and Scott as their hired hands, were, all of them, employees of the company, and the jury have found the death was caused "by their wrongful act, neglect or default." We consider it as proved that all the persons engaged on the train were employed by the company in the same service, and the jury were told by the court,

1st. That a railroad company, or other corporation, are not responsible for injuries to their servants or agents, occasioned by the carelessness, negligence or unskillfulness of fellow-servants, while acting in the same service, without their knowledge or sanction, provided such company or corporation have taken proper care to engage competent servants to perform the duty assigned them; or if the person injured was acquainted with the character of his fellow-servants for capacity or skillfulness, while engaged as such servant.

2nd. That, in this case, if Othneile Cox was, at the time of his injury, in the employment of the Illinois Central Railroad Company, (provided the jury are satisfied, from the evidence, that he was in their employment,) and in the discharge of his duty as such; and, further, if they believe, from the evidence, that the injury complained of was occasioned either by his own carelessness, unskillfulness or negligence, or that of his fellow

servants in the same line of service, they should find for the defendants, provided they have exercised proper care in the selection of competent servants.

3rd. That when Othneile Cox entered into the service of the railroad company, (if the jury should believe, from the evidence, that he was in their service at all,) he thereby virtually undertook to run all the ordinary risks incident to his employment, including his own negligence or unskillfulness, or the negligence or unskillfulness of his fellow-servants in the same employment, or necessarily connected therewith.

4th. That it is presumed in law that his wages were commensurate with the hazard to which he was exposed.

5th. The true principle is, that when the servant of a company engages in their service, he undertakes, as between himself and his employer, to run all the ordinary risks of the service which he undertakes; and this includes the risk of occasional negligence or unskillfulness on the part of his fellow-servants or employees engaged in the same line of duty, or incident thereto; provided such fellow-servants are competent and skillful to discharge the duty assigned them.

These instructions declare the law correctly, as we have already decided in the case of *Honner* v. *Illinois Central Railroad Company*, 15 Ill. R. 550, and are in harmony with the great majority of English and American decisions.

See on the point, *Hutchinson, Adm'x*, v. *The York, New Castle and Berwick Railway Co.*, 5 Exch. Rep. 341; *Wigmore, Adm'x*, v. *Jay*, ib. 353; *Skip* v. *The Eastern Counties Railway Co.*, 24 Eng. L. and E. 396; *Wiggett* v. *Fox*, 36 ib. 486; *Degg, Adm'x*, v. *The Midland Railway Co.*, 40 ib. 377; *Farwell* v. *Boston and Worcester Railroad Co.*, 4 Metcalf, 49; *Murray* v. *S. Carolina Railroad Co.*, 1 McMullen R. 385; *Brown* v. *Maxwell*, 6 Hill R. 592; 6 Barbour R. 231; 3 Cushing R. 270; *Ryan* v. *Cumberland Valley Railroad Co.*, 23 Penn. R. 384; 6 Louisiana Annual Rep. 495; *Shields* v. *George*, 15 Georgia R. 349; *Madison and Indianapolis Railroad Co.* v. *Bacon*, 6 Ind. R. (Porter) 205.

We think the doctrine established by these cases the correct doctrine. It is right and proper that one servant should not recover against the common master for the carelessness of his fellow-servant, provided competent servants have been selected by the master. It is important to all concerned that each servant should have an interest in seeing that all his co-servants do their duty with proper care and fidelity, and who will take care to report the negligent and unskillful by whom their lives may be endangered, to their principal. This will make them all prompt and vigilant, and their master's interest be closely inter-

woven with their own, and all properly regarded. Independent of this, it must be understood that each servant, when he engages in a particular service, calculates the hazards incident to it, and contracts accordingly. This we see every day—dangerous service generally receiving higher compensation than a service unattended with danger or any considerable risk of life or limb.

The jury in this case were fully informed of these principles by the clear and unqualified instructions of the court, and no duty remained to them but to obey them. They were constrained to believe from the evidence, there being no conflict, that the employees of the company were skillful and competent for the business in which they were employed. There was no "wrongful act, neglect or default" proved, of such a character as to have entitled the deceased, had he survived the injury, to maintain an action. The proof abundantly shows that the engine driver and conductor, who are the principal persons engaged about the train, were skillful and competent men, and that the usual and ordinary caution was observed by them. There can be little doubt, from the evidence, that the accident was occasioned by the unskillful manner in which the wood was loaded upon the cars—in doing which the deceased was an actor—the ends of the sticks extending over the side so far as to strike the train on the switch. By striking this train, the pile of wood near which the deceased was standing, was displaced, and he precipitated upon the track. This, surely, was but an ordinary accident—a casualty to which the employment he was engaged in, exposed him, and he must be understood to have made his contract with reference not to it especially, but to all accidents of such character. Whether he participated or not, in the act of piling the wood, is immaterial. All the hands hired by Bennett and Scott, who were contractors to furnish the wood, and who had control of the engine and train, were engaged in the same business, and the deceased took upon himself, in consideration of the compensation paid him, the ordinary risks of the business, including the negligence of his fellow-servants. If this were not so, no great enterprises could be safely undertaken and carried on, nor would there exist that vigilance and care on the part of the employed, which is so vital to their success.

The court, after instructing the jury as it did, should not have hesitated to set aside the verdict, as the verdict was directly in the face of the instructions, and no evidence justifying it.

We have said, and such is the rule every where, that a court will not set aside a verdict where the jury have found contrary to the instructions of the court, if upon the whole case it appears that substantial justice has been done. In a case like

this, however, where an important principle was involved, and one of no common magnitude, and in expounding which, the court was clear and distinct, and no sufficient evidence to charge the defendants, a court would fall far short of its duty, should it permit its instructions to be totally disregarded by the jury, as they appear to have been in this case.

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

Judgment reversed.

BENJAMIN F. SLATEN *et al.*, Plaintiffs in Error, *v.* THE PEOPLE.

ERROR TO JERSEY.

A *scire facias* upon a recognizance issues after such recognizance is made a record, and oyer of it is not demandable; if the writ misdescribes the record, the proper plea is *nul tiel record.*

A recognizance is not required to be under the seal of the parties; nor is the magistrate taking it required to certify it into the Circuit Court under his seal.

THE judgment sought to be reversed by this writ of error, was rendered at the April term, 1858, of the Jersey Circuit Court, by WOODSON, Judge.

The opinion of the court gives a statement of the case.

UNDERWOODS, for Plaintiffs in Error.

J. S. ROBINSON, for The People.

BREESE, J. On the first day of September, 1857, one John Morain being charged with larceny, and examined before a justice of the peace of Jersey county, entered into a recognizance, with Slaten and Piggott his sureties, in the sum of one hundred and fifty dollars, for his appearance at the next term of the Jersey Circuit Court, to answer any indictment that might be found against him on said charge.

At the next term of that court, Morain defaulted, and his sureties were called to bring in their principal in discharge of their recognizance, and they made default; a forfeiture of their recognizance was duly entered, and a *scire facias* ordered against them.

This writ was returned served on Slaten and Piggott, and *non est* as to Morain. The writ is in the usual form, but avers that the recognizance was signed and sealed by the defendants, and

is set out in full in the writ. The necessary averments that the recognizance was taken and acknowledged before the justice of the peace, and duly certified to the Circuit Court, and filed of record in the clerk's office of that court, as required by law, are made. The recognizance set out in the writ is not sealed by the parties, nor is the certificate of the justice of the peace certifying it into the Circuit Court, under his seal. The record shows an indictment by the grand jury against Morain, on this charge of larceny.

At the April term, 1858, of the Jersey Circuit Court, the plaintiffs in error appeared by attorney, and craved oyer of the recognizance and *scire facias*, and demurred generally, assigning the following causes: that it does not appear that the recognizance was certified into the Circuit Court; that it does not show that it was approved by the justice; that it does not appear that the person taking it had any authority; that the *scire facias* does not show for what offense the principal was indicted, or that he had been guilty of an indictable offense; that there is no averment that the recognizance was forfeited; and these are the causes assigned for error.

These causes are disposed of by reference to the *scire facias*. It avers that the recognizance was returned to the Circuit Court on the 7th of September, 1857; that it was approved by the justice of the peace taking it, and that he was a justice of the peace. It also sets out the indictment found by the grand jury for larceny, and avers the default of all the parties and a forfeiture of the recognizance. The writ is quite formal and technical. Where this writ is issued upon a recognizance, it is only so issued when the recognizance is made a record, on being certified into the Circuit Court. Being such record, oyer is not demandable of it. 1 Ch. Pl. 415. It is not, therefore, before the court to determine a question of variance. If the *scire facias* describes a record different from the true record, that fact should be brought to the notice of the court by plea of *nul tiel record*—otherwise the court cannot notice it.

The statute does not require that the recognizance shall be under the seal of the parties, or that the magistrate shall certify it into the Circuit Court under his seal. Rev. Laws, Chap. 30, Sec. 205.

The record shows a strict compliance with the statute in every particular, and the judgment is therefore affirmed.

Judgment affirmed.

William G. Bowman, Appellant, *v.* Milton Bartley, Appellee.

APPEAL FROM GALLATIN.

A judgment in an action of debt should show how much is for debt and how much for damages, or it will be erroneous.

This was an action of debt, commenced in the Circuit Court of Gallatin county, by Bartley against Bowman. The writ and declaration claimed seventy-six dollars twenty-five cents debt, and fifty dollars damages.

The general issue, and two pleas of partial payment, were filed.

Cause submitted to the court, proofs heard, and judgment against the defendant for seventy-nine dollars and ninety-four cents, and costs.

The defendant appealed, and assigned for error that the court erred in not specifying how much of the judgment is for debt, and how much for damages.

Olney & Bowman, for Appellant.

M. Bartley, for Appellee.

Breese, J. The judgment in this case shows a larger amount of debt recovered than is claimed in the declaration, and is made up of the debt and the damages, without distinguishing what portion is debt, and what portion damages.

This court has frequently decided that such a judgment is erroneous. *Marsh* v. *Wright*, 14 Ill. R. 248; *Mager* v. *Hutchinson*, 2 Gilm. R. 266; *Wilmans* v. *Bank of Illinois*, 1 Gilm. R. 667.

In conformity with these decisions, the judgment must be reversed, and the cause remanded, as we have no data by which to ascertain what part is debt, and what part damages, so as to render a correct judgment here.

Judgment reversed.

HARVEY B. LUCAS, Plaintiff in Error, *v.* SAMUEL S. FARRINGTON, who sues as S. S. Farrington, Defendant in Error.

ERROR TO WASHINGTON.

The fact that the clerk has copied an affidavit in support of a motion for security for costs into the record, is not sufficient; the affidavit should appear in a bill of exceptions. Exception should also be taken to the ruling of the court denying the motion.

The replication to a plea of misnomer, that a party is as well known by one name as another, is good.

An interlocutory judgment by default for the part of the debt claimed, not denied by a plea, is proper, and where the issue raised by the plea is submitted for trial and a finding is had, unless the contrary appears, it will be presumed that the debt, answered and unanswered, was submitted to the jury, and incorporated into the finding.

In an action of debt, where the finding is only for a part of the debt due, upon which a judgment is rendered, it is not necessary to specify which part is debt and which damages; it is all debt.

DEBT by note in the Washington Circuit Court, brought by defendant in error against plaintiff in error. Declaration in the usual form; amount of debt, $372.55; damages, $200.

Summons in debt, issued 4th March, 1857, against plaintiff in error, in favor of defendant in error, plaintiff in the court below, for $372.55; damages, $100; returnable to March term, A. D. 1857, of said court. Returned, "Not served."

On the 21st day of May, 1857, another summons issued from said court against plaintiff, and in favor of defendant, returnable to August term of said court. Returned, "Served," on the 25th day of May, 1857. On the 25th of August, 1857, motion was made by plaintiff in error, on affidavit, for a bond for costs, which motion was denied.

At the August term, A. D. 1857, plaintiff in error pleaded in abatement that the plaintiff in the court below, and defendant in error, who sued as S. S. Farrington, was called and known by the name of Samuel S. Farrington, instead of S. S. Farrington; to which the defendant in error replied, that he was as well known by the name of S. S. Farrington as by the name of Samuel S. Farrington; whereupon the plaintiff in error filed a demurrer to said replication, which was overruled by the court.

Plaintiff in error, at same term of court, then filed a plea setting up that, as to the sum of $300, parcel of the sum above demanded, he had paid and satisfied the same by bill of exchange, which was received by the defendant in full satisfaction of the sum of $300; which plea the defendant traversed in his replication. Defendant in error then asked for judgment by default, which was entered for $72.55, part not answered by

plea. Plaintiff in error then moved for a discontinuance of the suit, which motion was overruled. A jury was empanneled, by order of the court, who returned a verdict for the sum of $186, and costs, upon which the court rendered judgment for $186, and costs.

The plaintiff brings the cause into this court by writ of error, and seeks to reverse the judgment of the Circuit Court of Washington county,

1st. Because the court overruled the motion to dismiss for want of cost bond.

2nd. Because the court overruled the demurrer to replication to plaintiff's plea in abatement.

3rd. Because the court rendered judgment by default for $72.55, part of declaration unanswered.

4th. Because the court overruled the motion to discontinue suit, after rendering judgment for the part unanswered, as aforesaid.

5th. Because the court empanneled a jury to try said cause after the suit was discontinued in law, and rendered a judgment for $186, and costs, against plaintiff in error, on the verdict of the jury.

6th. Because the judgment of the court does not specify whether said judgment was rendered for debt or damages, or for what portion of the claim of the defendant in error the said judgment was rendered.

7th. Because there are two separate final judgments rendered against the plaintiff in error in one suit.

Nelson & Johnson, for Plaintiff in Error.

S. J. Hicks, for Defendant in Error.

Breese, J. We cannot know whether the Circuit Court decided correctly or not, in refusing to dismiss the suit for want of a bond for costs, the affidavit on that motion not having been made a part of the record, by bill of exceptions. Nor does the record show that any exception was taken to the decision of the court overruling the motion. This objection, therefore, is not properly before this court. *Selby* v. *Hutchinson, Adm'r*, 4 Gilm. R. 326. The fact that the clerk has copied the affidavit into the record, does not make it a part of the record. *McDonald* v. *Arnout*, 14 Ill. R. 58.

The demurrer to the replication to defendant's plea of misnomer of plaintiff, was properly overruled, for the replication tendered a proper and triable issue. That a party is known as well by one name as by another, makes a good replication to

such plea, even if the Christian or given name is made up of initials only. He may, if he chooses, risk an issue on that.

It was proper to enter an interlocutory judgment by default for that part of the debt not answered by plea, and then to take issue on the matter of fact alleged in the plea. No other course could be pursued without working a discontinuance. 1 Chit. Plead. 509.

The action was debt, and the verdict of the jury finds only a part of the debt due, for which the court renders judgment. Hence there was no necessity, as is urged, of specifying what part was debt, and what part damages. It is all debt, and so found by the jury, without any damages.

The last error assigned, that there are two judgments, one by default for $72.55, and one for $186.00, the amount found by the jury, is not true in fact. There is but one judgment, and we must presume, on the default being taken for the portion of the debt not answered, the same jury that tried the issue, assessed the damages on the default, and incorporated them into their finding on the issue, making them a part of the verdict, and for which the court rendered judgment. This we must presume the jury did do, there being no evidence to the contrary. This being so, we cannot discover wherein any error has been committed. We must presume the verdict of one hundred and eighty-six dollars was made up of the amount not answered to, and of the balance due on the note, and included the whole indebtedness, as there is nothing in the record to the contrary.

Our first impressions were, there was error in the proceedings, and accordingly we pronounced a judgment of reversal; but more mature consideration has satisfied us there is no error, and we avail of the act of the last session of the General Assembly, authorizing us to correct inadvertent or mistaken judgments, by now directing that the judgment be entered as affirmed.

Judgment affirmed.

Abner Eason *et al.*, Plaintiffs in Error, *v.* Daniel Chapman, Defendant in Error.

ERROR TO FRANKLIN.

Where it is shown that the general character of a witness, among his neighbors, for truthfulness, is bad, it is erroneous to refuse to let the impeaching witness answer whether he would believe such witness upon oath.

The case of *Fry* v. *Bank of Illinois*, in 11th Illinois Reports, page 367, on this question, approved.

Eason et al. *v.* Chapman.

This was an action of trespass, brought by Chapman against Eason and others, in the Williamson Circuit Court, for the supposed killing of a stable horse. The defendants below pleaded the general issue. There was a trial before Parrish, Judge, and a jury, at September term, 1857, of the Franklin Circuit Court, on a change of venue from Williamson, which resulted in a verdict and judgment for plaintiff below, of five hundred dollars.

In the progress of the trial, one *Charles Starix* was introduced as a witness, by the defendants, who stated that he knew Caroline Riddle, (a witness who had been sworn on the part of the plaintiff,) and had known her for five years, and that he was acquainted with her general character for truthfulness in the neighborhood in which she lived when witness knew her; and that her general character for truthfulness is bad. The witness was then asked if, from knowledge of her general character for truthfulness, he would believe her upon oath; to this question the plaintiff objected and the objection was sustained by the court, and the witness was not allowed to answer. On being cross-examined, Starix stated that Caroline Riddle was about twelve years old when he first knew her, and that he speaks of her character at that age; that she is now nineteen or twenty; that he heard the widow Bain, one of the Packers, and many other neighbors, say, but could not tell who, that she was a lying girl, and that her character for truthfulness was bad; he had always heard her badly spoken of, and thinks he heard most of the neighbors say her character for truthfulness was bad.

J. Logan, R. S. Nelson and A. D. Duff, for Plaintiffs in Error.

J. Allen, for Defendant in Error.

Caton, C. J. In order to impeach the plaintiff's witnesses, the defendants called witnesses who stated that they were acquainted with the characters of the plaintiff's witnesses for truthfulness in the neighborhood in which they lived, and that such characters were bad. The defendants' counsel then asked the witnesses if, from their knowledge of such general character for truthfulness, they would believe them upon oath. This question was objected to and the objection sustained by the court, to which an exception was taken, and this ruling is now assigned for error.

It is a general rule, no doubt, that the testimony of witnesses shall be confined to a simple statement of facts, and that they shall not be allowed to give their opinions or conclusions de-

duced from those facts, but that such conclusions shall be deduced by the jury. To this general rule there are, however, many exceptions which are as well known and universally recognized as the rule itself. Nearly, if not quite all, these exceptions are based upon the supposition that in the particular instance the witness is presumed, from his particular position, calling or experience, to be capable of forming a more enlightened opinion than the jury. The most usual example is where the opinions of experts in trades, sciences or professions, are admitted to enlighten the jury, who are presumed to be less informed than the witness, on the particular subject; or where, from the nature of the case, it is supposed to be impossible from any mere statement of facts to convey to the jury the same impressions which those facts, as they actually transpired, were calculated to make or did make upon the minds and understandings of the witnesses. Instances of this kind are met with where slanderous words are alleged to have been spoken, and it is alleged that they were designed to convey and did convey a different meaning to the minds of the hearers than that which would be understood by their simple import, and witnesses have been allowed to state what meaning was conveyed to them by the words used, taken in connection with the circumstances and manner of speaking.

So in the case before us. It does not follow as a necessary consequence that because the reputation of a witness for truth and veracity in the neighborhood in which he lives may be bad, that he is not to be believed when upon his oath. When such reputation has been proved, no party can rest assured that the veracity of the witness has been utterly destroyed with the jury. We all know that there are persons so given to apochryphal statements in their common conversation and intercourse with their friends and neighbors, that no one places any confidence in their statements, and this want of truthfulness becomes a subject of common remark among all who know them, still, from their daily walk and conversation in other respects, none would doubt their truthfulness when solemnly called to testify in a court of justice. And yet it would be impossible to detail all the minutiæ of the circumstances which would inspire that confidence, so as to impart their full and just impression to the jury. These well known facts are presumed to be ever present to the mind of the jury, so as to a greater or less extent, weaken the force of every impeachment. Hence witnesses who must be always impressed with these indescribable circumstances, if they exist, have always been allowed to express the opinion, whether they would, or not, believe the impeached witness under oath. Who is there who does not know that two witnesses may be

impeached in precisely the same language, and truthfully, and yet one would be implicitly believed by all who know him, when under oath, while no form of oath, however solemn, would inspire the acquaintances of the other with the least confidence in his statements ?

There is then, a sound and substantial reason which addresses itself to men of observation and affairs, why this should be an exception to the general rule. Indeed it is strictly within the rule of the exception.

This principle and practice has been so long settled and so uniformly acted upon, both in England and this country, that we are a little surprised even in this progressive and innovating age, to find it lately questioned in some quarters; where the reason of the rule, it is feared, has not been properly considered. It is sufficient for us that we find it well settled as a part of the common law, and that as such it has been expressly recognized by this court. In the case of *Fry* v. *Bank of Illinois*, 11 Ill. R. 379, this court said—"The proper question to be put to a witness called to impeach another is, whether he knows the general reputation of the person sought to be impeached, among his neighbors, for truth and veracity. If this question is answered affirmatively, the witness may then be inquired of as to what that reputation is, and whether from that reputation he would believe him on oath." We are not now disposed to depart from this rule, which it is believed has been always acted upon in this State, without question, till now, and which received the emphatic sanction of this court nearly ten years ago. Even though we thought a different rule the best, we ought not to be ever vascillating in our decisions, so that no lawyer can know whether he is giving reliable advice to his client, although he may have read it from a solemn decision of this court.

The court erred in sustaining the objection to the question, and its judgment must be reversed and the cause remanded.

Breese, J., dissenting. It is always with great diffidence that I dissent from an opinion of my associates, and I never do so, unless I conscientiously believe they rule erroneously on an important question, and this is such a case. The rule they seek to establish, is at variance, I think, with the first and fundamental principle of evidence, and though it may be the rule of the English courts, and of some courts in this country, it is not, and cannot be maintained to be, a rule founded in reason or justified by necessity.

The Chief Justice admits the general rule to be that the testimony of witnesses must be confined to a simple statement of facts, and they should not be allowed to give their opinions or

conclusions deduced from those facts, but that such conclusions should be drawn by the jury. This is undoubtedly the general rule, and but few exceptions to it are to be found in the books. The Chief Justice notices the most prominent, for example, the opinions of *experts* in certain trades, arts and sciences or professions. It is unquestionably true, on questions of science and trade, persons of skill are permitted to express an opinion on matters belonging to their particular science or art. They are not called to speak to facts, but to give opinions on facts sworn to by others. The books tell us why this is an exception to the general rule. 1 Greenleaf on Ev., secs. 280, 440. It is from necessity alone, and I think it may safely be affirmed that on this ground only, can a departure, from an otherwise universal principle of evidence, be justified. It is because of the peculiar science, art, trade or profession. Men not educated to them are not presumed to be informed in regard to them—they have no connection with them, and hence, from necessity, the opinions of the scientific are received.

To illustrate still farther the view taken by the court, instances in slander are referred to, where witnesses have been allowed to state the impressions made on their minds by the language used. This I apprehend is quite different, in principle, from the rule here laid down, and it proceeds on this ground: since words to be actionable in themselves must be such as in their plain and popular sense convey to the minds of the hearers a charge of some offense for which the plaintiff is amenable to the law, so the jury must be satisfied the defendant used the words in the sense imputed, and therefore may the defendant show under what circumstances the words were spoken, whether seriously, or in jest and merriment, and how they were received and understood by the hearers, so that the imputation of malice may be destroyed. It is right and just, and no rule is violated, by holding a party responsible for words in the sense in which he spoke them, and was understood to speak them. The very nature of the case admits this kind of testimony. But not so, when the character of a witness is attacked. He should stand or fall by the facts, not by opinions; neither to be prejudiced by an unfavorable opinion or aided by a favorable one. As in all other cases, so in this, the jury is entitled to the fact only, and that is his general character for truth, good or bad. On this fact, coupled with the bearing of the witness, his surroundings, and the circumstances proved, the jury can decide for themselves if he is worthy of belief, uninfluenced either way by the opinion of the impeaching witness. Having the fact, they are fully competent to make all proper deductions from it, and form a correct opinion, unbiased by improper influences.

Greenleaf, in his Treatise on Evidence—an acknowledged authority in this court—says, "The regular mode of examining into the general reputation, is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is. In the English courts, the course is further to inquire, whether, from such knowledge, the witness would believe that person on oath. In the American courts the same course has been pursued, but its propriety has of late been questioned, and perhaps the weight of authority is now *against* permitting the witness to testify as to his own opinion." 1 Greenleaf Ev., sec. 461.

The authorities cited in support of the English rule are, 4 Wend. (N. Y.) 257; 2 Devereux, (S. C.) 209–211; 1 Hill (S. C.) 258; 7 Humphrey, (Tenn.) 92. Against the rule he cites 2 Sumner C. C. 610; Swift's Ev. 143; 1 Appleton, (19 Maine) 375; and two cases in Pennsylvania, which I do not understand as departing very materially from the English rule, and the rule as laid down by this court.

The case in 2 Sumner, 610, is *Goss* v. *Stinson*, and after citing the English rule, Story, Justice, says, "with us the more usual course is to discredit the party by an inquiry what his general reputation for truth is, whether it is good or whether it is bad."

I have not Gilbert or Peake on Evidence to refer to. Philips, in his Treatise, lays down the rule as this court has done, (2 Phil. Ev. 432,) and so does Starkie, (1 Stark. Ev. 211,) but neither assign any reason for the rule. The case in 19 Maine, 377, (*Philips* v. *Ringfield*,) was decided by Shepley, J., and his opinion so fully and clearly expresses mine that I shall use such portions of it as may be necessary. The court in that case prefer the rule as stated by Swift in his Treatise on Evidence. He was once Chief Justice of the Supreme Court of Connecticut, and considered one of the ablest jurists this country has produced. He says the only proper questions to be asked are, whether the witness knows the general character of the witness who is attacked, in point of truth, among his neighbors, and what the character is, whether good or bad, and states, that his testimony must be founded on the common repute as to *truth* and not as to honesty. Swift's Ev. 143. This is the fact which should be placed before the jury for their consideration in weighing the testimony. The opinions of a witness are not legal testimony except in special cases. To these cases I have referred in this opinion.

In other cases the witness is not to substitute his opinion for that of the jury; nor are they to rely upon any such opinion instead of exercising their own judgment, taking into consider-

ation the whole testimony. When they have the testimony that the character of the witness is good or bad, they then have all the elements for the foundation of their judgment to which they are legally entitled. Any other rule is a departure from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it.

And he might have added, there being no necessity for making this an exception, it cannot be regarded as an exception.

The court say further, "It moreover would permit the introduction and indulgence, in courts of justice, of personal and party hostilities, and of every unworthy motive by which man can be actuated to form the basis of an opinion, to be expressed to a jury to influence their decision."

I insist a witness is not to be crushed by the opinion of another, no matter how disreputable he may be. He is to be judged by the facts, not by opinions.

Suppose the impeaching witness should state that the general character of the witness for truth, was good, and yet should give it as his opinion, that he ought not to be believed on oath. It is plain to be seen, such an opinion if expressed by a person of high standing and influence, and under the solemnities of an oath, might be overwhelming, and a man whose general character for truth is good, be sacrificed on the strength of a mere opinion. His "daily walk and conversation" may be above reproach, but through the malice and pique of a man of influence, he is stigmatized before a jury, and a deserving suitor deprived of important testimony.

Such a rule does not comport, in my opinion, with the purposes of evidence, which are the ascertainment of facts, nor with justice, which should be always in view, and is wrong in principle. It cherishes a defamatory spirit, encourages spite and malevolence, and should not be tolerated.

I cannot feel the force of the reasoning of the majority of the court by which the rule they have established is made an exception to the old fundamental and safe rule, that the witness must state facts, not give his opinions or impressions. The rule however, having been recognized in 11 Ill. 379, some years before this case arose, I think with the majority, that the Circuit Court should have been governed by it in this case, and have conformed his opinion to it. It would certainly have been more respectful, to say nothing of the obligatory force of the decisions of this court. Yet notwithstanding, I think the Circuit Court announced the safest, and best, and most consistent rule, founded on correct principles, and it should prevail. The rule in 11th

Ill. should not be adhered to, as it seems to have neither reason or necessity to justify it.

But again, should this error of the Circuit Court be considered sufficient to reverse this judgment?

I think we are all satisfied that substantial justice has been done in the case, by the finding of the jury. It could not very seriously affect the case whether the impeaching witness would or would not believe the person sought to be impeached. The jury had the facts before them on which to form their own conclusive opinion as to the credibility of the witness, and I think it is going too far to disturb a verdict where justice has been done, for any such like cause, and this court has so held repeatedly, in analogous cases. *Leigh* v. *Hodges*, 3 Scam. R. 17; *Smith* v. *Shultz*, 1 Scam. R. 491; *Gillett* v. *Sweat*, 1 Gilm. R. 475; *Newkirk* v. *Cone*, 18 Ill. R. 454.

In actions of trespass like this, where the testimony was, for the most part, circumstantial, the court should not disturb a verdict where there is any thing in the record going to support the finding of the jury, and no important rule of law violated. *Young* v. *Silkwood*, 11 Ill. R. 36. Even if proper testimony has been rejected by the court. *Greenup* v. *Stoker*, 3 Gilm. R. 202. I am therefore for affirming the judgment.

Judgment reversed.

Alfred Kitchell, Appellant, *v.* James Burgwin and Wife, and others, Appellees.

APPEAL FROM RICHLAND.

If an answer in chancery is defective or not responsive to the bill, it should be excepted to; if not excepted to, and there be no replication to it, when the cause is set down for hearing, on bill, answer and exhibits, if any, the answer, however defective, will be taken as true. If the answer neither admits nor denies the bill, its allegations must be proved.

In claiming under the homestead exemption law, whether by bill or answer, it must appear that the lot of ground has a building upon it, occupied as a residence, owned by the debtor, who must be a householder, having a family, (a wife constitutes a family,) and that the debt was not incurred for the purchase or improvement of the premises. A decree upon such bill or answer should find the facts required to exist by the statute.

The land claimed by exemption, must be the spot on which claimant and his family actually reside, as their home. An abandonment of the homestead will not be presumed from the fact that the head of the family is in search of another home, if, being disappointed, he may return to the old one.

Kitchell *v.* Burgwin et ux.

A bill of exceptions is not necessary in any case, where the error is intrinsic, appearing on the face of the record.

A formal release or waiver of the statute, granting the homestead exemption, must be executed by the parties, showing that it was the intention of the parties to release. A wife must do something more than release her dower.

THIS was a suit to foreclose two mortgages, both on same parcel of real estate—the first by C. H. Barney to Reuben Barney, and assigned (notes and mortgage) to plaintiff; and the second by Burgwin and wife to plaintiff.

By the original and amended bills, it appears C. H. Barney mortgaged to Reuben Barney, on the 4th of March, 1854, to secure five notes, amounting in all to $240, and being part of the purchase money of said premises, owing by said C. H. Barney.

That afterwards, and subject to the said mortgage, C. H. Barney sold and conveyed the premises to G. F. Powers, and Powers again by deed afterwards conveyed to James Burgwin, and subject to the Barney mortgage.

That Burgwin being indebted to Kitchell, the same premises were again mortgaged by said Burgwin and wife, to him, to secure a note for $90, and subject, as before, to the Barney mortgage.

That at the time of the making the mortgage by Burgwin and wife to Kitchell, Burgwin expressly agreed and promised to pay off the Barney notes and mortgage as the same became due.

That the several notes of C. H. Barney and the mortgage therefor, and the notes of Burgwin, all became due, and Burgwin failed to pay any part of them, and that Kitchell became the purchaser of the said Barney notes and mortgages, in order to protect his own claim.

At the September term, 1855, a decree was taken by default, against the defendants, but afterwards was set aside on motion of plaintiff, and the bill amended, and final decree entered, October term, 1858.

At October term, 1858, Burgwin and wife appeared and filed an answer, setting up a claim to the premises as a homestead exemption, but not denying any of the matters alleged in the bills.

Upon the bill, exhibits and answer, the court rendered a decree in favor of plaintiff for foreclosure of the mortgage, in usual form, subject to the following limitation and condition, viz: "And provided also, that while the said Burgwin and wife continue to occupy the same and to claim it as a homestead under the statute, no sale shall be made by the Master in Chancery, nor shall he proceed in any wise to execute this decree so

long as the said Burgwin and wife shall so occupy and claim it as a homestead, unless by due appraisement and after payment by the said plaintiff of $1,000, in pursuance of the statute in such case provided."

To the above recited provision in said decree plaintiff excepted, and prayed an appeal, and this cause is now brought here to reverse that part of the decree.

The mortgage of Burgwin and wife to plaintiff, is in usual form and substance for conveyances by man and wife, and sealed by both, and acknowledged by both before a justice of the peace, who certifies to such acknowledgment in usual form and according to the statute for like deeds.

The error assigned is the provision in said decree allowing the said Burgwin and wife to hold the same as a homestead against the plaintiff's debt.

A. KITCHELL, *pro se*, submitted this case *ex parte* upon non-joinder, in Error.

BREESE, J. There is nothing in the original bill, filed in this cause, or in the amended bill, showing that the mortgaged property therein described, was improved property, occupied or resided upon by the defendants, Burgwin and wife, or by any other person. It is described as a tract of land, by proper numbers, courses and distances, and as containing "one acre, more or less."

To the original bill no defense was made, it was taken as confessed against the defendants, and an order of sale entered.

On the coming in of the report of the commissioner appointed to sell the land, it was objected on the part of the defendants, 1st, That there was a want of proper parties in the cause, Charles H. Barney, the original mortgagor, under whom the complainant claimed in part, not being made a party; the want of proper process, and other irregularities: and 2nd, That the premises constituted the homestead of defendants, on which they resided at the date of the mortgage, and the date of the decree, and on which they still reside, and have not waived their claim of exemption, the debt having been created since the fourth day of July, 1851.

At the same October term, 1857, when these objections were made, the sale, by agreement of parties, was set aside, and also the decree entered in the cause, and the complainant took leave to amend his bill, by reviving the same against Charles H. Barney, and the administrator and heirs of Whittington, and in other particulars, as he might elect.

Afterwards, on the fifth day of August, 1858, the complainant filed an affidavit, showing that Charles H. Barney was a non-resident, and obtained an order of publication against him, which was duly published.

At the September term, 1858, the complainant filed his amended bill, making Burgwin and wife, Charles H. Barney, and the administrator of Whittington, parties, and called upon them for answers.

In the amended as well as in the original bill, it is alleged that the defendant, Burgwin, promised and engaged, on executing the mortgage to complainant, to pay off the notes and mortgage to H. Barney, he having purchased the property subject to this mortgage, and it is also averred that he had failed to do so, and that to protect himself, complainant had been compelled to buy in the notes and mortgage, which he then held, but there is no proof of any of these averments. The prayer is to subject the premises to the payment of both mortgages.

The amended bill is taken as confessed against C. H. Barney and Whittington—against Barney on proof of notice by publication.

The answer put in to the amended bill by Burgwin and wife, is very brief indeed, not denying or admitting any of the allegations of either bill, nor is it under oath. It is as follows: "Richland county, ss: The answer of James Burgwin and Kitty Ann Burgwin, defendants, to the bill of complaint of Alfred Kitchell, complainant, exhibited against these defendants and others, at the October term, A. D. 1858, of the Richland Circuit Court.

"These respondents, saving and reserving to themselves all manner of exception, etc., answering, say — That said tract of land mortgaged as set up in said bill, is the homestead of the defendants, and on which they reside at this time, and did at the date of their mortgage; that they have never waived their right to this homestead as exempted from forced sale, etc.; that they plead the statute exempting homesteads from sale, and claim its protection in this suit; wherefore having fully answered, defendants pray to be discharged, with costs."

This is not the practice in chancery. If an answer is defective —if it is not responsive to the allegations of the bill, it should be excepted to, and on exception being allowed and the defendant ruled to put in a sufficient answer, on failing to comply, the bill is taken for confessed. If an answer is put in, no matter how defective, and there be no exceptions to it, and no replication, the cause is set down for hearing on bill and answer and exhibits, if any, and the answer is taken to be true, whether

responsive to the bill or not. If the answer neither admits or denies the allegations of the bill, they must be proved, for such is the rule in chancery proceedings. *De Wolf et al.* v. *Long*, 2 Gilm. R. 682.

In this case no one of the allegations of the bill is admitted or denied, and no one of them proved, except so far as the exhibits prove themselves.

The answer not being replied to must be taken as true, and the fact is distinctly presented by it that the premises on which the mortgage to complainant was given, was, at the time it was given, the defendants' homestead, on which they then resided and still reside, and that they have never waived their right to it as a homestead, and claim the statutory exemption, and the case stands on this affirmative fact thus set up in the answer and not denied by the complainant.

Now the question arises, are the facts as stated by the defendants, that they reside, and did reside, on the land, sufficient to bring this case within the operation of the act of 1851, and constitute it a homestead and exempt from forced sale?

The homestead exemption law provides, (Scates' Comp. 576, sec. 1,) "That in addition to the property now exempt by law from sale under execution, there shall be exempt from levy and forced sale under any process or order from any court of law or equity in this State, for debts contracted from and after the fourth day of July, 1851, the lot of ground and the buildings thereon occupied as a residence and owned by the debtor being a householder and having a family, to the value of one thousand dollars;" * * * "and no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder," (and by the act of February 17, 1857, 'and his wife, if he have one,') "and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged."

The 2nd section provides that no property by virtue of this act shall be exempt from sale for a debt or liability incurred for the purchase or improvement thereof.

This statute must have a construction so liberal as to advance the object contemplated by the legislature and nothing more, and we are to understand by its phraseology, that several things must concur before exemption can be allowed. The lot of ground must have a building or buildings upon it; this building or buildings must be occupied as a residence; it must be owned by the debtor, who must be a householder and have a family.

The averment that defendants resided on the land, would imply there was a cabin, or tent, or some other structure upon it, in which a residence might be taken up, and which might

satisfy the requirement of the statute that a building should be upon the land. Having a wife, is having "a family," and the fact of residing upon the land would make the defendant a householder. But the answer fails to make out the case in this, there is no averment in it that the land was owned by the defendant, or that the debt was not incurred for its purchase or improvement. All the facts stated in the answer may be true, and yet the claim to exemption is not established for the want of these averments, which are indispensable.

A party claiming a statutory benefit must, by proper averments either in his bill or his answer, show himself entitled to the equities provided by it—all that is necessary to show his title and right to the relief he seeks. 1 Daniel's Ch. Prac. 411, and cases there cited.

Still more objectionable is the decree. It finds no one of the facts required by the statute to exist, but allows the exemption upon occupancy merely, which may be by a tenant, and by claiming it as a homestead. We think the statute requires more than this on the part of the debtor himself. The land must be the spot on which he claims a residence, and on which his family resides—it must be "the home" of the family. A mere occupancy and claim of homestead, the premises not being the actual residence or home of the family for every day in the year, may well consist with the view we have endeavored to express. We think it would still be the homestead though the head of the family might leave it in search of another home in a distant State, and being disappointed, might return to it. We can lay down no rule to govern such cases, each case must depend on its own peculiar circumstances, so that among them no evidence shall be found of an abandonment by himself and family. Whether it is a wise policy to grant such privileges, is not a question for the court; it is sufficient for us to arrive at the true meaning and intention of the legislature in their grant of it, and that we think is abundantly manifest—to secure to the family a home. It appears the complainant excepted to this proviso in the decree—an act wholly unnecessary. It should be well understood that a bill of exceptions is not necessary in any case where the error is intrinsic, appearing on the face of the record. The sole office of a bill of exceptions is to make matters which are extrinsic, or out of the record, a part of the record. *Joliet and Northern Railroad Company* v. *Jones*, 20 Ill. R. 225.

Upon the remaining points made by counsel, we think a formal release or waiver of the statute must be executed. It must appear, that the privileges and advantages of the act, were in the contemplation of the parties executing the deed, and that they were expressly released or waived, in the mode pointed out in

the statute. The wife must do something more than release her dower.

The first judgment of this court having gone to the extent only of a modification of the original decree, we have, on more mature consideration, deemed it right and just that the defendants should have an opportunity of presenting in a proper manner, their claim to the exemption under the homestead act, and for that purpose avail of the act of the last session of the General Assembly, authorizing this court to correct judgments in vacation, and reverse this judgment, and remand the cause, with leave to both parties to amend the pleadings.

Decree reversed.

Adam Cruce, Administrator of Peter Cruce, deceased, Appellant, *v.* Lucinda Cruce *et al.*, minor children, who appear by their Guardians, Appellees.

APPEAL FROM UNION.

Money in the hands of an intestate guardian, deceased, belonging to his wards, in the hands of his administrator, ranks within the third class of debts to be paid, as provided for in the 115th section of the Statute of Wills; and will be preferred to the statutory allowance to the widow of the deceased guardian, and is to be paid in preference to such allowances, although the estate of the deceased is inadequate to her allowance, and the amounts due to the children.

Where A., who in his lifetime was guardian to B. and C., died intestate, having at the time of his death in his hands money belonging to his wards B. and C. upon claims duly allowed, and D., the administrator of A., deceased, applied the personal estate of A. to the payment of claims of the first and second classes, and paid over the residue of his estate to the widow of A., but which residue was inadequate to pay her the separate property allowed her by the appraisers, and D. obtained an order to sell and did sell the real estate of A., the proceeds of which were also inadequate to pay the unsatisfied claims of the widow and the amounts due to B. and C., it was held, That the claims of B. and C. were of the third class provided for in the 115th section of the Statute of Wills, and that the proceeds of the real estate of A. sold by D., as administrator, should be paid to B. and C., the wards of A., instead of to his widow; in preference to her claim arising out of a deficit of the personal estate of A. to furnish her provisions for one year, and for a deficit to provide for the value of the specific articles allowed by law — no such articles having been left by the intestate.

If there be no other debt against the estate than the claim of the widow arising out of such deficit, she would then be a creditor of the estate to the extent of such deficit, and would have the same right of other creditors to be paid out of the assets derived from such sale, and the overplus would go to the distributees as in other cases.

The facts of this case are set out in the opinion of Mr. Justice Breese.

The Circuit Court of Union county, at April term, 1856, reversed the judgment of the County Court, which was in favor of the claims of the widow, and adjudged that Adam Cruce, administrator of Peter Cruce, deceased, should pay the money which came into his hands from the sale of the real estate of said deceased, after paying the first and second class claims, to the present guardians of the children instead of to the widow of Peter Cruce.

C. G. SIMONS, for Appellant.

J. DOUGHERTY, for Appellees.

BREESE, J. The record shows the following facts agreed upon by the parties. First, That the intestate, Peter Cruce, in his lifetime, was the guardian of Lucinda and Philip Cruce. That he died intestate, in 1852, and that defendant is his administrator. That at the time of his death he had in his hands money of his said wards, to the amount of three hundred and forty-six dollars and eighty-three cents—one hundred and eighty-two dollars and fifty-five cents, part thereof, being money of Lucinda, and the balance, being one hundred and sixty-four dollars and twenty-eight cents, the money of Philip. That the administrator had notice of this fact, and that said sums were duly proved and allowed as claims against said estate, on the 18th day of February, 1853, in the County Court of Union county.

That Sophia Cruce is the widow of the intestate, and that the amount of separate property allowed her by the appraisers, in lieu of specific articles of property and for one year's provisions—she having elected to take the same, in part in money, on the 15th day of March, 1852—amounted to six hundred and seventy-five dollars and twenty-five cents.

That the whole amount of the personal estate of the intestate was two hundred and forty-seven dollars and sixty cents, and that the claims of the first and second class amount to thirty dollars.

That the administrator applied the personal estate to the payment of these first and second class claims of thirty dollars, and paid over the balance to the widow, leaving a deficit of personal property to pay her separate property allowed her by the appraisers.

That the administrator, afterwards, at the April term of the County Court of Union county, obtained an order to sell the real estate of the intestate, and in pursuance of said order, did, on the 21st May, 1853, sell the same for three hundred and

eighty-eight dollars, and has received the same as assets in his hands, as such administrator.

That the claims of Lucinda and Philip are in no part paid, but remain due and unpaid, and are the only claims against the estate of the third class.

The question is, to whom the proceeds of the real estate should be paid, by the administrator—if to the widow of the intestate, the judgment of the Circuit Court is to be reversed—if to the wards, "in preference to the widow's claim for deficit of personal estate to furnish her provisions for one year and for the value of the specific articles of property allowed her by law, when no such articles were left by the intestate," then the decision of the Circuit Court is to be affirmed, and the administrator ordered to pay to them the proceeds of the sale of the real estate in his hands, according to the respective amounts of each of the minors.

This is a very important and interesting question, and we have bestowed upon it much attention. A brief review of our legislation on this subject, is necessary in order to a proper understanding of it.

By the first section of the act of Feb. 11, 1847, (Scates' Comp. 1203) it is provided, "That widows, living in this State, of persons whose estates are administered upon in this State, shall be allowed in all cases in exclusion of creditors, as their sole and exclusive property forever, necessary beds, bedsteads and bedding for themselves and families; necessary household and kitchen furniture; one spinning wheel; one loom and its appendages; one pair of cards; one stove and the necessary pipe therefor; the wearing apparel of themselves and families; one milch cow and calf for every four persons in the family; one horse of the value of forty dollars; one woman's saddle and bridle of the value of fifteen dollars; provisions for themselves and families for one year; two sheep for each member of the family, and the fleeces taken from the same; food for the stock above described, for six months; fuel for themselves and families for three months, and sixty dollars' worth of other property.

By the second section, the widow is entitled, in addition to the above, "to the one-third of the personal estate, after the payment of debts, as her property forever."

By the third section, the appraisers are required to make out and certify to the Court of Probate, "an estimate of the value of each article of specific property herein allowed to the widow."

By the fourth section, if the widow desires to take other property in lieu of that above specified, she must take the same

at the value affixed by the appraisers. The fifth section repeals the forty-eighth section of the act of 1845, and the first section of the act amendatory thereto, found in the appendix to the Revised Statutes, page 598. (Scates' Comp. 1202.)

The second section of this act, (ib. 1202,) provides, when the intestate leaves no property of the description above, the widow shall then be entitled to retain other property of equal value, or the value of the same in money, and it is made the duty of the administrator or judge of probate, to allow the value of these articles to be set apart to her, either in money or other personal property, at her election.

By section 110, (Scates' Comp. 1211,) it is provided: When any real estate shall, at any time, be ordered to be sold, the moneys arising from such sale shall be received by the executor or administrator applying for such order, and shall be considered as assets in his or her hands for the payment of debts; and shall be applied in the same manner as assets arising from the sale of personal property.

These are all the statutes, except one or two others hereafter noticed, which we conceive have any direct bearing on the question presented, and it will be seen they breathe a commendable spirit of liberality toward the widow, however much they may be supposed to detract from the rights of heirs and creditors.

The personal property she has a right to select and retain, is to the exclusion of creditors, and taken by the widow at the valuation fixed by appraisers, whose sympathies cannot be presumed to be against her, not unfrequently sweeps an entire estate.

This is undoubtedly the law, and however questionable its justice or policy may be, we must give it effect.

When, however, it is sought to put a construction upon these statutes, still further to advance the interests of the widow to the sacrifice of all others, we should require the strongest reasons therefor, and that it should be demonstrated they will bear no other construction than the one contended for, however that may operate; plausible or persuasive reasons merely will not do.

A desire, on the part of the legislature, to favor widows, is plainly discovered pervading all our statutes on the subject of intestate estates. So strong has it been manifested, that where there is no issue, the widow is entitled on the death of her husband, after the payment of debts, to the whole of his personal estate, and to one-half of his real estate, forever, and her dower in the remaining portion of the real estate, equal to one-third of the yearly rents and profits thereof, the next of kin of the intestate being wholly excluded except as to one-half of the real estate, and that subject to the dower right of the widow as

above stated. The personal, and one-half of the real estate, is the exclusive property of the widow, to dispose of as she pleases, without regard to the generally recognized rights of the family of the first taker, through whom it may have been derived. Strangers to his blood and family come into the enjoyment of an estate, which may have descended from father to son, through a long and unbroken line, in which, it would seem, justice would require it should continue, and to which, at least, it should return on the death of the widow. Surely, greater liberality and a more intense regard for the interests of the widow could hardly be manifested.

It is now contended that a proper and just construction of our statutes on this subject, requires that infant wards shall be deprived of their slender patrimony to advance the widow—that their interests must be sacrificed to hers—that this bounty of the legislature is a preferred debt, overriding all claims whatsoever, and if there be no personal property to satisfy it, the inheritance must go for such purpose.

Section 115 of Ch. 109, (Scates' Comp. 1206,) provides that all demands against the estate of any testator or intestate shall be divided into classes. In class first are arranged all funeral and other expenses attending the last sickness of the deceased. Into the second, all expenses of proving the will and taking out letters testamentary of administration and settlement of the estate, and the physicians' bill in the last illness of the deceased. Into the third, trust moneys; and into the fourth, "all other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be exhibited within two years from the grant of letters of administration."

The claim of the appellees in this case is of the third class, and the only claim of that description existing against the estate. Such a claim was once considered of the most sacred character, the unlawful appropriation of which was visited, not only by the severest censure, but by deserved punishment. Our law, however, it is contended, ignores this doctrine, and appropriates such funds to the widow of the guardian who may have been faithless to his trust, and whose property it never was.

We do not think our legislation should receive this construction, producing, as it does, such results, seemingly so full of injustice.

On intestacy, the personal property belonging to the intestate is vested in the administrator, to be disposed of in the payment of debts, to the extent only of the residuum, after the widow shall have made her selection. The lands descend to the kin, chargeable with the debts. The first duty of an administrator is, to make a careful and true inventory of the personal prop-

erty, and when that is made, by section 49, (Scates' Comp. 1201,) the widow may thereupon relinquish her right to any or all of the specific articles of property allowed to her; and in case the intestate shall not leave any or all of the articles specified, she may take other property, or the value of the specific articles in money, and it is made the duty of the administrator, or court of probate, to allow her the value of the articles in money, or in other personal property, at her election.

When the widow has made her election, then, and not before, the balance of the personal property becomes vested in the administrator, and is assets for the payment of debts.

By section 88, (ib. 1201,) when the estate is solvent and free from debt or incumbrance, or where there is a sufficiency of money or assets in the hands of the administrator to pay the debts independent of the property mentioned in the inventory and bill of appraisement, the widow can then make her election whether she will exercise her dower right, if there be children, to one-third of the personal property out of the articles mentioned in the bill of appraisement, according to the appraised value thereof, or the amount thereof in money, whenever the property shall be sold and the money therefor collected; or, she may take a part in property and a part in money, as she may prefer; or, "otherwise," if there be no children, she takes the whole, as heir, by section 46, (ib. 1200.) In all cases the administrator is required to notify the widow so soon as the appraisement is made, and to set apart to her the articles to which she is entitled, "and as she may prefer and select," within thirty days after the widow shall make written application for that purpose, with a penalty against the administrator for neglect. (Ib. 1201.)

From these various statutes we would understand, when the personal estate of an intestate is not sufficient to pay the debts, giving to that term its most comprehensive significance, and is only sufficient to satisfy the claim of the widow, she can take the whole of it either in property or money, if it be money, or when reduced to money by sale, to the exclusion of all others, no matter in what class the debts or claims may fall. If this be so, and there be debts coming within the several classes specified in section 115, (ib. 1206,) they are to be postponed, or if there be real estate, they would form the basis of petition for its sale to pay them. Ib. 1209, secs. 3, 4. The widow cannot be postponed so far as the personal property is concerned, or the money, and the personal property or money, under such circumstances, cannot be considered as assets for the payment of debts. The law vests these articles, or the money, at her election, in the widow, if they are on hand at the death of the

intestate. Her election is confined to the personal property or the money arising from its sale, or that may be on hand. If she waives the right to take the property, and there is no money on hand representing its appraised value, the property must then be converted into money and paid to her to the extent of her claim, and the overplus applied to the payment of debts. If her whole claim is not satisfied by the sale of the personal property, the balance becomes a debt against the estate, and she a creditor on the footing of other creditors. By waiving or refusing to exercise her right to retain the property on hand as hers exclusively, and demanding money, she must be considered as consenting to become a creditor, preferred only to the extent of the avails of the sale of the personal property.

If the widow refuses to take the property, demanding money, placing herself by her own choice in the attitude of a creditor, who can only be paid with money, then it follows she must take all the hazards incident to such a position, and if the personal property will not fetch the money to which she is entitled, and the real estate has to be sold to pay the debts, then the assets derived from such sale are applicable to her debt, as it is applicable to all other debts, according to the class in which it may be found—she has no longer a preference.

Abundant time is given the widow to determine what she will do—whether she will take the specific property, or make her claim a money demand—whether she shall occupy the position of a recipient of the bounty of the law, or a creditor demanding money. She must be controlled by her own election. As in the case of a will, time is given her to take under it or renounce, and having decided to take under the will, she is forever barred and precluded from claiming under the law, and *vice versa.*

We think this view keeps pace with the liberal disposition evinced by the legislature toward widows, by conceding her claim to be a creditor, her claim on the personal property being unsatisfied, and to pay which, the heir can be deprived of a portion if not the whole of his inheritance. A more rigid construction of the statute would perhaps deprive the widow of this position, and would leave her to the exclusive enjoyment only of the personal property or money on hand, at the time of the death of the intestate husband, for the statute nowhere declares, in terms, she shall have any right to the money which shall be realized from the sale of the real estate of the intestate, that being assets for the payment of debts only, as other assets. The right of the widow seems to be confined to the property or money on hand. But the statute having been understood to have received a different construction by the courts of this State, in which there has been general acquiescence, we will not disturb

it. We think she is a creditor of the estate to the extent of this bounty, and exclusive, so far as the personal property is concerned, and that to pay any balance of the debt thus raised the land can be sold. To the assets thus derived she has not the exclusive right to any part of them, if there be other claims, and if there be, they are to be paid according to the class into which they are arranged.

If there be no other debt against the estate than this of the widow, she would, of course, have the right to have appropriated to its payment so much of the assets derived from such sale as would be necessary for that purpose, the overplus going to the distributees, as in other cases.

Having renounced her right to the specific property, and having elected to become a creditor, she has no exclusive right or preference to the assets derived from the sale of the land. She is a creditor merely, and as such must take her chances with the other creditors.

In this case, where the money claimed by the appellees never was, in truth, the money of the intestate, the widow cannot be said to have any equitable claim whatever to it. It was not her deceased husband's—it belonged to these children, and the injustice of taking it from them would be enormous.

The difficulty in reconciling the various provisions of the several statutes we have cited, is not inconsiderable, as they fail to constitute an entirely harmonious system. We think the view we have taken of them tends not only to advance the supposed object of the legislature, but to satisfy the demands of justice, and to produce the desired harmony.

On the facts agreed, we are of opinion that the proceeds of the sale of the land should be paid over to the appellees, their claim being in the third class, as directed by the Circuit Court, and we affirm the judgment of that court.

Judgment affirmed.

The Bank of the Republic, Plaintiff in Error, *v.* The County of Hamilton, Defendant in Error.

ERROR TO HAMILTON.

Corporations are artificial persons, created with limited powers and capacities, and subject to the general laws and legislation of the State, as natural persons are; rights secured to them by contract they cannot be deprived of without just compensation; but, like natural persons in the exercise of their rights of organization and existence, they are subject to the control of the legislature by general laws.

Bank of the Republic *v.* County of Hamilton.

If, by the act creating it, a corporation has, by express grant or necessary intendment, rights and powers secured to it, such rights and powers are its property, and are protected under the constitution like the property of an individual.

The general rights and powers of a corporation, and which are not intended to be secured to it as its property, are subject to legislative control in the same manner as the general rights of individuals.

Whenever a property is asserted in a right, whether the right is inherent in an individual, or has been conferred by grant upon an artificial person, if the legislature has relinquished the power to legislate further in reference thereto, the property is fixed and absolute.

In the construction of statutes it will never be presumed that the legislature intended to abandon its rights as to the mode of assessing and collecting the State revenues.

In submitting a plan for banking to the people, it was not intended thereby, to release any legislative power necessary for revenue purposes. The mode of assessing the property of banks for the purposes of taxation, was not required to be submitted to the people, and their vote did not confer any additional sanction upon that provision; the legislature still controls the mode of taxation.

Bonds deposited with the auditor to secure the redemption of the bills issued by the banks, are subject to taxation.

THIS cause was brought into the Circuit Court of Hamilton county by appeal from the County Court, from a hearing had in the County Court on application, by the Bank of the Republic, for a reduction of the assessment of the property of the said bank, as made by the assessor of Hamilton county for the year 1857, the County Court having refused to reduce said assessment.

In the Circuit Court the cause on appeal was heard before BEECHER, Judge, at the May term, 1858, of the Hamilton Circuit Court, without a jury, and the judgment of the County Court was affirmed.

On the trial in the Circuit Court, it appeared in evidence, from the assessment lists of Hamilton county, that the valuation of the personal property of said bank for the year 1857, was four hundred and forty-two thousand dollars, which valuation was entered in said lists in the column headed "*Bonds, Stocks;*" there was not any noting on the said lists, of the words, "by assessor," in any way connected with the bank.

That the assessor of Hamilton county called upon the agent of the bank, (the president, etc., being absent,) in June, 1857, for a statement of the property of the bank for taxation, when it was agreed that such statement should be furnished by the first of September. That the assessor did not leave with the agent of the bank any blank to be filled. That said agent, in August, 1857, mailed through the post office to said assessor a statement of the property of said bank, signed by the president thereof, which stated the capital stock of said bank paid in, at fifty thousand dollars.

That it appeared from the testimony of Charles H. Rockwell,

the president of said bank, that the amount of capital stock thereof paid in at that time was fifty thousand dollars; that there was not any surplus profits, reserved funds, personal property, or real estate belonging to said bank, beyond said fifty thousand dollars; that said bank then had bonds and stocks deposited with the auditor, as a basis of issue for the circulating notes of said bank, to the amount of four hundred and six thousand dollars, and that the amount of circulating notes of said bank was four hundred and three thousand dollars; that the balance due upon the purchase of said bonds, when procured, was paid in the notes issued by said bank; that said bonds deposited draw interest; that said bank had, on the 1st April, 1857, thirteen thousand dollars in specie on hand. That after the passage of the act of 1857, amendatory of the general banking law, the auditor demanded proof of said bank that fifty thousand dollars of actual cash capital had been paid in, or secured to be paid in, to said bank. That there is no other or further cash capital paid in, or secured to be paid in, to said bank, than said fifty thousand dollars.

The Circuit Court fixed the valuation of the bank at four hundred and nineteen thousand dollars.

Thereupon the counsel on the part of said bank, and the counsel for the defendant (Hamilton county,) had the case certified to this court, upon the following agreement signed by them:

"We do hereby agree, in the case of The Bank of the Republic *versus* The People of Hamilton County, that the following questions and points of law arising in the said cause may be submitted to the Supreme Court of the State of Illinois, for final judgment and determination; and that no further action be taken or further proceedings had in the said cause, until the opinion of the said Supreme Court shall be first had thereon.

"1st. Whether the said assessment of plaintiff's property for the year 1857 was not invalid, for the reason that the assessor did not comply with the provisions of the statutes of the State of Illinois, in not leaving the notice and blank required by law for the listing of property, and in not making any note or memorandum of the date and name as required in such cases, and not noting the words, 'by assessor,' in the assessment lists, against the name of the plaintiff.

"2nd. Whether there was any such neglect or refusal on the part of the plaintiff to list property, as the law contemplates, in order to authorize the assessor to value the property independently of the owner.

"3rd. Whether said assessor was not bound to accept the statement of the property as listed by the president of said bank, on being notified that it was ready for him at the clerk's

office, before closing his assessment list, and before entering therein any valuation of said property.

"4th. Whether said statement of the order was sufficient authority for said assessor to enter the valuation of the property of said bank, without further information or inquiry.

"5th. Whether the assessor had any legal authority to assess bank property at all.

"6th. Whether the provision of the law is not compulsory, requiring a reduction of the assessment to the valuation fixed by the person required to list, when verified by the oath of such person, on applying for such reduction.

"7th. Whether the bonds or stocks deposited with the State auditor, as the basis of issue of said bank, are taxable as personal property of said bank.

"8th. Whether said stocks so deposited, are the measure of the capital stock of said bank, and liable to taxation according to their market value.

"9th. Whether the act of 1857, amendatory of the general banking law, makes the *bona fide* cash capital of said bank actually paid in, or secured to be paid in, the basis of taxation for said bank.

"10th. Whether the term 'capital stock paid in,' as employed in the sixth section of said amendatory act, is to be construed as synonymous with the term '*bona fide* cash capital actually paid in,' as it occurs in the eighth section of said act.

"11th. Whether the 'capital stock paid in, or secured to be paid in,' as used in said sixth section, means the investment of moneys other than the proceeds of the notes of issue of the bank, whether in purchase of real estate, coin, stocks deposited, or any other property belonging to the bank.

"12th. Whether the bank officer, in listing the property of the bank as required by law, is bound to include in such list, the stocks deposited by the bank, estimated according to their market value, together with the coin on hand and also the actual cash capital paid in, other than the proceeds of its own circulating notes, as well as any surplus profits and reserved fund in the bank.

"13th. Whether, if said stocks deposited are required to be listed as capital stock, together with the coin, *bona fide* cash capital paid in, surplus profits and reserved fund, the bank may not deduct from the aggregate amount thereof, the true amount of its outstanding circulation.

"14th. Whether the basis for taxation for banks, under the said amendatory act of 1857, is the same with that for individuals and other corporations or associations, namely, the actual value of property which they own; and in estimating such value,

whether they are allowed, in listing property, to deduct from the gross amount of moneys and credits owned, the amount of *bona fide* debts owing, in the same manner as other persons or corporations.

"15th. Whether the said amendatory act of 1857, in imposing additional burthens upon the banks, without any corresponding advantage or benefit conferred, and not authorized at the time of the passage of the general banking law in its adoption by the people, is not wholly null and void, and in conflict with the constitution of the United States, as impairing the obligation of contracts.

"16th. Whether an appeal lies to the Circuit Court, from the decision of the County Court, on the refusal of an application to said court to reduce the valuation of property as assessed by the county assessor.

H. T. Steele, for Plaintiff in Error.

N. L. Freeman, for Defendant in Error.

Caton, C. J. Two principal questions are raised by the appellant in this case, which have demanded our careful consideration. The first is, whether the bank can object to the change made by the law of 1857, in ascertaining the value of the property of the bank, on which it is to be assessed, from that provided by the general banking law, under which this bank was organized; and, second, whether the bonds deposited with the auditor to secure the issues of the bank, are taxable, or rather, whether the bank is taxable to the amount of these bonds, as capital paid in, or secured to be paid in.

The tenth section of the general banking law of 1857, says: "Taxes shall be levied on and paid by the corporation, and not upon the individual stockholders; the value of the property to be ascertained annually by the bank commissioners herein provided for, and the rate of taxation shall be the same as that required to be levied on other taxable property, by the revenue laws of the State." This was the provision of the original banking law, approved by the vote of the people, and under which this bank was organized. The sixth section of the amendment of 1857 is this: "The capital stock of every bank or banking association, paid in or secured to be paid in, except so much thereof as is invested in real estate, which shall be taxed as real estate, as herein provided, together with its surplus profits or reserved fund, and also the real estate of such company, shall be listed by the president or cashier thereof, and assessed and taxed in the same manner as other personal and

real estate of the county and towns in which such bank or banking association is located." This is the change in the law to which the bank makes objection as a violation of its chartered rights; and also as a violation of this provision of the constitution—"No act of the General Assembly, authorizing corporations or associations with banking powers, shall go into, or in any manner be in force, unless the same shall be submitted to the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for and against such law."

The objection that this change in the mode of ascertaining the value of the taxable property of the bank from the valuation of the bank commissioners to that of the president or cashier of the institution, implies that by this provision in the general banking law the State has entered into a solemn contract with all the banks which should be ever thereafter organized under that law, that that mode and none other should ever be adopted for ascertaining the value of the taxable property of the bank; and this very objection implies that all banks and all other corporations are above and independent of, all laws except only their charters. That no general law affecting the revenues, or the police, or in any way the general good government of the State, can be passed unless its charter so provides.

Corporations are artificial persons endowed with limited powers and capacities, and are subject to the general laws and legislation of the State, the same as natural persons. The natural man is born with sovereign power and unlimited rights, if he be beyond the limits of governments and societies; upon entering these, a portion of his rights are sacrificed, against his consent if he objects, either to a greater or less extent, as good government may be deemed to require. It would be absurd to suppose that the powers of government are greater over the rights of the being endowed by the Creator, than over the one spoke into existence by human laws. Government may enter into contracts with either, and by these contracts it must be bound, but no more so when the contract is entered into with a person of its own creation, than with a natural person. This obligation imposed upon government to observe and be bound by its contracts, is imposed by our federal and state constitutions, and these constitutional provisions were inserted in order that we might be relieved from the oppressions of an absolute government. An absolute government may deprive all its subjects, whether natural or artificial, of all rights, and even of being. To this very day the absolute power is claimed and exercised by the British parliament, and there is no compact existing between the people and the government in that free and

enlightened country, protecting the subject against the concentrated powers of the state. Society here might have been organized conferring upon government the same absolute powers over the citizen or subject, but happily, restrictions were adopted, curtailing these absolute powers, which experience has shown, left the hands of power sufficiently strong to govern this people.

The trouble has been in considering what the legislature may and may not do with corporations of its own creation, that we have too much lost sight of the distinction between those powers which are secured to them by contract and those which are mere endowments of existence. The former are their property, of which they cannot be deprived without just compensation; the latter are elements of existence, imparted to them by the law of their being, and are held by them like the natural rights of the natural person, subject to be controlled and modified by the legislature, the same as it may control and modify the natural endowments of the natural person. It may not be easy at all times to distinguish between those rights which are secured by the contract contained in their charter, and those powers which are conferred upon them as capacities or elements of their being. Indeed the judicial mind has not to any great extent been led to inquire into this distinction, but it has been mostly occupied in defending and maintaining those rights which are secured by what is called this legislative contract, and it has required all the weight of the judicial department of the government to protect these rights against the encroachments which have been sometimes attempted by the strong arm of the legislature. While we must be unyielding in resistance to such encroachments whenever attempted, we must not forget that these artificial beings must be subject to government and subordinate to legislation, precisely the same as an individual or natural person.

If in a law creating an artificial being, rights or powers are conferred upon it, which, by the express terms of the act or by reasonable intendment, shall not be taken away or modified by a subsequent law without the consent of the corporation, that becomes what has been termed a charter contract, and becomes a property in the hands of the corporation, and is protected by those constitutional provisions referred to; but unless there be such express provision or reasonable intendment that such right or faculty shall not be touched by subsequent legislation, it is held in the same subordination to governmental control to which the rights and faculties existing in natural persons are subject. Suppose an act passed creating a corporation and conferring upon it the same powers, faculties and capacities of natural

persons, and there stops. We cannot conceive of greater powers than would be conferred on that corporation, and yet as there would be no express or implied contract that it should be above legislative interference, the law-making power could subject it to the same control that it could a natural person. So again, should a law be passed declaring that a certain individual should enjoy a right exclusively, which he had formerly possessed in common with all men, or should thereafter enjoy a right of which he had, in common with others, been deprived, and the law, in express terms, or by fair intendment, should guarantee the enjoyment of such right, perpetually, that would be a contract with the legislature which would vest in him a property in such right, in which he would be protected to the same extent and in the same way that the same right secured in the same manner to a corporation would be protected. Whenever, therefore, a property is asserted in a right, whether it be a right inherent in a natural person or conferred by law upon an artificial person, the first inquiry presented is, has the legislature renounced the power to legislate further upon such right, or subject it to further legislative control? If so, then a property is secured; if not, it is a naked right, which is subject to governmental regulation, the same as all other rights, which may be dealt with by the law-making power, as the public good may require.

Having thus stated some of the fundamental principles by which we must be governed in the present inquiry, let us return to the immediate question before us, and to which we must apply them. We have already quoted the provisions of the law of 1851, and the change made in the mode of determining the value of the taxable property of the bank, by the law of 1857. There it nothing in the former showing that the legislature intended to bind itself never to change the mode there provided for assessing the bank. The insertion of that provision in this law is no more indicative of an intention by the legislature to abandon the right to fix by law the mode of assessment, than as if the same provision had been inserted in another law. It has nothing to do with the powers or privileges of the banks to be incorporated under it. It is but a revenue measure, and of all other subjects we must presume that the legislature will barter away last, the right to regulate the mode of assessing and collecting the public revenue. The existence of the State depends upon her revenues, and the most vital interests of the community require that the legislature retain its power over the means and mode of raising its revenues; and we cannot and ought not to presume that this right has been thrown away and

abandoned, or relinquished beyond recovery by the legislature, unless the language of the law clearly indicates such intention.

The language of the law of 1851, is, "The value of the property to be ascertained annually by the bank commissioners herein provided for." From this is it to be inferred that the legislature contracted and agreed with the banks that no other mode should be adopted for the assessment of the property of the banks in all time to come? We are not to presume that such was the intention of the legislature. The language conveys no such idea, and the subject matter at once forbids it. That the legislature might bind itself to a corporation or an individual to assess property in a particular mode consistently with the injunctions of the constitution, we will not deny, but in order to do so, negative words should be used, forbidding any other mode, or some consideration should be provided for the relinquishment of so important a right, or it should appear from some provision of the act, that it was the intention to grant the right to the party to have the value ascertained by that and in no other mode. This is a question of the construction of a statute, the object being to find out the real meaning of the legislature, which must be governed by the rules of construction applicable in such cases. The presumption is against the intention to abandon the right of the legislature to regulate by law the mode of assessing and collecting the revenue, and to overcome this presumption, we must find something in the law indicating such intention. There is nothing of that kind appearing in this law, and we hold that the legislature had and has the right to provide for the taxation of bank property the same as any and all other property.

The fact that the officers of the bank reported the list in conformity to the requirements of the act of 1857, shows that the bank had adopted its provisions as an amendment to its charter, and could not afterwards object to it as a violation of its chartered rights; serves as another answer to this objection; but we chose to consider the question of power in the legislature, and to vindicate that power upon what we believe to be sound and correct principles.

There is another objection, which is, that it is an amendment to the law of 1851, which was by the constitution required to be submitted to a vote of the people for their approval, before it could take effect, and it having been thus approved, it cannot be touched by the legislature alone. That it can only be altered or repealed by the same power, and through the same channel, which imparted to it vitality; which made it a law. We have already quoted the provision of the constitution upon which this

provision is based. On the one hand, it is contended that by the adoption of this provision of the fundamental law, it was the intention of the people to reserve to themselves the right, not only to decide the question whether or not there should be any banks in the State, but also that they should determine what kind of banks they would have, the principles upon which they should be established, and the mode of their organization. In short, that the only power which they delegated to the legislature on the subject of banks, was to propose measures on this subject to the people, for them to adopt or reject,—that the people retained in their own hands a portion of the legislative authority, and constituted themselves a branch of the legislature upon this subject. On the other hand, it is contended that this law of 1851, when it received the sanction of the popular vote, became a law the same as any other law, subject to be amended or repealed by the legislature, as much so as if it had not been required to be submitted to a vote of the people, but had been passed by the General Assembly alone, in the ordinary way. That when the vote was once taken and the law approved, the office of that provision of the constitution was fulfilled, and as to that law at least; became a dead letter.

Without stopping to examine how far either of these positions may be maintained, we are clearly of opinion that some of the provisions of this law which was submitted to the people, are subject to legislative interference and control, and among them is the one in question. We may safely say, that the constitution did not require that the mode of assessing the property of the bank for the purposes of taxation, should be submitted to the people, and its submission to them was a work of supererogation. Had the bank law been silent on this question, and the same provision inserted in another law, it would have been as validly passed as it was after the vote in its favor. That vote gave to this clause no additional sanction. The subject of taxation and the revenue, are, by the constitution, placed in the hands of the legislature alone. Upon this subject they have complete jurisdiction to legislate independently of the popular vote, and such vote in approval of laws which might take effect without it, could not place the law beyond or above the jurisdiction of the General Assembly; so that we may safely assume that any provision in that law which might have been enacted by the General Assembly alone, is still subject to legislative control, without reference to a vote of the people. Such is the provision now under consideration.

There is one remaining question to be considered, and that is, whether the amount of bonds deposited with the auditor to

secure the redemption of the issues of the bank, is subject to taxation. Upon the power of the legislature to declare all rights and interests held within the State, property, and subject to taxation, we have fully expressed our views in the case of *The People* v. *Worthington*, *post*, and we shall not repeat them here. Of the authority of the legislature to impose the tax, we have no doubt, and the only real question is, have they done so? The passage from the law of 1857, has been already quoted. It says, the capital stock "paid in, or secured to be paid in," shall be assessed and taxed. The second section of the general banking law provides, that when any person or association shall transfer to, and deposit with the auditor, certain specified public stock, the auditor shall deliver to him or them an amount of bank notes, in blank, to an amount equal to the value of the bonds, to be issued by the bank for and as in lieu of money. The stocks thus deposited with the auditor are presented to him as the property of the bank, either purchased by the bank with its cash or credit, or that of the owners, and constitute the basis of its currency, and the fund from which its issues are ultimately to be redeemed, in case the bank does not voluntarily redeem them with other funds. It is not the business of the auditor, or of the State, to inquire whether the bonds were purchased with cash or on credit. That circumstance could not affect the title of the bank to the bonds when presented to the auditor, and at that moment they are the proper subject of taxation, as bonds. When they are transferred and delivered to the auditor, they constitute so much bank capital paid in. The title of the bonds is then vested in the auditor, for the trusts declared in the law. They then cease to be taxable as bonds, but the amount of their value becomes taxable as bank capital paid in. What is bank capital? It is a fund contributed, or to be contributed, by the shareholders or proprietors of the bank, and transferred by each to the aggregate association, upon and with which it is to transact business. It may be either loaned to its customers in specie, or deposited either in its own vaults or in some other place, where it may remain as a basis or security for the redemption of the bank bills which it may issue, and these bills are loaned to its customers or otherwise used, as and for money. If this law had required coin to be deposited and kept in the vaults of the bank instead of bonds in the hands of the auditor, to secure the redemption of the bills issued by the bank, would any one deny that the coin thus deposited was so much capital paid in? And if coin thus deposited in the vaults of the bank would be so much capital of the bank, it would be none the less so if deposited with the

auditor, or in any other hands ; and when stocks are substituted for coin, we are unable to appreciate any reason why they are not equally capital paid in. It seems to us that neither ingenuity nor sophistry can avoid this conclusion. At least, we can comprehend no reason why it is not so. We might go on with a tedious review of various provisions of this and the subsequent laws on the subject, showing that it was the manifest intention of the legislature that the bonds deposited with the auditor should be considered as so much capital paid in, as a basis for the banking operations of the institution, but we deem it entirely unnecessary. To us it seems so plain as to admit of neither question nor cavil.

We are of opinion that the judgment must be affirmed.

Judgment affirmed.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

JANUARY TERM, 1859, AT SPRINGFIELD.

THE PEOPLE, on the relation of Gustavus Koerner *et al.*, Complainants, *v.* NICHOLAS RIDGLEY *et al.*, Respondents.

APPLICATION FOR A QUO WARRANTO.

An information in the nature of a *quo warranto* is a criminal proceeding, and can only be resorted to in cases in which the public, in theory at least, have some interest. It is not to be allowed against persons for assuming a franchise of a merely private nature.

The information should allege that the party against whom it is filed, holds and executes some office or franchise, describing it, so that it may be seen whether the case is within the statute or not.

The persons appointed under the act of 1847, to close up the affairs of the State Bank, are not officers—they are mere trustees, and do not exercise or enjoy a franchise. The proper proceeding against them would be by bill in chancery, to which a creditor of the bank may resort.

The Executive of the State has not authority, by virtue of his office, to appoint trustees under the said act.

AT the April term, 1857, of Sangamon Circuit Court, the people, by the circuit attorney, upon the relation of Gustavus Koerner, George T. Brown and Richard Yates, informed the court that on the first day of November, A. D. 1848, by virtue of the act entitled, An Act for finally closing the affairs of the State Bank of Illinois, approved March 1st, 1847, the Governor duly appointed Nicholas H. Ridgley, Uri Manly and John Calhoun, trustees to take charge of the assets and wind up the affairs of said State bank; that they entered upon the trust and have thenceforward continued to exercise the duties and franchises

thereof to the present time. That on the 18th day of February, A. D. 1857, the Governor of the State, by and with the advice and consent of the Senate, duly removed said Ridgley, Manly and Calhoun from said trusteeship, and appointed the relators, but that said Ridgley, Manly and Calhoun continue to hold the books, papers and assets of said bank, and exercise the franchises of said trust, unlawfully, and contrary to the peace and dignity of the people.

To this information a plea was filed, giving a history of said bank and the several acts passed in relation thereto, including the said act for winding up the same, also setting out the connection of said bank with the State, and the liquidation and adjustment of matters between the bank and the State, also reciting that the bank had conveyed to them by deed all of the assets belonging to it, and that by virtue of the deed the assets were delivered to them; that they accepted the trust and were acting under it; that they had paid the State $50,000 in its bonds, and that the interest of the State in the bank had been relinquished to said trustees, and that as such trustees they were authorized to act and continued to act; that they were lawfully in possession, and that they be allowed so to continue, etc.

To this plea there was a demurrer and joinder. By agreement the issue was decided *pro forma* for the defendants, and an appeal taken to this court.

J. B. White, State's Attorney, and A. Lincoln, for The People.

S. T. Logan, M. Hay and J. A. McClernand, for Appellees.

Breese, J. An information in the nature of *quo warranto*, is understood to be a criminal proceeding, (*The People ex relatione Bush* v. *Neil Donnelly*, 11 Ill R. 552,) and can only be resorted to, in cases in which the public, in theory at least, have some interest. We think an instance cannot be found where it has been allowed against persons for assuming a franchise of a mere private nature, not connected with the public, its interests, or its government. *Rex* v. *Ogden*, 21 Eng. C. L. R. 62.

Our statute on this subject, (Scates' Comp. 224,) provides, section one, "In case any person or persons shall usurp, intrude into, or unlawfully hold or execute any office or franchise, it shall be lawful for the Attorney General or the Circuit Attorney of the proper circuit, with the leave of any Circuit Court, to exhibit to such court an information in the nature of a *quo warranto* at the relation of any person or persons desiring to sue or prosecute the same," etc. The second section authorizes a

judgment of ouster and the imposition of a fine, besides costs. This statute is, substantially, a copy of the statute of 9 Anne, ch. 20. Both are pointed at the usurpation of, intrusion into, or unlawfully holding and executing certain offices. The offices are specified in the 9th Anne, as offices and franchises in corporations and boroughs, in our statute they are not specified, and that seems to be the only real difference between them. The statute of Anne applies only to corporate offices, and franchises of a corporate nature, in corporate places.

But at common law before this statute, we understand informations were filed and sustained in the nature of *quo warranto*, in cases not relating to any corporate office or franchise of a corporate nature in a corporate place, as in cases where a party unlawfully took upon himself to act in any public capacity, touching the rule and government of any place in England or Wales, or the administration of justice, or the political rights of third persons.

The usual object of an information of this nature, is, to call in question the defendant's title to the office or franchise claimed and exercised by him, because of some alleged defect therein, as for instance, that at the time of the election he was disqualified to be elected; or that the election itself was void or irregular; or that the defendant was not duly elected or not duly appointed; or that he has not been duly sworn in, or otherwise unlawfully admitted; or that he has since become disqualified, and yet presumes to act. A defective title is understood to be, and is, in contemplation of law, the same as no title whatever, and a party exercising an office or franchise of a public nature, is considered as a mere usurper unless he has a good and complete title in every respect. This court has decided that the people are not required to show anything. The entire *onus* is on the defendant, and he must show by his plea, and prove, that he has a valid title to the office. He must set out by what warrant he exercises the functions of the office, and must show good authority for so doing, or the people will be entitled to judgment of ouster. *Clark* v. *The People ex relatione Crane*, 15 Ill. R. 217.

The information, however, must allege that the party against whom it is filed, holds and executes some office or franchise, describing it, so that it may be seen the case is within the statute. This information contains no such averment, nor anything equivalent to it. The allegation is, that the Governor appointed the defendants trustees, to take charge of the assets and wind up the affairs of the State Bank, and that they, then and there, entered upon said trust, and thenceforward have in fact continued to execute the duties and franchises thereof to the present

time." It is then averred that the Governor, by and with the advice and consent of the senate, duly removed them from "the said trusteeship," and duly appointed the relators "their successors in said trusteeship," of which the defendants had notice; concluding with the averment that the defendants "continue to hold and exercise the books, papers and assets of said bank, and the franchises of said trust, unlawfully, and contrary to the peace and dignity of the people," etc.

There is no distinct averment that the defendants hold or execute any office or franchise, so that the demurrer to the defendants' plea in bar might well have been carried back to the information, for it does not present the statute offense in any sufficiently legal or technical form. *The People ex relatione Gillenwater* v. *The Mississippi and Atlantic Railroad Co.*, 13 Ill. R. 66. And the defendants, for the same reason, might successfully have defended against the information, by interposing a general demurrer, for admitting, which the demurrer would do, all the allegations to be true, no case is made out against the defendants. In truth, the affirmative facts that they were appointed by the Governor the trustees of the bank, and have taken upon themselves the execution of the trust, and at the time of filing the information, were executing the trust, make a case for the defendants, for the validity of their appointment is not assailed.

The real question, as the relators have made it, and argued it, is, has the Governor the power to remove the defendants from the trust? It is contended by the relators that the Governor has such power—that although they are called trustees, they are in fact public officers, and "the trusteeship" is an office or franchise in which the public have an interest, and its incumbents are necessarily under executive control.

We will not question that the power of removal from office, where the tenure is not defined by the constitution or law whence the appointment originates, resides with the power to appoint, and were this trust committed to the defendants by the Executive, a public office, we would not hesitate to accord to him the right to remove them. But is it an office?

An office is defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it, and they are civil and military, and the civil are divided into political, judicial and ministerial. Of the former, the president, and the governors of states, heads of departments, members of congress, of the legislature, etc., are examples. The judicial are those which relate to the administration of justice, and cannot be exercised by deputy. The ministerial are those wherein the officer has no power to judge of the matter to

be done, but must act in obedience to the orders of a superior, and the duties of which can be performed by deputy. All offices in this country are public. Some employments of a private nature are considered offices, if connected with the public, as a bank or railroad president, treasurer, or secretary, or director. 2 Black. Com. 31; 3 Kent Com. 454.

The act under which the defendants were appointed, does not declare the trust to be an office, nor in the manner of their appointment was it considered an office. It has none of the indications of an office—no tenure is prescribed—no fees or emoluments allowed, and no salary—nor is any oath required to be taken. As the relators define it in their information, it is a mere "trusteeship," the duties of it being to take charge of the assets and wind up the affairs of the State Bank, pay out its specie on hand *pro rata*, and issue certificates of indebtedness to bill-holders and other creditors; in one word, to administer on the effects of a defunct corporation. These were duties of a special character, applicable alone to a particular corporation, and nothing more. It has none of the constituents of an office, none whatever. The defendants have the legal title to all the property assigned, to hold to them and the survivors of them, so that by judgment of ouster they could not be divested of this title. This can only be done by bill in chancery.

Is it a franchise? A franchise is said to be a right reserved to the people by the constitution, as the elective franchise. Again, it is said to be a privilege conferred by grant from government, and vested in one or more individuals, as a public office. Corporations, or bodies politic are the most usual franchises known to our laws. In England they are very numerous, and are defined to be royal privileges in the hands of a subject. An information will lie in many cases growing out of these grants, especially where corporations are concerned, as by the statute of 9 Anne, ch. 20, and in which the public have an interest. In 1 Strange R. (*The King* v. *Sir William Louther*,) it was held that an information of this kind did not lie in the case of private rights, where no franchise of the crown has been invaded.

If this is so—if in England a privilege existing in a subject, which the king alone could grant, constitutes it a franchise—in this country, under our institutions, a privilege or immunity of a public nature, which could not be exercised without a legislative grant, would also be a franchise.

There must be some parting of prerogative belonging to a king, or to the people, under our system, that can constitute a franchise. Upon these defendants, nothing of that kind was conferred. The State having, at the time of their appointment as trustees, an interest of $50,000 in the bank, it was no doubt

an amicable arrangement with the bank that the Governor should name the trustees. But at that time, the charter was forfeited, and no franchise remained.

The defendants were appointed trustees on the 31st October, 1848, on which day the bank, being in liquidation, conveyed to them, by deed duly executed and recorded, all the assets of the bank, real and personal, in trust for the purposes mentioned in the deed, and possession was delivered to them This deed refers to the 2nd section of the act of 1847, and recites that "the Governor having designated the said Uri Manly, John Calhoun and Nicholas H. Ridgley, as the three trustees to be appointed by him under the provisions of that act; now, this indenture witnesseth," etc. By this deed the legal title passed to these defendants.

At this date, the State was still interested in the bank, to the extent of $50,000, and it was just and right, and a partial guarantee to the public, that this interest should be looked after by agents of her own selection. But on the first of July, 1852, this interest was conveyed to the trustees, as such, on their surrender to the State, of an equal amount of State bonds and other evidences of indebtedness, and from that day, henceforward, the State had no interest whatever in the bank or corporation. All that remained in the bank, and of the bank, belonged to its numerous creditors, any one of whom, could, on any day since that date, have filed in chancery a bill against the trustees for an account, and for their removal, and for the appointment of others more trustworthy, the State being in no wise responsible for their conduct, or interested in their accounts.

The deed executed by the bank to the defendants, conveys the legal title to all the assets, real and personal to the defendants, of which the joint action of the Governor and Senate cannot deprive them, but a court of chancery can. That court can give adequate relief. It is a case wholly for the courts, with which, neither the executive nor the legislature can rightfully interfere, nor can we in this proceeding, for if judgment of ouster is rendered, the title to the assets is still in the defendants.

These defendants have a high duty to perform, but it is to the creditors of the bank, and its stockholders. They are trustees for them, and can only, by their mal-administration of its affairs, injure them, and to them the courts will hold them responsible, on a proper case made. If the creditors are satisfied with the manner in which the trust is being executed, who shall complain? The public, as such, have not a particle of interest in the matter, in any view in which we can regard the case. It is a clear case between trustee and *cestui que trust*—who are, not the people, but its creditors and stockholders.

Had the legal estate in the assets passed to the relators by an adequate conveyance, then indeed there might be some pretense of right, to file an information.

The act of 1847, under which the defendants were appointed, refers to the act of 1845, specially applicable to the Bank of Illinois at Shawneetown, which act is to govern in winding up the bank, as far as applicable. By the 13th section of that act, on a vacancy occurring in the board of assignees, it was to be filled by the remaining assignees—if they fail to fill it, then the Governor is to fill it.

It cannot be pretended under this act that the Governor could make vacancies by his own act, and fill them by his own appointment. The very nature of the trust and the business to be performed under it, forbids the idea that it should be subject to the politics of the country and its many fluctuations.

In every aspect in which we can view this case it seems a clear case for the defendants, and we think the plea is a full and complete bar to the information, and shows a case in which the executive has no power to interfere.

As the merits of the case have been thoroughly examined and considered in this proceeding, we make no question as to its propriety as applicable to this case.

The judgment of the Circuit Court on the demurrer is affirmed, the plea of the defendants being a full answer and bar to the information.

Caton, C. J., did not hear the argument in this case, and gave no opinion.

Application denied.

The Tonica and Petersburg Railroad Company, Plaintiff in Error, *v.* William McNeely, Administrator, etc., Defendant in Error.

ERROR TO MENARD.

A stock subscription made in contemplation of a charter to construct a railroad, is a valid contract, and can be enforced.

Where the objects of a contract are lawful, and it is founded upon a good consideration, and is entered into by parties capable of contracting, it creates a legal obligation, which may be enforced according to its terms.

Tonica and Petersburg Railroad Co. *v.* McNeely, Adm'r, etc.

In 1856 a voluntary association, in the name and style of the plaintiffs, was formed for the construction of a railroad from Tonica to Jacksonville, in this State, contemplating an application to the next session of the legislature for an act of incorporation. Said association was organized by the election of officers, and subscriptions of stock, in shares of one hundred dollars each, were obtained in that year, for a large amount. The intestate subscribed two shares, and died some days before the incorporation of the plaintiffs. By consent of parties this case was tried by the court, Harriott, Judge, and the plaintiffs proved on the trial, the organization of their company, calls by the directors for the whole of the stock, and notices to stockholders, by advertisements in two newspapers. The court rendered judgment for the defendant below.

D. A. and T. W. Smith, for Plaintiff in Error.

McNeely & Walker, for Defendant in Error.

Caton, C. J. A subscription made in contemplation of a charter to construct a railroad or to accomplish any other legitimate object, is a valid contract between the parties, and as such may be enforced, the same as any other contract. The object of the contract is lawful, and it is founded on a good consideration, which is the mutual promise expressed in the contract. Upon the general principles of law by which all contracts are governed, we are at a loss to see what objections are to be urged to the enforcement of such a contract, which could not be urged to any other contract, for the payment of a specified sum of money. There is no pretense in this case, that the objects contemplated by the contract are not provided for by the charter, or that the charter which was obtained, or the organization or action under it, were not in strict pursuance of the contract. No such defense has been insisted upon. But it is simply claimed that the contract was void—a *nudum pactum*. We are of opinion that where the objects of a contract are lawful, and it is founded upon a good consideration, and is entered into by parties capable of contracting, it creates a legal obligation, which may be enforced according to its terms. We know of no law against this proposition, but are very familiar with a great deal for its support.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Samuel P. Thompson, Interpleading Claimant, *v.* Charles E. Yeck, Plaintiff in Attachment.

AGREED CASE FROM CASS.

A. having sold goods at public sale under a chattel mortgage, purchased them himself and allowed the mortgagor to retain possession of them, taking his receipt therefor: Held, that the goods being in the mortgagor's possession after the sale, were liable to attachment.

Possession should accompany the title to personal property, or a sale will be void, *per se*, as to creditors and purchasers, without notice, and not open to explanation; unless the deed, properly acknowledged or proved, expressly stipulates otherwise.

This case has been brought to this court under the following agreement:

On the first of September, 1857, the defendants, of Morgan county, Illinois, made a note of some $2,000 to Samuel P. Thompson, of the same county, at six months date, and to secure the payment of the same, executed a chattel mortgage of the items of property named in a receipt hereinafter copied. The mortgage was duly acknowledged and recorded in said county, and was foreclosed at maturity by advertisement and sale of the property at public auction, and it was bought by the said Thompson at the said sale, and left in the possession of the said defendants, who gave to Thompson the following receipt for the same:

Received of Samuel P. Thompson, surviving partner of C. C. & S. P. Thompson, the following property, which we agree to take good care of and deliver to said S. P. Thompson, surviving partner of C. C. and S. P. Thompson, when called for, to wit: (here follows a list of articles specified in the mortgage) together with all other household furniture and farming utensils not enumerated in this receipt.

JOHN DEMPSEY. [SEAL.]
RICHARD DEMPSEY. [SEAL.]

Morgan County, March 12*th*, 1858.

Afterwards the defendants were absconding with the property, and it was attached, viz: a portion of the stock, at the suit of the plaintiff, in the county of Cass. From the date of the receipt up to the time of levying the attachment, the defendants were in possession of the property, and claimed it as theirs, but without any knowledge on the part of Thompson that they were asserting any such claim. The question submitted to the court was, whether or not, under the true and proper construction of the chattel mortgage law, there was such legal or constructive fraud in the premises, as that the property was subject to the lien of the attachment, or was it the property of the said Thompson; which questions were decided in favor of the plain

tiff. The propriety of this decision is the question certified by the undersigned, counsel of the parties, to the Supreme Court of Illinois, January term, 1859, with request that it be promptly decided by said court, to prevent accrual of costs from keeping said stock, the parties relatively and respectively stipulating that they will finally abide by the decision of said court, without remanding order for further trial of the case in the court below. Costs in court below, and in Supreme Court, to be subject, by consent, to order of said court.

Error assigned, that the case ought to have been decided by the court below in favor of Thompson instead of Yeck.

D. A. AND T. W. SMITH, for S. P. Thompson.

H. E. DUMMER, for C. E. Yeck.

BREESE, J. This court has adopted the rule, in *Thornton* v. *Davenport et al.*, 1 Scam. R. 296, and in several other cases, that all conveyances of goods and chattels, when the possession is permitted to remain with the donor or vendor, is fraudulent of itself, and void as to creditors and purchasers, unless the conveyance itself stipulates for such retaining possession by the vendor or donor. And the same was held in a case arising under our chattel mortgage act. *Reed* v. *Eames*, 19 Ill. R. 595. In all cases the change of possession must be substantial and exclusive.

If goods are purchased on execution by a stranger, and from motives of humanity are left in possession of the debtor, for a temporary and honest purpose, the parties not standing in the relation of debtor and creditor, the transaction has been held in England not to be fraudulent as to creditors, and the title will remain in the purchaser. Here it would be required that the possession should accompany and follow the title, or a sale will be void *per se*, as to creditors and purchasers, without notice, and not open to explanation, unless the deed, if the sale be by deed, acknowledged or proved according to law, expressly stipulates otherwise.

In this case the property had been sold under the mortgage. It should then have passed at once into the possession of the purchaser, who, in this case, was the mortgagee. *Reed* v. *Eames*, 19 Ill. R. 595.

The chattel mortgage act, would be useless if this transaction is sustained. Possession of personal property being one of the strongest indications of ownership, the policy of that law is, that so soon as the credit expires, the mortgagee shall take possession, so that others may not be deceived and defrauded by the

appearance of ownership in one, while the title is really in another.

The mortgagee in this case, by suffering the property to remain with his debtor, and taking his receipt to re-deliver, is precisely in the situation Eames was, in the case above cited. To have made the transaction fair, there should have been a change of possession.

We think under a true and proper construction of the chattel mortgage act, there was such a legal fraud in the transaction, as to render the property subject to the lien of the attachment.

The receipt given is quite general, and embraces other property than that sold under the mortgage, namely, "all other household furniture and farming utensils, not enumerated in this receipt." This, to say the least, is a strong indication of fraud. The judgment must be affirmed, and the property held liable to the attachment.

Judgment affirmed.

Jacksonville, Alton and St. Louis Railroad Company, Appellant, *v.* John Caldwell, Appellee.

APPEAL FROM MORGAN.

In estimating the damages occasioned by granting a right of way across a farm, where there is a conflict of evidence as to the amount of damage sustained, the jury will be justified in giving greater weight to the testimony of farmers than to that of persons engaged in other pursuits.

This was an appeal to the Circuit Court of Morgan county from an assessment of damages for right of way across the farm of Caldwell. In the Circuit Court there was a trial by jury. Eight witnesses were examined. A part of these thought the land was more benefited than injured by the right of way granted to the road. The others, who were farmers, estimated the damages from $1,000 to $1,200. The jury rendered a verdict for Caldwell, for $800, and the plaintiff entered a motion for a new trial, which was overruled, and the company prayed this appeal. This cause was tried at October term, 1857, of the Morgan Circuit Court.

D. A. and T. W. Smith, for Appellant.

Walker, J. We are asked to reverse this judgment because it is alleged the verdict of the jury is against the weight of

evidence. The witnesses estimated the damages from nothing to twelve hundred dollars. Those fixing it at the highest estimate were farmers, and those fixing it at the lowest amount were persons engaged in other pursuits. None of the witnesses who were farmers estimated the damage to this farm at even as low a sum as that found by the jury. There were four farmers who estimated the damage at more than the jury gave, and they stand wholly unimpeached. From their occupation they had a better opportunity of estimating the injury and inconvenience occasioned to this farm by the construction of this road, than mechanics or persons engaged in other pursuits. And in such a conflict, the jury were justified in giving the preference to their testimony, and having done so, we do not feel authorized or even inclined to find fault with the conclusion at which they have arrived. And we are therefore of the opinion that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

City of Alton, Plaintiff in Error, *v.* John Mulledy *et al.*, Defendants in Error.

ERROR TO MADISON.

A city, as an incorporation, can only bind itself for the payment of money for labor done for its benefit by ordinance, or by resolution, or it might by either of these modes authorize its officers or agents to make such contracts.

Where a city contracted with a railroad company to construct a levee, and authorized it to take earth from certain streets for that purpose, and the railroad company employed the plaintiff to perform the labor, and the plaintiff removed earth from another and different street: Held, that no promise could be implied on the part of the city to pay the plaintiff for such labor, although the city surveyor had surveyed the latter street before the work had been commenced, and some of the committee on the improvement saw him at work and made no objection.

A party cannot force another to become his debtor by performing labor for him, against his will or without his assent.

This was an action of assumpsit brought in the Madison Circuit Court, by the defendants in error against the plaintiff in error, for work and labor alleged to have been done by the said defendants for the said plaintiff.

Plea, the general issue.

The defendants in error, to sustain their suit, introduced *Samuel A. Buckmaster*, who was sworn, and testified to the jury that he was one of the directors of the St. Louis, Alton

and Chicago Railroad Company, and that said railroad company had contracted with the city of Alton, under an ordinance passed by said city December 5th, 1856, to do certain work and make certain improvements within said city, amongst which, to make and improve the levee on the Mississippi River within said city as specified in said city ordinance. That after making said contract, the said railroad company contracted with the defendants in error to fill out and make said levee for the sum of twenty cents per cubic yard for all earth required and used in making said levee. That in the progress of the work, the defendants in error took a portion of earth out of Langdon street, which was not one of the streets mentioned in said ordinance out of which earth was to be taken by the railroad company. That however, both the city and the railroad company supposed that Langdon street was included in said ordinance. That S. E. McGregory, the city engineer of Alton, under the direction of the city of Alton, staked out the streets from which earth was to be taken by said railroad company, and acting for the city, staked out Langdon street from which the earth in controversy was taken. That afterward, and about the time the defendants in error commenced taking earth out of Langdon street so staked out, the witness, acting for the railroad company, discovered that Langdon street was not included in the ordinance, and told the defendants in error of this fact, but told them at the same time they could do as they pleased. Witness also told the committee of the common council of the city of Alton, who had charge of this matter, that Langdon street was not included in the ordinance, but said committee insisted that as it was intended by all parties to include Langdon street, the railroad company should go on and take earth out of said street. That he told the defendants in error, so far as the road was concerned, they could do as they pleased about removing the earth from Langdon street.

S. E. McGregory, another witness for the defendants in error, testified that he was city engineer of the city of Alton, and staked out the streets from which the said railroad company were to take earth under the ordinance. That acting for the city, he staked out Langdon street. The railroad company paid him for all the services rendered by him in regard to the matter. The defendants in error told him they wanted to take earth from Langdon street, as they could take earth out of that street better than they could take it out of other streets, on account of the frost. That at the time he staked out Langdon street, the defendants in error had already commenced, and had taken out a considerable quantity of earth from said street. Witness sup-

posed at the time, and so did all parties, that Langdon street was included in the ordinance.

M. H. Filley, another witness for defendants in error, testified that he was employed by said defendants to superintend their work, and that while they were engaged in taking earth out of Langdon street, Mr. Coppinger and Mr. Stanford, two of the common council of the city of Alton, and who were members of the committee to see to the work, were present several times and saw them taking earth out of said street, and made no objection, but gave directions as to the manner of taking out the earth.

The plaintiff in error moved the court to instruct the jury:—

1st. That if they believe, from the evidence, that the city of Alton never made any express or implied promise to pay defendants in error for removing earth from Langdon street, they will find for plaintiff in error.

2nd. If the jury believe, from the evidence, that the city of Alton never expressly or impliedly employed the defendants in error to remove the earth in question, they will find for plaintiff in error.

Which instructions were given by the court.

The jury having found a verdict for said defendants in error, for the sum of $800, being the amount in full claimed by them, the plaintiff in error moved for a new trial, upon the ground that said verdict was contrary to the law and the evidence, which motion was overruled by the court, to which decision of the court, in overruling said motion, the plaintiff in error at the time excepted, and now brings this cause into this court by writ of error, and assigns errors.

Levi Davis, for Plaintiff in Error.

H. Billings, for Defendants in Error.

Walker, J. It is not claimed that this labor was performed under any express agreement with the city, but it is insisted that the circumstances are such that the law will imply a promise to pay by the city. The city employed the railroad company to construct a levee, and for that purpose authorized them to remove earth from Third and Fourth streets. The company employed defendants in error to perform the labor of constructing the levee, and they went into Langdon street and removed earth which was used in constructing the levee. They were notified by the agent of the company soon after they had commenced removing earth from that street, that the city had only author-

ized the company to take earth from Third and Fourth streets, but they continued to work in that street. The evidence shows that at the time the earth was removed from this street, it was more convenient to get earth in it, than the other streets, on account of the frost, and that the street was measured by the city engineer before they commenced the work, and some of the committee having charge of the improvement of streets, saw them at work on this street and made no objection, and it is under these circumstances that they seek to recover against the city, for this labor. The city, as an incorporation, could only bind itself for the payment of money for labor done for its benefit, by ordinance or by resolution, or it might by either of these modes authorize its officers or agents to make such contracts. The contract which was entered into by the city, was with the company, and not with the defendants. They were strangers to that contract, and must look to the company for compensation unless they can show a binding contract with the city. They have wholly failed to prove such a contract, nor does it appear any ordinance or resolution was ever passed by the common council, authorizing any of its officers or the committee, to make any contract for the improvement of the streets. The mere fact that the city engineer surveyed this street before the work was commenced, and that some of the members of the committee saw them at work there, without objection, does not raise an implied promise on the part of the city to pay for this work. These persons were only the agents of the city, and could exercise no power but such as they had delegated to them, and in the absence of such authority they could neither by express or implied agreement bind the city.

Again it appears that it was for the convenience of the defendants that they removed this earth, at a time when they could not get it at the places where they were authorized, on account of the frost. So far as we can see, they were trespassers and wrong-doers, in taking this earth. It seems to have been without permission from the city, and it was probably done in violation of city ordinance. The law never implies a promise to pay for a trespass, nor can a party force another to become his debtor, by performing labor for him against his will, or without his assent. If the defendants contracted with the company at too low a price, it is their misfortune, for which the city is in no way responsible, and cannot be held liable, unless it is by agreement, and the evidence fails to establish either an express or implied promise, on the part of the city, to pay for this labor. In no point of view can we see that the city is liable to pay for this work, or any portion of it.

We are of the opinion that the evidence did not show a liability on the part of the city, and consequently no right of recovery by the defendants, and therefore the court below erred in not granting a new trial. The judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

Isaac Dyer, Plaintiff in Error, *v.* Richard F. Flint, Defendant in Error.

ERROR TO LOGAN.

Where an affidavit for a writ of attachment purports, on its face, to have been made in Logan county, and the jurat is signed A. B., Notary Public, if the suit is brought in Logan county, it will be intended that A. B. is a Notary for that county.

The Circuit Court will take judicial notice of the civil officers of the county in which it holds its sittings.

Where an affidavit for a writ of attachment is made in the county in which the suit is brought, and before a notary public, it need not be authenticated under his notarial seal.

Where the *fac simile* of a notary public's seal is represented on the sheet attached to the record by the clerk, it will not be judicially examined by the Supreme Court. Such sheet is no part of the record.

An affidavit for a writ of attachment must allege positively and unequivocally the requirements of the statute. It is not sufficient for such allegations to be made on the information and belief of the attaching creditor or his agent.

This was an action of assumpsit, commenced against the defendant below, a non-resident, by writ of attachment, returnable at the September term, A. D. 1857, of the Circuit Court of Logan county.

The affidavit is as follows:

STATE OF ILLINOIS, } *ss.*
LOGAN COUNTY, }

Circuit Court of Logan County,
September Term, A. D. 1857.

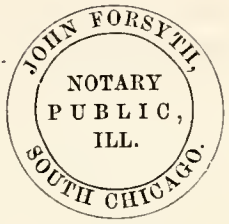
Thompson J. S. Flint, of Chicago, in the county of Cook, State of Illinois, being first duly sworn, on oath says that he is the agent of Richard F. Flint, of Green Bay, Wisconsin. That he is informed, and verily believes, that Isaac Dyer, of East Baldwin, in the State of Maine, is justly indebted to said Richard F. Flint in the sum of about nineteen hundred and twenty-five dollars, for money received by said Dyer, from sales of land made by said Dyer, belonging to him and said Richard F. Flint, and by said Dyer retained from said Flint. I further say that

said Dyer is not a resident of the State of Illinois, and pray that a writ of attachment in due form of law, may issue against the estate of said Dyer which may be found in said county of Logan, and further I say not.

THOMPSON J. S. FLINT."

[L. S.] Subscribed and sworn to before me, Aug. 17th, 1857.
JOHN FORSYTHE, *Notary Public.*

The seal of the notary affixed to the above affidavit, and indicated by the letters ["L. S."] inclosed in brackets, and by a scroll on the record, consists of a naked impression upon paper, without wax or wafer, of the following words, to wit:



The declaration contains a count in assumpsit, for money had and received.

There was a judgment by default.

Afterwards, to wit: on the first Tuesday after the first Monday in January, in the year one thousand eight hundred and fifty-nine, at this same term, before the judges of the Supreme Court of the State of Illinois, comes the said Isaac Dyer, by Parsons & Goodwin, his attorneys, and says that in the record and proceedings aforesaid, and also in rendering the judgment aforesaid, there is manifest error in this, to wit: That the paper filed in said cause, purporting to be the affidavit of Thompson J. S. Flint, and purporting also to have been sworn to by him in said county of Logan, does not appear to have been sworn to before any person authorized to administer oaths within and for said county of Logan; nor does the same appear to have been sworn to before any person authorized to administer oaths elsewhere than in said county, and that the same, by reason that it is not duly sworn to, is wholly insufficient to warrant the proceedings and judgment aforesaid: That said paper purporting to be such affidavit as aforesaid, is not certain nor positive, as to the indebtedness therein mentioned; but in the averment thereof, rests wholly on information and belief, and is therefore, insufficient to warrant the proceedings and judgment aforesaid: That said paper purporting to be such affidavit as aforesaid, does not state, as near as may be, the nature of the indebtedness, in respect whereof said suit was prosecuted; by reason whereof the proceedings and judgment aforesaid are erroneous: That it does not appear that the writ of summons and attachment sued out in the court below was in any manner served upon, nor was

the same returned "not found," as to the defendant below; by failure whereof, the court below acquired no jurisdiction to proceed in said action, nor to render the judgment aforesaid: That the declaration aforesaid and the matters therein contained, are not sufficient in law for the said Richard F. Flint to have or maintain his aforesaid action thereof against the said Isaac Dyer, by reason of which insufficiency the proceedings and judgment aforesaid are erroneous. There is also error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said Richard F. Flint, against the said Isaac Dyer, whereas, by the law of the land, the said judgment ought to have been given for the said Isaac Dyer, against the said Richard F. Flint. And the said Isaac Dyer prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of such judgment, etc.

Parsons & Goodwin, for Plaintiff in Error.

Scammon & Fuller, for Defendant in Error.

Breese, J. This is an action commenced by attachment against an absent and non-resident debtor, and default taken.

Several objections are made to the regularity of the proceedings. The first is as to the manner in which the affidavit is sworn to, and its substance.

The affidavit appears, on its face, to have been sworn to in Logan county—that is the county stated in the margin, and there is nothing in the record impeaching it. The jurat is signed by "John Forsyth, Notary Public," and it is a fair intendment that he was Notary Public of Logan county. The court trying the case would so intend; it would, *ex-officio*, take notice of the civil officers of the county in which it holds its sittings. *Thompson* v. *Haskell*, *post*, and cases there cited. By our statute, a Notary Public can administer oaths in all cases, and proof of his official character is not required. *Stout* v. *Slattery*, 12 Ill. R. 162; *Rowley* v. *Berrian*, ib. 200. In this last case it was objected, as it is here, that if a notary takes an affidavit which is to become the foundation of an attachment, he must authenticate it under his seal of office, and the 32nd section of chap. 9, R. S. (Scates' Comp. 235,) is referred to as sustaining the position.

This section embraces three kinds of cases, one when the affidavit is made in the county where the suit is brought, as is this case, where proof of official character is not required, the

court taking judicial cognizance of all who are authorized to administer oaths within the county; another, where the oath is made in a county other than the one where the suit is pending, in which case the official character must be proved; and lastly, when the oath is made out of the State before any officer authorized by the statute to take the acknowledgment of deeds, in which case also, proof of his official character must be made. Their acts are to be authenticated in the same manner as in taking the acknowledgment of a deed.

It is insisted, however, that the record shows that the notary was actually a notary in Chicago, and not of Logan county, and that it so appears from a *fac simile* of his seal, as presented on the abstract. There is a representation in ink of a circle, within which are the words, executed with a pen, "John Forsyth, Notary Public, Ill., South Chicago," but there is nothing of that kind appearing in the record. The sheet attached by the clerk is no part of the record, which we can judicially examine. The intendment from the record is, that the jurat was made before a Notary Public of Logan county, an officer authorized by law to administer oaths, and we must so hold, and hold further, under the decision in *Rowley* v. *Berrian*, that his seal was unnecessary to the authentication. But there is to the jurat in this case, a scroll denoting a seal. Our statute, R. S., chap. 75, title "Notaries Public," (Scates' Comp. 794,) does not require they shall have a seal, and by chap. 76, title "Oaths and Affirmations," (Scates' Comp. 796,) which gives to Notaries Public power to administer oaths in all cases, does not require a seal to their attestations.

But a notary cannot take the acknowledgment of a deed if he has no official seal, for the statute requires, R. S., chap. 24, sec. 16, (Scates' Comp. 965,) he shall have a seal by which such an act shall be authenticated, but in no other case.

The cases referred to in 4 Blackf. 185, and 6 ib. 357, were decided under the statute of Indiana, which expressly requires all notarial acts to be under the official seal of the notary.

It is urged, that perjury could not be assigned on this affidavit for the reasons stated, that it purports to have been sworn to in Logan county, and it is inferable from the circumstances that it was made in Cook county. If made in Cook county, and before a competent officer, surely perjury could be assigned on it, though purporting to have been made in Logan. 3 Greenl. Ev., page 181, sec. 192. But as to the objection that the affidavit is not certain, or positive, as to the indebtedness, but rests wholly on information and belief, we think that is well taken.

Our statute is in these words: If any creditor, his agent or attorney, shall file an affidavit in the office of the clerk of the

Circuit Court of any county in this State, setting forth that any person is indebted to such creditor in a sum exceeding twenty dollars, stating the nature and amount of such indebtedness as near as may be, and that such debtor is not a resident of this State, it shall be lawful for the clerk to issue a writ of attachment, etc. Scates' Comp. 228.

These requirements of the statute must be fulfilled. The creditor or agent making the affidavit, cannot rely upon hearsay as to either. He must positively allege both the non-residence and the indebtedness—its nature and amount, as near as may be—as near as the peculiar kind of indebtedness will enable him to do. Information and belief cannot supply the place of a positive allegation that the defendent "is indebted," or, that he is non-resident. As to the first, if an agent makes the affidavit, his conscience may be relieved by stating his means of knowledge, by stating as appears from his certain note signed by him, or from other evidence in possession of the agent.

We have found no case sustaining the view of the attaching creditor's counsel, except the case of *Ker* v. *Philips*, 2 S. Car. Law Reports, 197, in which, in an affidavit for an order to hold to bail, a majority of the court held that where the plaintiff resides in a foreign country, an affidavit made by his agent in South Carolina, that he, the agent, "is informed and believes that the defendant is indebted to the plaintiff," is sufficient. In that State, the statute referred to does not seem to require a positive statement of indebtedness, as in ours.

We have no power to release parties from the requirements of a statute, or to relax a rule therein prescribed. A positive averment of indebtedness and of non-residence being required, whether the affidavit be made by the creditor or his agent, we cannot dispense with it, however much it might accommodate parties, suing as well in their own right as in *autre droit*. We must adhere to the words of the statute, leaving to the legislature, where it belongs, the question of any change or modification in it, that may be desirable or necessary.

In the action of replevin, the statute provides, (Scates' Comp. 226,) before any writ of replevin shall issue, the person bringing the action, or some one in his or her behalf, shall make oath or affirmation before the clerk of the Circuit Court, or any justice of the peace of the proper county, "that the plaintiff in such action is the owner of the property described in the writ, and about to be replevied, or that he is then lawfully entitled to the possession thereof," etc. In such case, the affidavit of ownership, if made by the agent, must be as positive as if made by the owner himself. *Frink* v. *Flanagan*, 1 Gilm. R. 38.

We think, as the phraseology of the two statutes are identical, the affidavit for an attachment against a non-resident debtor, whether made by the creditor himself, or by his agent, must allege in positive terms the indebtedness, as well as the non-residence. Nothing short of this would seem to fulfill the requirements of the statute.

For this error the judgment of the court below is reversed, and the cause remanded, with leave to amend.

Judgment reversed.

Jacob Spangler, Appellant, *v.* Isaac C. Pugh, Appellee.

APPEAL FROM MACON.

Where a note offered in evidence differed in amount a half a cent from the one declared on, it was held to be a variance, and that it could not be received in evidence.

Matters of substance may be substantially proved, but matters of essential description, such as names, sums, magnitudes, dates, durations and terms, must be precisely proved.

This was an action of assumpsit by the appellant, against the appellee, upon a promissory note.

The declaration sets out the legal effect of the note as follows, viz: The said defendants made their promissory note in writing, bearing date a certain day and year therein mentioned, to wit: the day and year aforesaid, and thereby promised to pay, one year after the date thereof, to the said plaintiff, or order, two thousand five hundred and seventy-nine dollars and fifty-seven cents, with six per cent. interest per annum, from date until paid, for value received.

The appellant plead the general issue. By consent, trial by the court. The appellee offered a note in evidence, in the words and figures following, viz:

$2,579.57½ Decatur, September 19th, 1857.

One year after date, we, or either of us, promise to pay Isaac C. Pugh, or order, Two Thousand Five Hundred and Seventy-Nine Dollars and Fifty-Seven ½ cents, with six per cent. interest per annum from date until paid, for value received.

JACOB SPANGLER,
LEVI EHRHART.

To the introduction of this note appellant objected, and the objection was overruled by the court. Judgment against appel-

lant for $2,765.30. Motion of appellant for new trial overruled. The cause was heard before EMERSON, Judge.

Error assigned: the court erred in admitting said note in evidence.

THORPE & TUPPER, for Appellant.

A. B. BUNN, for Appellee.

WALKER, J. The alleged variance in this case depends on the question whether the note given in evidence was the one described in the declaration. That offered in evidence was one half cent greater in amount than the one declared on. It is a familiar rule of pleading that the contract must be stated correctly, and if the evidence differs from the statement, the whole foundation of the action fails, because the contract is entire and must be proved as laid. A distinction is however made between matters of substance and matters of essential description. The former may be substantially proved, but the latter must be proved with a degree of strictness extending in some cases even to literal precision. No allegation, descriptive of the identity of that, which is legally essential to the claim, can ever be rejected. And of this character are names, sums, magnitudes, dates, durations and terms, which being essential to the identity of the writing set forth, must, in general, be precisely proved.

In declaring, it is not necessary that the contract should be recited in *hæc verba;* but if it be so recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated, and if there be a failure in either mode, an exception may be taken for the variance, and the instrument cannot be given in evidence. While the variance is trifling in amount, it is descriptive of the identity of the instrument, and being so, it is material. The note given in evidence was not the one described in the declaration. It is true this is but the fractional part of a cent and is trifling in value, but if the same fraction were applied to a dollar or an eagle, the value becomes material and matter of substance. And if courts may disregard the variance in the one case, no reason is perceived why they may not in the other. The one is a violation of a rule of evidence as much as the other. And the principle of the rule does not depend upon value or amount for its binding force.

However much courts may regret that a slip in pleading should delay the party in the administration of justice, the rules of law must be observed. If the rule were relaxed in this case, it would be to sanction a looseness in practice that might event-

ually be productive of more injury than benefit. If we depart from the well established rules, the departure would be followed and likely extended in subsequent cases, until a description of the instrument sued upon, would cease to be required.

For these reasons we are of the opinion that the judgment of the court below should be reversed and the cause remanded, with leave to plaintiff to amend his declaration.

Judgment reversed.

Aaron W. Shook, Appellant, *v.* John Thomas, Appellee.

APPEAL FROM ST. CLAIR.

The degree of diligence required from a party applying for a continuance on account of the absence of a witness, must depend on the circumstances of the case. Greater diligence should be required on a second or any subsequent application. The party should state that he expects to be able to procure the attendance of his witness at the next term, that the witness is not absent by his permission, and all facts showing the materiality of his evidence, and that the application is not made for delay. If within reach of process, an attachment should be issued for the witness.

In an appeal from a justice of the peace, it is error for the court to affirm the judgment for the plaintiff without hearing evidence. A trial cannot be had on the transcript of the justice, without other proof.

If the appellant fails to appear, the appeal may be dismissed, and the judgment of the justice of the peace, affirmed.

This was an appeal from a justice of the peace, to the St. Clair Circuit Court, Snyder, Judge. There appears on the record a transcript from a justice of the peace, showing that Thomas recovered a judgment of $50 against Shook, on a note, from which judgment Shook appealed to Circuit Court. There appellant moved for continuance upon the case being called for trial, which motion was overruled, and to which ruling appellant excepted. The court then decided that the judgment below be affirmed; motion for new trial denied by court; exception taken; appeal prayed for, allowed, and bond filed.

Bill of exceptions sets out that when the cause was called for trial, James H. Scott, witness, was called by the sheriff, and did not answer or appear. The appellant then offered the following affidavits: Affidavit of appellant sets out that he (appellant) made the annexed affidavit, now made a part of this affidavit, at the last term of court, and that all the allegations therein contained are still true except those relating to the inability of said Scott to attend court; affidavit further states that said

Scott has been duly subpœnaed to attend the present term of this court, to testify for affiant in this case, and is not here. Subscribed and sworn to, 23d Sept., 1858. The annexed affidavit referred to, is made by said appellant April 22nd, 1858, and sets out that affiant has a meritorious defense to this case. That the suit is instituted upon a promissory note given by affiant to one James H. Scott, and endorsed in blank to said Thomas. That after the note became due and before any endorsement or delivery to Thomas, and while it was in the hands and the property of said Scott, this affiant paid and satisfied said note in full, by causing real estate to be conveyed to said Scott, which was then and there received and accepted by said Scott in full satisfaction and discharge of said note. Affiant further says that said Thomas well knew said facts when he received said note, and when the same was endorsed as aforesaid. Affiant further says that he knows of no other person by whom he can prove the above facts as clearly and satisfactorily as by said Scott. That said Scott is a resident of St. Clair county, and would have been subpœnaed in this case, but that the said Scott a few days ago had his leg broken, and this affiant is informed and verily believes said Scott has been confined to his bed ever since, in consequence thereof, without an intermission of one hour at a time, and has been and is wholly unable to attend this court at this term. Affiant further says that he cannot safely proceed to trial without the said Scott; that he expects to be able to procure his testimony by the next term of this court; that this affidavit is not made for delay, but that justice may be done. And moved for a continuance of said cause to next term of court, which motion was overruled—exception taken. After affirmance of judgment below, when the cause was called for trial, defendant's attorneys said they stood mute in the cause. When the court affirmed the judgment below, defendant moved for a new trial because court refused continuance, and because the proceedings were irregular and without a jury, which motion was overruled by the court.

W. H. and J. B. Underwood, for Appellant.

N. Niles, for Appellee.

Walker, J. The appellant entered a motion in the court below for a continuance on account of the absence of one Scott, a witness on his behalf. The case had been continued at the previous term by reason of the absence of the same witness, on the application of the appellant. He had a subpœna issued and served, and when called just before the case was disposed of,

the witness failed to answer. The case was disposed of on the sixth day of the term, and no attachment was issued or other steps taken to procure the attendance of the witness, than the service of the subpœna. The affidavit stated that he was a resident of the county in which the court was held, but failed to state that the party expected to be able to procure the attendance of the witness, or to obtain his evidence at the next term, nor did it state that he was not absent by the permission of the appellant, nor that the application was not made for delay.

We are now called upon to reverse this judgment because the court overruled the motion for a continuance.

The 13th section of the Practice Act, (R. S. 1845, 415,) has this provision: "And whenever either party shall apply for the continuance of a cause on account of the absence of testimony, the motion shall be grounded on the affidavit of the party so applying, or his or her or their authorized agent, showing that due diligence has been used to obtain such testimony, or the want of time to obtain it; and also the name and residence of the witness or witnesses, and what particular fact or facts the party expects to prove by such witness or witnesses; and should the court be satisfied that such evidence would not be material on the trial of the cause, or if the opposite party will admit the fact or facts stated in the affidavit, the cause shall not be continued."

This provision requires that diligence shall be shown in the affidavit, and what will constitute such diligence necessarily depends on a variety of circumstances, which must be sufficient to satisfy the court that reasonable efforts have been used. On a first application a less degree of diligence would satisfy the court, than on a second or third application. The fact that a party applies for the continuance of a cause a second time on account of the absence of the same witness, might create the suspicion that the party was not sufficiently anxious for his attendance to make the necessary effort to procure it, and would require evidence of greater diligence than if it were a first application, and so would it continue to require greater diligence on each successive application. The party should, on a second application be required to show something more than a mere service of a subpœna, he should avail himself of other legal means to compel the attendance of the witness. If within the reach of the process of the court, so as to be availing, the party should apply to the court for an attachment to compel his attendance, so soon as he has failed to attend under the subpœna. By this means the witness can be brought into court to be punished for the contempt in disobeying the subpœna, and the party procure the benefit of his evidence. The affidavit should state that the

witness is not absent by the permission and consent of the party, and should also state that the party expects to procure the evidence of the witness by the next term. The affidavit should also state, that the party has no other witness by whom the same facts can be proven, or if the point is disputed and numerous witnesses are to be examined, show that fact, or that it is a question of identity upon which there will be a contrariety of evidence. This is necessary to show its materiality. This affidavit, it is perceived, fails to come up to these requirements. The trial was on the sixth day of the term, and no application was made for a writ of attachment to compel the attendance of the witness, nor does the affidavit show that the witness was absent without the consent of appellant. Nor does it appear that the witness would be any more disposed to obey a subpœna at the next than at that term. For these reasons, we think this affidavit was not sufficient, to authorize the court to continue the cause.

It is again urged that the court erred in rendering a judgment of affirmance, without hearing evidence in support of the plaintiff's demand. The mode of procedure in the Circuit Court, in cases of appeal from judgments of justices of the peace, is regulated by the 59th chapter of "Revised Statutes." The 66th section, page 325, provides that on trial of such appeals in the Circuit Court, no exception shall be taken to the form, or service of the summons, or to any proceedings before the justice; "but the court shall hear and determine the same in a summary way, according to the justice of the case, without pleading in writing." The 67th section provides, that if it appear that the justice of the peace had no jurisdiction of the subject matter of the suit, the same shall be dismissed at the cost of plaintiff. The 68th section provides, "that the plaintiff in the Justice's Court shall be plaintiff in the Circuit Court, on the trial of the appeal, and the rights of the parties shall be the same as in original actions." These provisions clearly require that the trial in the Circuit Court shall be *de novo*, upon the evidence the parties may adduce. This is the uniform and settled construction. The trial cannot be had upon the transcript of the justice's record, but the court must hear the evidence on the trial. Or if the appellant shall fail to appear to prosecute his appeal, the appellee may have the appeal dismissed, and the judgment of the justice of the peace affirmed. But the case, when properly in the Circuit Court by appeal, and the necessary service has been had, must be disposed of in one of these modes.

In this case neither of these modes were adopted. When the motion for the continuance was overruled, the court should have proceeded to try the cause, or if upon being called, the defend-

ant had failed to appear to prosecute his appeal, it might have been dismissed and the judgment of the justice affirmed. The record states that the defendant stood mute; but it does not state that he refused to go to trial. Nor does it appear that any evidence was heard, or any motion entered requiring him to answer. And until some step had been taken by the plaintiff to procure a trial, or a dismissal of the appeal, he was not required to act. For aught appearing in the record, he may have been ready and prepared to have made a complete answer to any proof the plaintiff might have adduced, or to any other legal step that might have been taken by the plaintiff.

We think this error was well assigned, and that the judgment of the Circuit Court should be reversed, and the cause remanded for further proceedings.

Judgment reversed.

John S. Dill *et al.*, Plaintiffs in Error, *v.* The Wabash Valley Railroad Company, Defendant in Error.

ERROR TO COLES.

A railroad company cannot be enjoined from collecting instalments on subscriptions for stock because the money may be expended in extending the road beyond the county in which the stockholders reside, unless the contract of subscription expressly stipulated that the money should be expended in such county.

If there was any such condition in the subscription, it should be clearly and positively stated in the bill.

A verbal agreement or understanding to that effect, would constitute no defense to the liability of the stockholders on the contract.

The insolvency of a railroad company is no ground for restraining collection of subscriptions for stock.

This was a bill in chancery, filed by Dill and others against the Wabash Valley Railroad Company, to enjoin said company from collecting judgments obtained against the complainants for thirty-five per cent. on the capital stock subscribed by them to said company, and also from instituting suits to coerce the collection of the residue of the stock subscribed by complainants to said road, upon the grounds that according to the terms of the said subscription, the stock was to be used and expended in the construction of said road through the county of Edgar, and not elsewhere, and that it was to be located and put under contract immediately. They allege that since the rendition of the judgments aforesaid, the company have become hopelessly insol-

vent, that they have failed to locate and put the road under contract through Edgar county, and that they are collecting and misapplying said stock by using it in other counties, and for other purposes, and that unless they are enjoined, they will coerce the collection of all said stock, and use and apply it in violation of the terms and stipulations upon which it was subscribed, and that complainants are remediless at common law.

The defendants filed a general demurrer to the bill, which was sustained by the court, EMERSON, Judge, and the bill dismissed, and judgment against the complainants for costs and damages, to which judgment of the court the complainants excepted at the time, and assign the same for error.

A. GREEN, for Plaintiffs in error.

READ & BLACKBURN, for Defendant in Error.

CATON, C. J. The demurrer to this bill was properly sustained. It does not show that there was any condition attached to or embodied in the contract of subscription that the money should be expended in Edgar county. Were there any such condition in the subscription which the defendant was about to violate, it should have been clearly and positively stated in the bill. In the absence of such averment, we cannot intend it, as the bill must be most strongly taken against the complainants: at least, it must be presumed they have stated their whole case, and it must be required of them to set forth enough to entitle them to the relief asked. If the supposed condition was not expressed in the contract of subscription, but rested in a verbal understanding or agreement at the time the subscription was made, it can constitute no defense to the liability on the contract, either in law or equity. That writing, like all other written contracts, must be held to embrace the whole contract, and cannot be varied by parol. If there were any of the parties who did not execute the contract themselves, or authorize others to execute it for them, they should have made that defense at law under the plea of *non est factum*. But even if they could now interpose that defense as a ground for an injunction, to restrain the collection of the judgments, it is not shown which of the complainants did not authorize the execution of the unconditional subscription.

The insolvency of the company can constitute no ground for restraining the collection of these judgments. Indeed it shows the more urgent reason why they should be collected. It is due to the creditors of the company that it should make available all its resources, and faithfully apply the proceeds to the

payment of its debts. The complainants cannot, now that the enterprise has proved a losing concern, separate themselves from the other stockholders, who have advanced their money towards its execution, when, had it proved successful and profitable, they would perhaps, have been among the first to step forward to claim their dividends and enjoy its benefits. We cannot foster a disposition, which is now too prevalent, to evade responsibilities when a loss is anticipated by parties, who would be entitled to benefits had success crowned their efforts. Those who would share the profits, must endure the losses. The bill shows no ground for the injunction, and the decree must be affirmed.

Decree affirmed.

William Rice, Appellant, *v.* The Rock Island and Alton Railroad Company, Appellee.

APPEAL FROM MORGAN.

In an action by a railroad company against a stockholder for instalments upon his subscription for stock, he ought not to be permitted, in a collateral way, to question the regularity of the organization of the company.

It is no defense to such an action, that the company has accepted an amendment to its charter after the defendant had subscribed for the stock, authorizing it to extend its road, and otherwise to assume new and increased responsibilities.

This was an action of assumpsit, by the Rock Island and Alton Railroad Company against the appellant, Rice, for instalments upon his subscription for stock.

The declaration contains three counts—the first and third special, averring the organization of the company and an order by the directors for payment of the instalments; the second, the common indebitatus count.

Neither count contains any averment that the $500,000 required by the charter, had been subscribed *before the organization of the company*, nor is there any averment that the three million dollars, which, by the charter, constitutes the capital of the company, had been subscribed when the directors ordered payment of the instalments sued for.

The defendant, Rice, filed twelve pleas in bar.

Upon the first (non assumpsit,) and the second (nul tiel corporation,) issues were taken; to the remainder, general demurrers were filed, which were sustained by the court.

The issues upon the first and second pleas were, by agreement of counsel, tried by the court, and judgment rendered against Rice for the instalments.

The defendant appealed to this court, and by his assignment of errors calls in question the judgment of the Circuit Court in sustaining the demurrers to his 7th, 8th, 9th, 10th, 11th and 12th pleas.

The 7th plea alleges that three millions of dollars of the stock of the Rock Island and Alton Railroad Company had not been subscribed when the order was made by the directors, requiring payment of the instalments sued for.

The 8th plea alleges that five hundred thousand dollars of the stock of the company had not been subscribed when the company was organized, and that defendant, Rice, was not present at, nor did he in any way participate in the organization.

The 9th alleges that the commissioners mentioned in the first section of the charter did not call a meeting of the stockholders of the company for the organization of the same, by giving thirty days' notice, in the manner required by section 7th of the charter; and that defendant, Rice, was not present at, and did not participate in any way in the meeting held when the pretended organization was effected.

The 10th alleges that the directors of the company have, since the defendant's subscription for stock, and without the assent of defendant, extended the line of their railroad from Whitehall, in the county of Greene, in the State of Illinois, to parts far distant and beyond, and in the direction of Illinoistown, in said State, and have caused surveys of said extended route to be made, and said extended route, in part, to be located, and portions thereof to be let out by contract for work thereon, with the view of making a permanent extension of said railroad beyond Whitehall aforesaid, to parts far distant; and avers that the directors have not made any reasonable effort to effect an arrangement for the running of cars from Whitehall, aforesaid, to Illinoistown, aforesaid, with the railroad company heretofore authorized to construct a railroad between said places.

The 11th alleges that since defendant's subscription, the charter of the company has been amended by the act of 14th February, 1857, (made a part of the plea,) which has been accepted by the directors, and by which amendment new and increased hazards, risks and responsibilities have been imposed upon the subscribers for stock, and different enterprises authorized, from the one set forth in the original charter under which defendant's subscription was made; and defendant avers that he neither applied for said amendment of the charter, nor has he in any wise accepted or assented to the same.

The 12th alleges that when the organization of the company was effected, five hundred thousand dollars of stock in the company had not been subscribed, and that for the purpose of supplying the deficiency and effecting the organization upon subscriptions to the aforesaid amount, the stockholders assembled for the purpose of effecting the organization, *previous to the organization* created false and spurious subscriptions for stock in the company to the amount of the deficiency, to wit: the amount of many thousand dollars, and falsely reported and acted upon, and received votes for the same as genuine, at said organization, and effected the organization thereon, the said stockholders then and there well knowing that a great part of the five hundred thousand dollars in subscriptions, was falsely made up as aforesaid; and avers that defendant was no party to said fictitious subscriptions, and in no way assented to them or to the organization of the company thereon.

H. B. McClure and D. A. & T. W. Smith, for Appellant.

Knapp & Case, H. E. Dummer, and J. Grimshaw, for Appellee.

Caton, C. J. All the questions in this case have been lately decided by this court, and we do not deem it again necessary to elaborate them.

The party ought not to be permitted in this collateral way to question the regularity of the organization of the company. If it has assumed to exercise corporate functions before it had a right by law to do so—if it has usurped franchises not granted by the statute, that should be more properly inquired into by a direct proceeding to seize the franchises to the people and dissolve the corporation. If in every suit which the company may bring to enforce its rights, it must come prepared, over and over again, to show that its organization was formal and proper, it would lead to embarrassments and inconveniencies the most intolerable. But be this as it may—granting that the company was prematurely organized before the half million of stock had been subscribed, and that it was competent for the defendant to plead that fact in bar of the action, that was cured by the amendment to the charter of the company after its organization, by the act of the 14th February, 1857, which is declared to be a public act, of which the courts must take notice. *Illinois River Railroad Company* v. *Zimmer*, 20 Ill. R. 654. That case, as well as *Sprague's Case*, 19 Ill. R. 143, settles, in principle, the objection which is made, that by the amended charter they are authorized to extend the road to Illinoistown, in a certain con-

tingency. Such extension may be indispensable, to make the balance of the investment of any value. Enough has been said in former cases, on this subject.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

The Tonica and Petersburg Railroad Company, Plaintiff in Error, *v.* Jacob Stein, Defendant in Error.

ERROR TO MENARD.

Where the defendant authorized the secretary of a meeting to subscribe for shares of railroad stock for him, by putting his name to a blank sheet of paper, and the name was subsequently transferred to the subscription books of the company, without any further authority: Held, that the defendant might show by parol evidence, that he authorized the subscription only on certain conditions.

This was an action of assumpsit commenced by the plaintiff in error against the defendant in error, in the Menard Circuit Court, Harriott, Judge, and by the said company brought to this court by writ of error. The action was brought to recover for price of stock subscribed. The cause was first tried before a justice of the peace, where the jury found a verdict for the railroad company, and this was appealed to the Circuit Court of Menard county, and there tried, and in which court the jury found for the defendant.

On the trial below, the railroad company proved and read their charters, proved its organization, then introduced the subscription books of the company, and read the subscription of the defendant Stein, who had subscribed $100; proved the making of the calls according to the charter, and proved that Stein lived in the fourth division. The plaintiff then introduced *L. M. Green*, who being sworn, said he saw various and continuous acts done by the company, its agents, hands, engineers, surveyors and other persons on and along said road as early as July, 1857, and down to the present time; and the said company proved that at a public meeting, held at the court house in the town of Petersburg, at which Mr. William M. Cougill was chairman, and Henry L. Clay was secretary, Mr. Stein was present, and that he authorized said secretary Clay, to sign his, Stein's, name, and to subscribe for one share in said capital stock for the defendant; that said secretary did so, as per request and authority. This signing was first on a small slip of paper, but

was put regularly on the subscription books the next morning, or within three days thereafter.

The defendant then introduced *J. M. Miles*, who said in substance: "I was present at the meeting. The road wanted to raise $2,300, which sum was necessary before the road could be commenced, and if that sum was raised, the road would locate the depot in the bottom, in Maj. Harris's cornfield, or would bring the railroad through the town and thence along the southern route—provided that if the southern route cost more, the citizens of the town would make up that sum, and that the depot should be in the bottom at all events. I asked Mr. Bennett to say whether I had stated the matter rightly. Bennett being the railroad agent, or was getting subscriptions, said that what I stated was correctly stated, but went on and gave additional reasons. He said that the depot should be placed in the bottom at all events. After stating some other conditions, Mr. Green, another agent of the railroad company, said that the depot should be placed opposite to the street east of the public square in said town of Petersburg. I called on the people to come up, and, under these conditions, subscribe for the stock. The subscriptions were put on a piece of naked paper. There was no heading to it; don't recollect anything about Stein. The depot is not in the town as represented. It is about three hundred yards further off. *Thought* the subscribers were to pay only under the conditions. This book—the subscription book, explains what I say, but does not specify the conditions—do not know anything about Stein's subscription—did not see him that I know of. I did not hear Mr. Bennett say anything about the conditions at all in the meeting. *He might have said he would not receive* conditional subscriptions."

The defendant further introduced one *H. Bailes*, who was asked under what condition the subscription was made. He stated substantially as follows: "I was present at the said meeting, and agree in substance to what Mr. Miles has just said. I did not hear Mr. Bennett say anything about conditional subscriptions. The subscriptions were rather subject to the conditions which Mr. Miles stated."

The plaintiff then called *L. M. Green*, who stated: "I was present at the meeting: was there before it organized, and staid till it closed. Was with two of the directors, Green and Bennett, and they told Mr. Miles and myself to get up the meeting, and that we might then assure the people that the said depot should not be put on Bennett's meadow, but would make it on the bottom, subject to conditions. I was present, and distinctly heard Mr. John Bennett, the director, say he could not,

and would not take conditional subscriptions to the railroad stock—said he had no authority to do so. He repeated this."

The plaintiff then introduced *Henry Clay*, who stated in substance: "I was at the meeting aforesaid—was its secretary. I heard Mr. Bennett say distinctly, at and in said meeting, that he was not authorized to take, get or receive, conditional subscriptions, but would give them every assurance that the depot should not be on the hill. The depot is not in Bennett's meadow. *These were the important points, and I remember them.*"

The jury found for defendant.

LINCOLN & HERNDON, for Plaintiff in Error.

STUART & EDWARDS, and THOMAS P. COWAN, for Defendant in Error.

BREESE, J. This suit was brought originally before a justice of the peace, and by appeal taken to the Circuit Court of Menard county, where a judgment was rendered in favor of the defendant. The case is brought here by writ of error, and the principal error relied on to reverse the judgment is, that the court below admitted parol evidence to explain the defendant's subscription to the capital stock of the railroad company.

It will be perceived that this is a case in which the defendant did not actually sign the subscription book. The stock was subscribed by another person, by writing the name of the defendant on a blank sheet of paper, and afterwards, without any authority, transferring it to the subscription list.

The defendant on the trial contended that he agreed to take one share of the stock on certain conditions, and his name was put down on a piece of paper for one share, on certain assurances that the depot would be located at a particular place, or not located at a certain place. There is no proof that he authorized Clay or any one else, to put his name to a subscription list containing no conditions.

It became necessary on the trial to determine the extent to which the defendant was willing to go—how far he did go—what authority was given by him to put his name down at all for one share—what was his understanding and intention when he said he would take one share. This necessarily let in much testimony, none of which is in the category of an attempt to explain a written instrument—the subscription paper—by parol. The inquiry was, did he subscribe at all? The jury have found he did not subscribe in such manner as to bind him, and we are satisfied they decided correctly, and accordingly affirm the judgment.

Judgment affirmed.

Charles E. Quackenbush, impleaded with, etc., Plaintiff in Error, *v.* John Carson *et al.*, Defendants in Error.

ERROR TO MORGAN.

In a petition for a mechanics' lien, the land was described as being about three acres, lying in the south-east corner of the south-west quarter of the north-west quarter of section 22, in T. 15 N., R. 10 west of 3d P. M., and the petition further stated that the defendant "is now owning and in possession of said land, as he has been ever since the time above mentioned, and in his own right is now holding, and has been so holding from," etc., "under a title bond or a bond for a deed, to and for said land, in writing made and given by William B. Warren:" Held, that as circumstances were referred to, by which, with the aid of extrinsic evidence, the premises could be precisely located, the description was sufficient.

Petitions to enforce mechanics' lien were filed by the defendants in error, in which the property sought to be subjected to lien and sale, was described as "a certain piece or parcel of land situate in said county, and described as being about three acres of land lying in the south-east corner of the south-west quarter of the north-west quarter of section twenty-two, in township fifteen north, of range ten west of third P. M."

At the appearance term, Quackenbush was defaulted, and decrees *pro confesso* were taken, describing the property as above, and directing it to be sold.

The special master reported that he had advertised and sold the property, describing it as in the decrees, and that he was about to execute a deed to the purchaser, when he was notified by the counsel of Quackenbush not to make a deed.

At the same time Quackenbush, by his solicitors, appeared and objected, on the report of the special master filed, to the validity of the sale and to his making any deed pursuant to the sale, for the following reasons: "That in the petitions and decrees in the above cases, and in the advertisement for sale by the special master, there is and was no legal, certain and sufficient description of the premises which were claimed as subject to the asserted liens of the petitioners severally and respectively, and thereupon asks the court to vacate said sale;" which being heard was overruled, to which Quackenbush excepted, and brings the case to this court by writ of error, assigning as errors,

1st. That there is no legal or definite description in said petitions or decrees, or either of them, of the premises sought to be subjected to lien and sale by said petitions and decrees.

2nd. That the court erred in approving the report of the special master, and in ordering him to make a deed pursuant to sale made by him.

D. A. AND T. W. SMITH, for Plaintiff in Error.

GEO. EDMUNDS, JR., for Defendants in Error.

CATON, C. J. This was a petition for a mechanics' lien, which avers that the defendant "was owner by contract of purchase, and in possession of a certain piece or parcel of land situate in said county, and described as being about three acres of land lying in the south-east corner of the south-west quarter, of the north-west quarter, of section twenty-two, in township fifteen north, of range ten, west of the third P. M., and said Quackenbush is now owning and in possession of said land, as he has been ever since the time above mentioned, and in his own right is now holding and has been so holding from and before the time above mentioned, under a title bond or a bond for a deed to and for said land in writing, made and given by William B. Warren," etc. The objection taken to the decree rendered is, that the description is so uncertain that the sheriff cannot certainly know what he should sell, and that a deed of the premises containing the same description would be void, for uncertainty. We think the description abundantly sufficient. Granting that the simple description of, about three acres in a particular corner of a certain quarter section, would be objectionable without any attendant circumstances to help fix the precise location, here are circumstances referred to, which by the aid of extrinsic evidence, must enable any one to locate the precise premises without the least trouble. It is the same lot which is in the possession of and occupied by the defendant. This can be established by any one who is acquainted with that possession, as satisfactorily as if the premises had been described as enclosed by a stone wall, or as if any other usual mode of description had been adopted. If a description of land is such that it can be located by the proof of the existence of facts stated to exist in the description or deed, it is sufficient, and such beyond all doubt is the case here.

The decree must be affirmed.

Decree affirmed.

Watson Trowbridge *et al.*, Appellants, *v.* John Seaman, Appellee.

APPEAL FROM ADAMS.

Where a judgment by default is entered on a promissory note, payable in currency, the clerk may assess the damages; it is not necessary to call a jury for that purpose.

This was an action of assumpsit, brought by the appellee against the appellants, in the Circuit Court of Adams county. At the June term of said court, 1858, Sibley, Judge, presiding, a judgment was rendered by default against the appellants, and in favor of the appellee, for $2,762.50 damages. Said damages were assessed by the clerk under an order of the court. A summons issued in said cause was duly served on the appellants, more than ten days before the commencement of said June term of said court, but they did not appear.

The declaration contains six special, and the usual common counts.

The first five special counts are each upon a separate instrument of writing, made and delivered by the appellants to one John B. Bennett, bearing date June 1st, 1857, and in and by each of which the appellants promised to pay to the order of Bennett "five hundred dollars in currency," with interest thereon at the rate of six per cent. per annum. Said instruments are payable respectively on the 10th day of October, November and December, 1857, and the 10th day of January and February, 1858; and they are all alleged to have been assigned by Bennett to the appellee. It is also alleged that the currency called for in each instrument, was at the time the same became due, of great value, to wit, of the value of five hundred dollars.

The sixth special count is upon all of said instruments, and embraces substantially what is contained in the first five special counts.

The appellants assign for error, the order of the court that the clerk assess the damages, the assessment of the damages by the clerk, and the rendering of the judgment upon such assessment.

Wheat & Grover, for Appellants.

J. Grimshaw, for Appellee.

Caton, C. J. This action was upon several promissory notes payable "in currency." A judgment by default was entered, and the clerk assessed the damages. The objection taken is,

that the notes being payable in currency, the clerk could not assess the damages, but that a jury should have been called for that purpose. This same question was raised and decided by this court, in the case of *Swift* v. *Whitney*, 20 Ill. R. 144, where it was held, that a note payable in currency was in legal contemplation payable in money, and that it was not necessary that a jury should be called to assess the damages. We do not deem it necessary now to add anything to what was there said in favor of the decision.

The judgment must be affirmed.

Judgment affirmed.

James Abrams, Plaintiff in Error, *v.* Benjamin E. Taylor, Defendant in Error.

ERROR TO SCOTT.

A receipt given for produce, is not evidence of any indebtedness by the party signing it; but it will be presumed that the produce was received in payment of an antecedent debt, unless explained by extrinsic evidence.

This cause was tried at the May term, 1858, of the Cass Circuit Court, before Woodson, Judge, without the intervention of a jury. The case is fully stated in the opinion of the court.

D. A. and T. W. Smith, for Plaintiff in Error.

Knapp & Case, for Defendants in Error.

Walker, J. This was an action of debt instituted by appellee against appellant on a receipt of which this is a copy: "Rec'd of B. E. Taylor, 1071 Bushels corn, 25 cts. pr B. 267.75. Naples, March 20, 1852. J. Abrams." The declaration contained two counts on the receipt. Appellant filed a plea that the causes of action did not accrue within five years, and the plea of *nil debet*, to the first of which there was a demurrer sustained, and on the latter there was an issue to the country. By consent there was a trial by the court without the intervention of a jury, and on the trial appellee read in evidence the receipt, and a note for $43.12, dated January, 1851, due at one day, given by appellee to appellant, with two credits endorsed, amounting together to the sum of $12.40, with some figures on both the note and receipt. Upon this evidence the court found for the

appellee, and rendered judgment for two hundred and thirty-three dollars and forty-three cents debt, and $84.03 damages against appellant, from which he appeals to this court.

We shall first consider whether the receipt read in evidence, created any liability on the part of appellant, unexplained by extrinsic evidence. Phillips, in his work on Evidence, lays down the rule that, "In order to recover under a count for money lent, it will not be sufficient merely to prove the receipt of money from the plaintiff by the defendant, since the presumption of law is that money when paid, is in liquidation of an antecedent debt." 4 Phil. Evid. 121. And this rule is recognized by the Supreme Court of New York, in *McKinstry* v. *Pearsall*, 3 J. R. 319. That case was on a receipt of fifty barrels of provisions from one Smith, for account of McKinstry. The court say that, "If the receipt had been more explicit than it is, it would be open to explanation; I mean that kind of explanation not directly contradictory to, but consistent with it. With respect to papers of this kind, the courts have permitted the party to show mistake, fraud, and imposition in obtaining them. It is necessary in this case to go so far, as the receipt itself is perfectly equivocal, and from the mere reading of it, no one could say whether the provisions were received to go on account held by the defendant against the plaintiff, or whether the defendant meant only to acknowledge that though the provisions were received from Captain Smith, they were received by the defendant for safe keeping, for or on account of David McKinstry." So in the case under consideration, there is nothing to indicate, that this corn was received as a purchase. It is true that as a price was fixed, it would rebut the presumption, unexplained, that it was received simply for safe keeping, but it still left it equivocal as to whether it was a purchase, or was received on account of a precedent debt, and the legal presumption would be, that it was on the latter. That it was produce, we conceive makes no difference, as every day's observation shows that a large proportion of indebtedness is paid in grain and articles of produce, and the inference has not been rebutted in this case. Nor do the figures on the receipt and note in any degree explain or contradict it, as we can by no process convert 67.75 into 267.75, nor can we by any rule in mathematics, deduct 34.32 from 67.75 and have a remainder of 233.43, and to sustain the finding of the court below, we are asked to draw these inferences. If there were more data to act upon, the inference might be indulged, but there is nothing in any degree indicating that these figures on the receipt should be other or different than we find them endorsed. If we were once to enter the field of conjecture, we might then arrive at the con-

clusion asked of us by the appellee. But we can only deal with evidence and its legitimate conclusions. We are for these reasons of the opinion that the evidence fails to sustain the finding of the court, and that the judgment should have been for the defendant. Therefore the judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

Church G. Cole, Plaintiff in Error, *v.* Aaron Green, Defendant in Error.

ERROR TO CASS.

Where a judgment debtor has but sixty dollars' worth of property, he need not prove a formal or express selection by him, of that property, in order to protect it from levy and sale on execution.

If a debtor has but sixty dollars' worth of property, the statute exempts it from the effect of any judgment, execution or attachment; it is placed beyond the reach of the law, unless by the voluntary act of the owner.

Green claimed the property levied upon, as exempt from execution. On the trial of right of property, the case was submitted to the court, Harriott, Judge, presiding, who found the law and facts for Green. Cole, the plaintiff in execution, took exception, and brings the cause to this court.

Walker & Smith, for Plaintiff in Error.

J. Grimshaw, for Defendant in Error.

Caton, C. J. The evidence as to the value of the debtor's property is very conflicting, and it was the province of the court below, sitting in the place of a jury, carefully to consider it, and determine the facts thereby established, as a jury would have done. The court found that the proof showed that the value of the property did not exceed sixty dollars, and we cannot say that such finding was contrary to the evidence. We shall therefore consider that fact as settled. And also that the property was suited to the condition in life, of the debtor, and that he was the head of a family and residing with the same, which facts were also necessarily determined by the finding of the court.

The provision of the statute is this: "The following property, when owned by any person being the head of a family, and residing with the same, shall be exempt from levy and sale on any execution, writ of attachment, or distress for rent; * * * * and sixty dollars' worth of property suited to his or her condition or occupation in life, to be selected by the debtor." The question to be considered is, whether it is necessary, when the debtor has but sixty dollars' worth of property, to prove an express and formal selection by him, of that property, under this statute, in order to protect it from levy and sale on an execution.

Looking at the reason which induced the legislature to insert this provision authorizing a selection to be made, we are of opinion that in such case no formal or express selection need be proved. In adopting this provision it was assumed by the legislature that the debtor would have more than this amount of property not specifically exempt, from which the selection could be made. This is necessarily implied by the meaning of the word *select*, which is to pick out or take from among a number. There can be no selection, where there is nothing left. One may take the whole, but he cannot select the whole. Where there is but sixty dollars' worth of property, this portion of the statute can have no application or meaning. The case does not exist where it can perform its office. In such a case, the statute, by its own force, sets apart the whole property to the use of the debtor, and absolutely exempts it from levy and sale on the execution. As to it, no judgment, execution, or attachment can exist. The judgment creates no lien, and the execution creates no power over it. By the law itself it is placed beyond the reach of the law, unless by the voluntary affirmative act of the owner. The law will only take cognizance of it for the purpose of protecting him in its enjoyment. He may sell or mortgage it, no doubt, and thus bring it within the influence of the law regulating the transfer of property, but in doing so, the title passes from him as free from the influence of the judgment and execution as it existed in his hands.

We are of opinion that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

Theophilus M. Nichols, Plaintiff in Error, *v.* Charles Stewart and John H. Calbreath, Defendants in Error.

ERROR TO ST. CLAIR.

A plea of usury, professing to answer the whole count of the declaration, while it only answers so much of it as claims to recover more than legal interest, is bad on demurrer.

Our statute attaches no penalty to an usurious transaction; it merely modifies the contract so that the defendant shall be bound to pay only the principal sum, with legal interest.

A judgment in an action of debt which recites that the plaintiff is entitled to six per cent. interest, but leaves a blank in the part of the judgment which states the damages recovered, will be reversed.

This was an action of debt, commenced by Nichols against Stewart and Calbreath on a sealed note, dated Oct. 4th, 1856, for $500, payable by defendants, jointly and severally, six months after date, with interest at two per cent. monthly until paid. Plaintiff filed a declaration with a special and the common counts, but before any plea was put in, withdrew the common counts. Defendants filed a plea, to which a demurrer was sustained, and subsequently amended their plea so as to crave oyer and be a plea of usury, in the usual form. Plaintiff filed a demurrer to the amended plea, which was overruled, and the plaintiff abided by his demurrer. The court then rendered a judgment for the plaintiff for $500 debt, which recited that the plaintiff was entitled to six per cent. per annum interest, but a blank was left in that part of the judgment which states the damages recovered.

The plaintiff brings the case to this court by writ of error; assigning as errors—

1st. Overruling of demurrer to amended plea.

2nd. Giving judgment as rendered.

W. H. and J. B. Underwood, for Plaintiff in Error.

Meyer & French, for Defendants in Error.

Caton, C. J. This was an action of debt upon a sealed obligation for five hundred dollars, with a special and the common counts, which latter were withdrawn before the plea was filed. To the declaration containing only the special count the defendants filed a plea of usury. The introduction to this plea is as follows, "and the defendants, by French & Meyer, their attorneys, come and defend, etc., and crave oyer of the said writing obligatory in the first count of the plaintiff's declaration, and

it is read to them, * * * and for plea say, that before the making," etc. The plea goes on to state that the obligation was given for five hundred dollars, loaned money, and that it was agreed that the makers should pay to the payee for the forbearance of said sum of money at the rate of two per cent. per month, and that is the rate of interest reserved in the body of the obligation as stated in the declaration, and as set out on oyer. To this plea a demurrer was filed, which was overruled by the court, by which the plaintiff abided; whereupon the court rendered a judgment for the five hundred dollars debt, but no damages, a blank being left in that part of the judgment which states the damages recovered, although the judgment recites that the plaintiff is entitled to six per cent. interest on the obligation.

The court unquestionably erred in overruling this demurrer. The plea professed in the most unequivocal terms to answer the whole count, while at most it only answered so much of it as claimed to recover more than the legal rate of interest. Were our statute like the English usury laws, which forfeit the whole amount of the obligation or note which is tainted with usury, then the plea would have been good, and the pleader was probably misled by following an English precedent in the introductory part of the plea. There is in fact no penalty attached to an usurious transaction by our statute, as we have already decided. It merely modifies the contract, so that if the defendant shall insist upon it, no matter what the terms of the contract may be, he shall only be bound to pay the principal sum and legal interest. The plea was bad, and the demurrer should have been sustained.

But if the plea had only professed to answer that part of the declaration to which it was really a good answer, still the judgment was wrong, in not giving the plaintiff the damages to which he was entitled by the statute.

The judgment must be reversed and the cause remanded, with leave to amend the plea.

Judgment reversed.

Cornelius H. Tunnison *et al.*, Plaintiffs in Error, *v.* Franklin Field *et al.*, Defendants in Error.

ERROR TO MADISON.

In a proceeding by attachment, the declaration must be limited to the cause of action specified in the affidavit upon which the proceeding is based; and the plaintiff cannot recover a larger sum than the amount claimed in the affidavit, with interest.

If the plaintiff might declare in the common counts on the cause of action set forth in the affidavit, commencing by attachment does not deprive him of that right.

Where a contract has been fully performed by the plaintiff, and nothing remains for the defendant but to pay the money due on it, the plaintiff may declare specially, or on the common counts.

Where the right of the plaintiff to declare on the common counts, depends upon whether or not he has fully performed his part of a contract, it is error to dismiss the suit without proof. The court could not judicially know that fact, nor could it be determined by reference to the bill of particulars filed with the declaration.

The affidavit in this case states an indebtedness under a written contract, for work and labor and materials.

The declaration is on common counts.

A motion to dismiss suit for want of declaration, was sustained, and the suit was dismissed.

It is agreed by the parties in this cause, that the declaration copied into the record was filed within the time prescribed by agreement, but after the return term, and the only point of law at issue between them is, whether the same can be treated as a declaration in this case.

The error assigned is, that the court below erred in sustaining the motion of the defendants, and in dismissing suit.

H. W. Billings, for Plaintiff in Error.

J. and D. Gillespie, for Defendants in Error.

Walker, J. This was an attachment commenced to the October term, 1858, of the Madison Circuit Court. The affidavit upon which the proceeding is based was made by Tunnison, and alleges that defendants are indebted to plaintiffs "in the sum of eight thousand three hundred and fifty-eight dollars and seventy-six cents. That said indebtedness was for work and labor done and materials furnished the said Field and Barton, by this affiant and Henry E. Warren, under a contract entered into, in writing, on the 25th day of June, 1856, between affiant and said Warren, of the one part, and the said Field and Barton, of the other part, and the benefit of which contract has

been assigned to this affiant and Theodore F. Tunnison. Work done and materials furnished on the North Missouri Railroad, in the State of Missouri. That said sum of eight thousand three hundred and fifty-eight dollars and seventy-six cents, is the balance due for work and labor and materials furnished to said Field and Barton on said contract."

The plaintiffs filed a declaration in assumpsit, which contained the common counts for work and labor and materials furnished, money paid, laid out and expended, and on an account stated, all in the usual form. They filed with it a bill of particulars. At the October term, 1858, defendants entered a motion to dismiss the suit for want of a declaration, which was sustained, and the suit dismissed. The record is filed in this court, and the parties agree that the declaration copied into the transcript of the record was filed within the time prescribed by agreement, but after the return term, and the only point presented is, whether the same can be treated as a declaration in the cause.

Our statutes regulating proceedings in attachment, have not changed the rules of pleading or evidence. They remain as they were previous to their adoption. These enactments have, in some respects, changed the practice in proceedings of this character, and limit the declaration to the cause of action specified in the affidavit upon which the proceeding is based. Nor can the plaintiff recover a larger sum than the amount claimed in the affidavit, with its accruing interest. But if the plaintiff might declare in the common counts, on the causes of action specified in the affidavit, it being a proceeding in attachment will not change his right to still declare in that mode. If ordinarily he might declare on the cause of action set out in the affidavit, either specially or generally, under the common counts, he has the same right when the proceeding is by attachment. If then, the cause of action in this proceeding were such that the plaintiffs might, in an ordinary action, declare for work and labor done, materials furnished, or on an account stated, the declaration in this case, must be held sufficient. The principle is familiar and well settled, that when a written contract has been fully performed on the part of the plaintiff, and nothing remains to be done under it but for defendant to pay the compensation in money, the plaintiff may declare specially, on the original contract, or generally, in *indebitatus* assumpsit, at his election. *Throop* v. *Sherwood*, 4 Gilm. R. 98; *Lane* v. *Adams*, 19 Ill. R. 169. It then follows that if this contract was fully performed on the part of the plaintiffs, and nothing remained to be done under it, but for the defendants to pay the money due, there can be no doubt of their right to recover under the common counts. And whether it had been fully executed

or not, the court could not judicially know. The determination of that question depended on proof, and if, on the trial, it had appeared that plaintiffs had not fully executed the contract, without being prevented by defendants, they would have failed to recover. Nor can the court refer to the account filed with the declaration, to determine that question, on a motion to dismiss, but it is the evidence alone which must determine it. If the account filed is not such as the party has a right to prove under this affidavit, that would form no grounds for dismissing the suit, unless he failed to file a proper one under a rule entered for that purpose. But even if it were conceded that this declaration was defective, it is still a declaration in the case, and might be amended on leave of the court. But no objection is perceived to it, either in substance or in form.

We are therefore of the opinion that the Circuit Court erred in dismissing this cause, and that the judgment of dismissal should be reversed and the cause remanded.

Judgment reversed.

Allen C. Wade, Plaintiff in Error, *v.* William T. Moffett and David S. Moffett, Defendants in Error.

ERROR TO MACON.

Where by the terms of a public sale, a credit of nine months was to be given to a purchaser if he gave approved security, and A. purchased a mule, without complying with the terms of sale, or taking possession of the mule, it was held, that the vendor after the credit expired, might recover the price of the mule, without delivering or offering to deliver to the purchaser; the law gave the vendor a lien which he was not bound to relinquish, unless the terms of sale were complied with.

This was an action of assumpsit brought by the defendants to recover the price and value of a mule bargained, sold and delivered by the defendants to the plaintiff.

Plea of general issue; trial by jury.

It was in proof that the Moffets had a public sale, and among other property, a mule was put up for sale and was struck off to plaintiff for $89. That the terms of sale were a credit of nine months, with bond and approved security; that plaintiff did not comply with the terms of sale, and never took possession of the mule.

The court instructed the jury for the defendants, That if they believed, from the evidence, that the plaintiff bid off the mule at

defendants' sale, that that was a contract of sale between the parties, and the defendants had a right to compel the plaintiff to take the mule.

That if the plaintiff afterwards failed or refused to comply with the conditions of the sale, by giving bond and security, that that was his own wrong, of which he could not take advantage, and that his failing to give bond and security, could not affect the defendants' right to sue for and recover of the plaintiff, the price which he had agreed by his bid to give for the mule.

The court refused to instruct the jury for the plaintiff, that "if they believed, from the evidence, that the plaintiff bid off the mule in controversy at the sale, and that the terms of sale were a credit of nine months with approved security, and that the mule was not to be delivered until such terms were complied with by the purchaser, then such bid of itself did not vest the property in the mule in the plaintiff, and the defendants are not entitled to recover."

That if the jury believe, from the evidence, that the defendants kept the mule in their possession awaiting the compliance of the plaintiff with the conditions of the sale, and that the delivery of the mule and the execution of a bond by the plaintiff with approved security for the purchase price were to be concurrent acts, then the defendants are not entitled to recover until they first offer to deliver or tender the mule.

There was a verdict for defendant below, and a judgment for $89. The cause was heard before Emerson, Judge.

Post & Tupper, for Plaintiff in Error.

A. B. Bunn, for Defendants in Error.

Breese, J. This is a declaration in assumpsit, and the first count is for a mule bargained and sold, and the other is for a mule bargained, sold and delivered to the defendant. The verdict is general, for the plaintiffs.

The questions presented are, do the facts proved amount to a sale of the mule, and were the instructions given for the plaintiff proper, and those asked by the defendant, properly refused.

It is a general rule of the common law as to sale of chattels that, as between the vendor and vendee no actual delivery, symbolical or otherwise, is necessary—the completion of the bargain being all that is requisite to pass the title, though not the possession, until the price be paid or satisfactorily arranged.

In Noy's Maxims, as quoted by Lord Ellenborough, C. J., in *Hinde* v. *Whitehouse and Galan*, 7 East, 558, it is said, "If

I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And if the *horse die in my stable between the bargain and delivery*, I may have an action of debt for my money, because by the *bargain, the property was in the buyer.*" So in 2 Blackstone's Com. 448, citing Noy's.

Kent says, (2 Com. 491,) "When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer.

In Meigs (Tenn.) Rep. 26, *Potter* v. *Cowand*, it is said, It is not the delivery or tender of the property, nor the payment or tender of the purchase money, which constitutes a sale. The sale is good and complete so soon as both parties have agreed to the terms—then the rights of both are instantly fixed. But to have his action for the price, the seller must deliver or offer to deliver the property. If he tenders a delivery of the property, and demands the purchase money, he may have his action of debt or assumpsit if it be refused.

In *Willis* v. *Willis's Adm'r*, 6 Dana, 48, the doctrine was declared that a sale of goods becomes absolute—the property vested in the buyer and at his risk, as soon as the bargain is concluded, without actual payment or delivery.

In *Tarling* v. *Baxter*, 13 Eng. C. Law R. 199, the court say, "The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow; one of which is, that if it be destroyed, the loss falls on the vendee."

So in *Gardner* v. *Howland et al.*, 2 Pick. 602; *Shumway et al.* v. *Ritter*, 8 ib. 443; *Parsons* v. *Dickenson et al.*, 11 ib. 352.

The same doctrine is recognized in North Carolina. *The State* v. *William Fuller*, 5 N. Car. R. 26.

So in Ohio the court say, in *Hooben* v. *Bidwell*, 16 Ohio R. 510, The civil law required a delivery, and so it has been said did the common law. But we think delivery not necessary by the common law to pass the title to personal property; that a sale without it is complete as between the parties, though it be not, so as to affect the interests in certain cases of third persons.

In New Hampshire, *Ricker* v. *Cross*, 5 N. H. R. 571, the court say, "The general rule is, that the delivery of possession is necessary in a conveyance of personal chattels as against every one except the vendor. Between the vendor and the vendee, the property will pass without delivery, but not with respect to third persons who may afterwards, without notice, acquire a title to the goods under the vendor. An actual delivery by the vendor to the vendee is not, in all cases, necessary."

So in Maine, *Wing* v. *Clark et al.* 24 Maine R. 366, it is held that, "When the terms of sale of personal property are agreed on and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property in the goods is in the buyer; and if they are destroyed by accidental fire, he must bear the loss." So in *Bradeen* v. *Brooks et al.*, 22 Maine R. 470.

A party becomes a *buyer* when goods are knocked down to him at an auction. Hilliard on Sales, 323.

In the case of *Lansing et al.* v. *Turner et al.*, 2 Johnson, 15, the court held to the rule as laid down by Blackstone; and Thompson, J., says, "This I apprehend to be the rule in all cases on the sale of a specific chattel, where the identity of the article cannot be controverted. The inference of law being that the vendor is a mere bailee, retaining the possession at the request of the vendee."

Numerous other cases might be cited to the same purport, recognizing the rule of the common law.

Whether the sale was complete, was a question of fact for the jury. See *Kidder* v. *McKnight*, 13 Johnson, 293; *Shurtliff* v. *Willard*, 19 Pick. 209; *Houdlette* v. *Tallman*, 14 Maine R. 400.

In this case, the sale was at auction on nine months time, the purchaser giving bond and security. At the time of bidding, the mule was struck off to Wade at eighty-nine dollars, and his name was entered by the witness as the purchaser, in the memorandum kept by him. The witness saw the mule about the plaintiff's premises for two or three weeks after the sale, sometimes in the field and sometimes in the road.

Another witness stated that he was present at the sale, and had a conversation with Wade, in which he proposed to purchase a mule of him. Wade told him if he did not buy a mate for his mule at the sale, he would sell him his, and after the sale Wade declined selling.

This was all the testimony for the plaintiffs, and it appears from it, there was a complete agreement to buy on the terms proposed—"a bargain was struck," and there can be no doubt, had Wade tendered the security and demanded the mule, he

could have recovered in trover or replevin on refusal by Moffett to deliver it up.

It was proved by Richard Hust on the part of Wade, that ten days after the sale he had a conversation with one of the plaintiffs, Thomas Moffett, in which Moffett asked him if he had heard the defendant say anything about taking the mule, to which he replied, that the defendant told him he should not take it, as there was unfairness at the sale. Moffett said he could make him take it, and that he intended to make him do so. Witness then asked Moffett if he would sell the mule, who said he would, and stated the terms on which he would sell to witness, being the same as the terms at the auction sale. No sale was made. This is all the testimony in the case.

It is certain the terms of the sale at which Wade bought, could be released in favor of Wade by the Moffets, they were not obliged to insist on a bond and security, but having the mule in their possession on which they retained a lien, they could give to Wade the stipulated credit without other security if they chose to do so. The property was Wade's, but he had no right to the possession of it until he had complied with the terms of the sale, or otherwise satisfied the price. Moffetts had a right to keep the mule until they were paid or made secure, but had no right to sell to another without first having notified Wade that they should do so, if he did not comply with the terms of the sale. But it would seem they could not have an action against Wade for the price, even after the term of credit had expired, according to the rule in Noy's Maxims, until they had delivered the mule to Wade, or tendered him, and the case of *Potter* v. *Cowand*, Meigs, 26, above referred to, proceeds on this ground. The other cases do not, and we think as the sale was perfect between Moffetts and Wade, the Moffetts could sue for the price after the credit expired, without a delivery or offer to deliver, because the law giving them a lien on the mule, it would be unreasonable to require them to relinquish it before they were paid the price agreed. According to the cases cited, had the mule died, or been lost, Wade would have to bear the loss.

It is argued that the Moffetts should have given Wade notice to take the mule, and give his bond and security by a day named, and if he did not, they would sell the mule at public sale, and charge him with the difference in the price if the sale was at a loss, and so too, after the term of credit had expired. This the plaintiffs might have done. Chitty on Contracts, 431. They had an option, and having chosen to sue, and the instructions to the jury being right, we cannot interfere.

The judgment is affirmed.

Judgment affirmed.

The City of Alton, Plaintiff in Error, *v.* The County of Madison, Defendant in Error.

ERROR TO MADISON.

Section Six, Chapter 50, of Revised Statutes, is not to be construed to include insane persons having adequate means of support.

An insane person having property adequate to his support, is not a pauper, and the county is not liable for the support of such person, nor is the city in which he resides liable for his support.

Where the city of Alton voluntarily supported an insane person possessed of means adequate to that purpose: Held, that as no legal obligation rested on the city or county for the maintenance of such person, there could be no implied promise by the county to repay the city for such support.

This was an action of assumpsit, brought by the city of Alton against the county of Madison, to recover the sum of five hundred dollars, for the support and maintenance of one Constantine Shook, an insane person residing in the city of Alton, but owning property in her own right. The defendant demurred to the declaration, and a judgment *pro forma* was rendered by the court below sustaining the demurrer, and the case is brought to this court, and by agreement of parties, the following points are submitted for the decision of this court, viz:

Was the city of Alton bound to take care and provide for the said Constantine Shook, an insane person having property, before she was declared insane by the proper authorities, or is the county of Madison bound to take care of and provide for her before she was declared insane as aforesaid?

Is the said city of Alton bound to take care and provide for said Shook, she being a person having property, after she has been declared insane, according to law, or is the county of Madison bound to take care and provide for her?

Levi Davis, for Plaintiff in Error.

J. and D. Gillespie, for Defendant in Error.

Walker, J. In determining whether the city or county are liable for the support of insane persons having means of support, it will be proper to refer to the provisions of several legislative enactments. The liability of both the city and county to support paupers, is imposed alone by statute, and to such enactments we must look for its existence. The 9th section of the act incorporating the city of Alton, (Laws Spec. Sess., 1837, p. 21,) provides, "That the common council shall provide for, and take care of, all paupers within the limits of the city, and to accomplish this object, they shall have the exclusive right, power and authority to license and tax all ferries, taverns, mer-

chants, auctioneers, pedlars, grocers, venders of spirituous liquors and wines, other public houses of entertainment, theatrical and other performances, within the limits of said city." And the 1st section of chapter 80, R. S. 402, define paupers to be "Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause." The same section requires such persons to be supported by certain specified relations, if they have such in any county within this State, who are of sufficient ability. But if they have no such relatives, then the third section provides that "The said pauper shall receive such relief as his or her case may require, out of the county treasury." From these enactments, to become a public charge, the person must be poor, and unable to earn a livelihood by reason of some one of the enumerated causes, and must not have any of the enumerated relatives of sufficient ability for their support. A person having such relatives, or sufficient means for his own support, clearly is not within the provisions of the law; and until such person does come within its provisions, neither the city or county can be held liable for his support.

But it is insisted that the 50th chap. R. S. 276, creates the liability, and we are referred to the 6th section as creating this liability. That section provides that, "The overseers of the poor in every county, shall take charge of the body of any person so insane, lunatic or distracted, and shall have power to confine him or her, and shall comfortably support such person, and shall make out an account thereof and return the same to the County Commissioners' Court, whose duty it shall be to make an order requiring the treasurer of said county to pay the same out of any money in the treasury of said county not otherwise appropriated." The first section of this chapter provides that, "Whenever any idiot, lunatic or distracted person, has any estate, the judge of the Circuit Court of the county in which such idiot, lunatic or distracted person lives, shall summon a jury to enquire whether such person be lunatic, insane or distracted." And if the jury shall so find, the judge is required to appoint a conservator, who is required to give bond, and take charge of and manage the estate of such person. The fourth section of the same chapter provides that, "It shall be the duty of such conservator to apply the annual income and the profits thereof to the support of such idiot, lunatic or distracted person, his or her family," and "He may sell or dispose of the personal estate to pay his or her debts, or to support him or her, or his or her family, and to educate the children of the same." The seventh section of the same chapter provides that in case such person shall be restored to his or her reason, then what shall remain

of his or her property and estate shall be returned to him or her; or in case of the death of such person, to his or her heirs, executors or administrators.

While the sixth section of this last named chapter in terms would seem to require all idiots, lunatics and distracted persons to be taken into the custody of the overseers of the poor, and supported as a public charge, we think the other provisions of the chapter clearly manifest that such is not its proper construction. If such was the design of the legislature, why is the conservator required to apply the income and profits of the estate, and the proceeds of the sale of their personal property to their support and maintenance? The provisions of the seventh section also require that what shall remain of his or her estate after his or her support, shall be restored to such person upon restoration to reason, or paid to the heirs, executors or administrators at the death of such person. We think all these provisions when taken together, and in connection with the provisions of the 80th chapter of the Revised Statutes, clearly manifest, that it was the intention of the legislature to confine the sixth section alone to pauper idiots, lunatics or distracted persons. There can be no reason why the public should be charged with the support of a person having ample means for that purpose, nor would it be humane to remove such persons from the kind and protecting care of relatives and friends, against their will. But unless this section is confined to paupers, it would be the duty of the overseers of the poor in all cases to take such persons into their custody, and support them as a county charge. The law was enacted under the dictates of justice and humanity, and to hold that such persons must be removed from the care of friends, would be unreasonable, and to support them as a public charge, where they had ample means, would not be just. We are therefore of the opinion that an insane person having property adequate to his support is not a pauper, and consequently the county is not liable for such person's support. Nor is the city of Alton liable to support such a person. Their contract with the State was to support the paupers within the limits of the city, and this they are required to do, whether such pauper be sane or insane. But they are not liable under this provision in their charter to support persons having means for their own support.

The common council, or any other person, might have applied to the Circuit Court of Madison county, and have had a conservator appointed, who would have been compelled to provide for the care and support of this person, so long as her means might last, and until they became exhausted, she was neither a city or county charge. But the city having voluntarily supported her

without any legal obligation to do so, and without any such legal liability resting upon the county, there is no implied promise by the county to repay to them the expense incurred in her support.

We perceive no error in this record for which the judgment of the Circuit Court should be reversed, and the same is therefore affirmed.

Judgment affirmed.

Harvey Otter, Appellant, *v.* John S. Williams, Appellee.

APPEAL FROM COLES.

Where the defendant received oxen from the plaintiff to be kept until a particular time, and before the expiration of the time sold a portion of them; Held, that it was not error to instruct the jury that the plaintiff was entitled to recover the value of the oxen at the time of their conversion by defendant.

If the defendant neglected to recoup for the value of the feeding, he lost his proper remedy.

This was an action of trover for fifty head of cattle, tried at the October term, 1858, of the Coles Circuit Court. Plea not guilty—verdict for plaintiff for $1,050. Motion for new trial overruled. Bill of exceptions filed, and appeal taken.

There was an article of agreement, dated 11th November, 1857, by the terms of which, Williams delivered to Otter, fifty head of work cattle, weighing 55,065 lbs., to be fed by Otter from the 11th day of November till the 10th or 30th of April following, as Williams might choose, at a compensation of four and one half cents per pound for all above 55,065. Otter to be responsible for all the cattle except such as might die, and Williams to pay part of the money due for feeding, between the 1st and 10th of January, 1858. The residue of the money for feeding to be paid when Williams should receive the cattle from Otter.

Richard L. Williams testified that he, as agent for his brother, John S. Williams, delivered to Otter, fifty head of oxen, to be fed at four and a half cents per pound for the increased weight, under the written contract aforesaid. Also Otter told witness that he had shipped twenty head of the cattle to Chicago, and sold them, to get his pay for feeding them. Witness paid Otter $100 on the contract, between the 1st and 10th January, 1858, which was all Otter asked at the time. He testified that work cattle were, at the time of the shipment of the

twenty head, worth five cents per pound. That the cattle, when delivered to Otter, were lank and hungry, and would weigh sixty pounds less than if full; that the cattle in question were work oxen and kept for the purpose of breaking prairie; that the twenty head sold were the best of the lot, and would be worth from $12 to $20 per yoke over the average; that he demanded the cattle on the 19th of April, 1858, and tendered the pay for feeding them. Otter told him that he had shipped and sold twenty head of the cattle, and that plaintiff below, Williams, had driven off thirty head, which embraced all that had been delivered to him.

Thomas Decker, on the part of Otter, testified that he was present when the witness, Richard L. Williams, demanded the cattle, but saw no tender. Otter talked of settling and complying with his contract if Williams would with his.

The following instruction was then asked on the part of the plaintiff, and given by the court:

If the defendant sent off and sold, for his own use, a part of plaintiff's cattle, that constituted a conversion of so many of plaintiff's cattle as he so sent off and sold, and the plaintiff is entitled to recover their value at the time of the conversion.

And now said plaintiff assigns for error the following:

The instruction of the court, given at the instance of Williams, the plaintiff below, is wrong in this, that it fixes the value at the time when the cattle in controversy were sold, as the measure of damages, in view of the fact that part of that value was added to the cattle by Otter, the defendant below. And also, there was error in the court deciding, that trover would lie, notwithstanding there was a special contract in writing, in respect to the cattle in controversy.

O. B. Ficklin, for Plaintiff in Error.

Logan & Hay, for Defendant in Error.

Breese, J. The conduct of the defendant in this case is without apology. Entrusted with fifty head of work oxen to feed for the plaintiff, so that they might resume the labor of breaking prairie in the spring, without any excuse whatever, he selected twenty of the most choice animals, shipped them to Chicago without the knowledge or consent of the plaintiff, and sold them for beef, and he should, by every principle of justice, be held to the heaviest verdict the law could pronounce.

By the agreement, the defendant having received the oxen in November, 1857, was to feed them until the tenth or thirtieth of April following. Between the first and tenth of January, the

plaintiff paid the defendant one hundred dollars, on this account, being all that he asked at that time. When afterwards, in February, the plaintiff went after the oxen, the defendant said he had shipped twenty head to Chicago, to get his pay for feeding them. There is no evidence whatever that the plaintiff was behind in his payments a single dime, and this act of the defendant, thus depriving the plaintiff of his property, was wholly unjustifiable. It was an outrageous breach of trust, to say the least, and for which full damages should be awarded.

It is complained now, that as the court instructed the jury that if the defendant sent off and sold for his own use, a part of the plaintiff's cattle, that constituted a conversion of so many as he did so send off and sell, and the plaintiff is entitled to recover their value at the time of their conversion. The plaintiff profited by the increased value put on the cattle by the feeding. That the true measure of damages was their value independent of the feeding.

The court stated the general rule in trover correctly. *Keaggy* v. *Hite*, 12 Ill. R. 101.

If the defendant supposed there were any circumstances in this case constituting an exception to this general rule, he should have asked a separate and distinct instruction, stating the exception. All the right the defendant had, was that of recoupment for the value of the keep of the oxen, and, looking at the evidence and verdict, it is quite manifest that right was fully accorded to him by the jury.

The plaintiff had the right to declare in trover for the tort or on the contract, and the defendant could defend under the contract if necessary to his defense. *Ill. Cent. Railroad Co.* v. *Morrison*, 19 Ill. R. 141.

The judgment is affirmed.

Judgment affirmed.

The Trustees of Schools of Town. 23 N., R. 1 E., Plaintiffs in Error, *v.* James Allen *et al.*, Defendants in Error.

ERROR TO McLEAN.

The eleventh section of the act of 1847, requiring the school commissioners to keep certain books for purposes connected with the sale of school lands, is directory to the commissioners. But a commissioner might sell such land, and if legally and fairly sold, the title would not depend on his obeying these directions.

Trustees of Schools *v.* Allen et al.

Whether a township contains the number of inhabitants necessary to authorize the sale of an entire school section, is a fact for the school commissioner to determine, before he makes the sale of the land.

After a patent for school lands has issued, in the absence of fraud, proof will not be required to show that the property was advertised for sale according to the statute; enough must be presumed in favor of these sales, if unstained by fraud, to sustain them. It is to be presumed that the school commissioner has performed his entire duty concerning such sales.

The acts of two school trustees, in dividing and appraising school lands to be offered for sale, are valid. It is unnecessary for the third trustee to join with them, or be notified of their proceedings.

It is alleged in the bill filed in this behalf, that sometime about the 28th day of September, 1850, the school commissioner of McLean county, illegally sold to William H. Allen and James Allen, Jr. That this sale was illegal and void, because the prerequisites of the law had not been complied with; that the said Allens had received a patent from the governor; but as the sale to them was illegal and void, they hold the legal title in trust for the inhabitants of the township; and prays for a decree.

The defendants filed their answer, and deny the allegations of the bill. Upon which the complainants filed their replication.

Stuart & Edwards, and O. T. Reeves, for Plaintiffs in Error.

A. Lincoln, for Defendants in Error.

Breese, J. The grounds for the relief prayed by complainants are not established by any testimony they have adduced, nor does it cast upon the case the slightest shadow of fraud on the part of the defendants, or others concerned in the sale of the land.

It is urged that the prerequisites of the act authorizing a sale of school lands have not been complied with, in this, that the school commissioner kept no record of the sale.

The 11th section of the act of 1847, under which the sale in question was made, (Laws of 1847, p. 121,) required the school commissioner to keep four separate books, in one of which he was to record at length, all petitions presented to him for the sale of the school lands, and the plats and certificates of valuation, etc.; in another, an account of all sales, with date of sale, name of purchaser, description of land sold, and sum sold for; in another, a regular account of money received for land sold, and paid over to the township treasurer, or loaned, and to whom, etc.; and in the other book a just account of all moneys received on all accounts, and its disbursement.

This is directory to the commissioner, but the title to the land he might sell, if legally and fairly sold, could hardly be made to depend on his obeying these directions.

The 9th section of the revenue act of January 19th, 1829, required a deposit of copies of the advertisement of sale with the Auditor, Treasurer and Secretary of State, and the forwarding of others to the clerks of the County Commissioners' Courts of the respective counties, was held to be directory only to the officers named in the section, and a failure on their part to comply with the statute did not invalidate a sale for taxes, the sale being good in every other respect. *Vance* v. *Schuyler*, 1 Gilm. R. 160.

It is also said, the record does not show there were fifty white inhabitants in that township, nor does it show an advertisement and sale as required by the act of 1847, sections 16–19, 20.

The proviso in section 16 is as follows: "*Provided*, That no whole section shall be sold in any township containing less than fifty inhabitants."

There is proof in the record that the number of white inhabitants residing in that township, over twenty-one years of age, amounted to thirty-seven, at the time the petition for the sale was presented to the school commissioners, which was February 17, 1848.

This was a fact for the commissioner to determine from the *data* before him, and we must presume a township showing so large a number of inhabitants over twenty-one years, must have had at least thirteen under that age. At any rate the commissioner was satisfied, and there is other proof in the record, that at no time from the 15th of December, 1847, preceding the presenting the petition, was there less than that number, but "very many more."

Again it is said, there was no proof that the sale was advertised in the mode required by the 20th section. That section required that notices should be posted in at least six of the most public places in the county, forty days before the day of sale, describing the land, and stating the time, terms and place of sale, and if any newspaper is published in the county, in that also for four weeks previous to the sale.

After the lapse of ten years, the proof on this head must be expected to be imperfect. But it must be presumed, the notice was given as required, else the school commissioner would not have offered the land for sale. He must be presumed to have discharged his whole duty, in the absence of proof to the contrary.

But we do not consider these points of much, if any importance, as, since a patent was issued, and the legal title become

vested, and no fraudulent act shown, it would be unreasonable to require this kind of proof. Enough must be presumed in favor of the regularity of these sales, if unstained by fraud, to sustain them.

This court said, by CATON, J., in *Nealy* v. *Brown et al.*, 1 Gilm. R. 13, "The laying out and opening roads is not an exercise of judicial powers, and hence, the position that no presumptions are to be indulged in their favor, is not tenable. As well might he, who is affirming the sale of school land, be required to show that a petition for the sale of the land had been presented by the requisite number of householders of the township."

It is, however, objected, that only two trustees acted in the division of the section, platting and appraising it, and it appears that three trustees were elected in that township, and they all should have participated in the act.

This is true in some cases, where the requirements of a statute are express and positive. There is nothing of this nature in the act of 1847, cited. The 17th section provides "when the petition and affidavits are delivered to the school commissioner, he shall notify the trustees of schools of the township thereof, and the said trustees shall immediately proceed to divide the land into tracts or lots, of such form and quantity as will produce the largest amount of money, of which a correct plat shall be made." "Said trustees shall then fix a value on each lot, having regard to the terms of sale, certify to the correctness of the plat, and referring to and describing the lot in the certificate, so as fully and clearly to distinguish and identify each lot; which plats and certificates shall be delivered to the school commissioner, and shall govern him in advertising and selling said lots."

Now here is nothing to be done by the trustees which could not be done by two of them. A section of land can be divided, and in such mode as to produce the largest amount of money, by two judicious men, as advantageously as by three or a greater number, and the valuation of each lot as accurately fixed, and they are as competent to make out the required certificate. When a body of men are referred to as having power to decide a question, it is always understood, unless otherwise expressly declared, that the majority shall decide. It may be, for aught that appears, the third trustee was consulted, and for reasons not known, declined to act. And we have a right to presume such was the fact. In such case the appellants admit, the acts of the majority would be valid and binding. No notice is shown to the trustee not acting, nor was any necessary, because it was his duty to act without a notification, and we may pre-

sume he did, and disagreed, or that he agreed and deemed it unnecessary to sign, as a majority had signed.

In the note to the case referred to by appellants' counsel, *Ex parte Rogers*, 7 Cowen, 530, it is said, "Where a public act is to be done by three or more commissioners appointed in a statute, and a competent number have met and conferred, though they separate, and then a majority do the act without the presence of the other, the act seems good in construction of law; though it is otherwise when there is a positive statute or charter requiring that a full board should be present at the consummation."

In *The King* v. *Beeston*, 3 D. & E. 325, it was held, under the 9 Geo. 1, ch. 7, sec. 4, which leaves the churchwardens and overseers, with the consent of the major part of the parishioners, to contract for the providing for the poor, it is not necessary that all the churchwardens and overseers should concur; the contract of a majority of them will bind the rest.

In *Grindley* v. *Barker*, 1 Bos. & Puller, 236, Eyre, C. J. said, "I think it is now pretty well established that where a number of persons are entrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further—there it is not necessary the whole number should meet; it is enough if notice be given; and a majority or a lesser number, according as the charter may be, may meet, and when they have met, they become just as competent to decide as if the whole had met."

Coke, in his Commentaries on Littleton, 181 *b*, says, in express terms, that in matters of public concern, the voice of the majority shall govern.

To the same point is *Withnell, Clerk*, v. *Gartham, Clerk*, 6 D. and E. 388.

The record being silent as to the fact of the third trustee participating in any manner, it would not be a far-fetched presumption that he was notified of the action of his co-trustees, and confided in their action. Even this bill of complaint is filed by two only of the trustees.

These trustees were a corporation, to all intents and purposes; could sue and be sued in their corporate name. If so, the third trustee need not to have met for consultation or action with his fellows.

The case, as shown by the proofs in the cause, is wholly destitute of any indication of fraudulent act or intent, in any quarter by any party. The most that can be said about it is, there are omissions to perform certain acts which the statute required; but which not being performed, in the absence of fraud, should

not be permitted to invalidate a patent issued by the State which the statute declares, section 28, "shall operate to vest in the purchaser a perfect title in fee simple."

It would be hard indeed, if one of our farmers, whose all was his land, should, after receiving a patent for it from the United States or from this State, be deprived of it because some careless official in some public office, had omitted to do some act the law required him to do before the patent could issue. The public and individuals have a right to repose upon the patent issued by the government, and that it shall not be attacked except for fraud, or as having issued without law.

The testimony shows that full value was paid for the land at the time it was sold. It is only by the wonderful and magnificent improvements that have been made in that beautiful region since 1851, that has so enhanced the value of all the land in that region, that this sale is sought to be disturbed. It may be a misfortune and loss to the county that the sale was made so soon, but being made fairly and not in violation of any law, it must stand. The decree is accordingly affirmed except as to the costs, it being provided by statute that trustees of schools pay no costs. *Trustees of Schools* v. *Walters*, 12 Ill. R. 154.

Decree affirmed.

William J. Green, Appellant, *v.* The People, Appellees.

APPEAL FROM CLAY.

In an indictment for playing at a game with cards, for money, it is not necessary to state with whom the defendant played.

The record in this case presents an indictment preferred by the grand jury of Clay county, against the plaintiff in error, "for playing at a game with cards, for money, to wit: the sum of one dollar." The defendant was arrested at the return term of the writ, appeared, and it appearing that he played with no other person, as charged in the indictment, moved the court to quash the indictment, as charging no offense under our statute. This motion was overruled, and the defendant required to plead, which he did, by traversing the allegations of the indictment by a plea of "not guilty." The cause was tried by the court, and a verdict of guilty returned; whereupon the defendant was fined ten dollars and costs of suit, which he replevied, etc. This writ of error is prosecuted to reverse the said judgment of

conviction, under an agreement with the State's Attorney, which is made a part of the record in this cause.

The error of the court below, on which defendant relies for this reversal, is in refusing to allow the motion to quash the indictment in that behalf, and in requiring the defendant to plead to the charge in the indictment, set forth in the record.

C. CONSTABLE, for Appellant.

J. B. WHITE, District Attorney, for The People.

CATON, C. J. This was an indictment "for playing at a game with cards, for money, to wit: the sum of one dollar." A motion was made to quash the indictment, because it does not state with whom the defendant played, which motion was overruled, and this is now assigned for error. The grounds for this motion presuppose that there is no game at cards, upon which the defendant might have wagered a dollar, and which he could have played by himself. We have been informed by those who profess to be learned in such matters, that such is not the case, but that there is a game at cards which may be played by one person alone, and that it even requires great skill and a very retentive memory to win that game. However this may be, we cannot say judicially that this is not so, and that the game, for playing which the defendant was indicted, must necessarily have been played with some other person, whose name might have been stated in the indictment.

But even were we sufficiently informed on the subject, that we might take judicial notice that all games at cards must be played by two or more persons, we think that the principle settled in the case of *Cannady* v. *The People*, 17 Ill. R. 158, determines this question against the plaintiff in error. That was an indictment for selling liquor without license, and it was objected that the name of the person to whom the liquor was sold was not given, but the indictment was held sufficient. The objection in this case is founded upon the same reason as in that, and must be determined in the same way. The judgment must be affirmed.

WALKER, J., dissenting. I am unable to concur in the opinion of the majority of the court, in this case. I understand it to be an inflexible rule of pleading, that an indictment should be so certain as to fully apprise the defendant of the specific offense for which he is required to answer. I think this indictment fails in this respect, as it nowhere states with whom defendant played, the kind of game he played, or the person with whom he bet the money. I am unable to perceive how the de-

fendant is notified, so as to be able to make his defense. Under this indictment evidence may be received of any game defendant may have played with cards within the statute of limitations, with any person, or at any particular game; and which offense he was required to answer, he could not, from the indictment, determine. For these reasons I am of the opinion that the indictment should have been quashed.

Judgment affirmed.

John B. Shaw, Joseph H. Shaw, and Henry Menke, Securities of Alexander Beard, Appellants, *v.* C. H. C. Havekluft *et al.*, Judge and Justices of the County Court of Cass, Appellees.

APPEAL FROM CASS.

In an action upon a constable's bond, the obligees cannot be permitted to deny that he is a constable.

If the officer whose duty it is to receive and approve a bond for costs, accepts it, it is then *prima facie* good until it is adjudged insufficient, and it is not error for the court to allow the party to amend it, or to file a new bond.

On 17th March, 1857, Beard, as principal, and appellants as his sureties, executed a bond to the County Court of Cass county, in the penalty of one thousand dollars, with condition, "That whereas, the above bounden Alexander Beard was elected a marshal in the city of Beardstown, and by virtue therof a constable of Cass county, on the 16th day of February, 1857: Now if the said Alexander Beard shall well and truly account for and pay over all moneys that may come to his hands under any executions or otherwise, by virtue of said office, and that he will well and truly perform all and every act and duty enjoined on him by the laws of this State, to the best of his skill and judgment, then this obligation to be void and of no effect; otherwise to remain in full force and virtue."

Summons was issued against Beard, as constable, and his sureties, by appellees, "for a failure to return an execution within ten days after its proper return day."

First bond for costs was filed 3d June, 1858, but was not pursuant to summons.

Motion to dismiss suit for want of proper bond for costs, and cross-motion to amend. Motion disallowed, and cross-motion allowed by the justice of the peace.

Judgment of Circuit Court, HARRIOTT, Judge, for one thousand dollars, and that execution issue for sixty-three dollars and sixty-one cents.

Bill of exceptions shows renewal of motion in Circuit Court to dismiss suit for want of proper bond for costs; that motion was overruled, and appellants excepted; that against their objections, (which were overruled) certified copies of bond and proceedings before the justice of the peace, were read, and the court gave judgment against the appellants, and they excepted.

Errors assigned.—1st. That the court below erred in not allowing the motion of appellants to dismiss suit, for want of proper bond to secure costs, before institution of the suit. 2nd. That the court below erred in rendering judgment against appellants without any authority of law for so doing.

D. A. AND T. W. SMITH, for Appellants.

WILLIAMS, GRIMSHAW & WILLIAMS, for Appellees.

CATON, C. J. In an action upon a constable's bond, the obligees cannot be permitted to deny that he is a constable. Upon that question the execution of the bond concludes them. This same question was raised in an action on the bond of a justice of the peace, in the case of *Green* v. *Wardwell*, 17 Ill. R. 278, where this court said, "By signing his bond they acknowledged his right to the office, and to discharge its duties, and as such, recommended him to the public. They at least shall not be heard to say, that although they signed his bond, and thereby induced others to put money in his hands relying on their bond for its safety, still he was not elected, was not commissioned, was not sworn; and that he was not in fact a justice of the peace." That case disposes of this question.

The only remaining question is, whether the Circuit Court erred in allowing the plaintiffs to amend the bond for costs. In this we are of opinion the Circuit Court acted within the pale of its powers. Had no bond at all been filed for costs, then indeed it would have been the duty of the court, on motion made in apt time, to have dismissed the cause. But here, when the suit was commenced, a bond was filed, although it may have been defective. To determine whether it was sufficient or not, required the adjudication of the court. Until such adjudication, it was *prima facie* good. Whether it was good or not, may have been a very difficult question to determine, and one about which lawyers and judges might differ. If the officer whose duty it was to receive and approve the bond, accepted it as sufficient, that must save the rights of the party until it is

adjudged insufficient, and when that has been done, it is but reasonable that the party should be permitted to cure the defect, or obviate the objection, by filing a sufficient bond, or by amending the old one.

The judgment must be affirmed.

Judgment affirmed.

James D. Gardiner, Plaintiff in Error, *v.* Nathan R. Harback, Defendant in Error.

ERROR TO COLES.

Any alteration in a written contract, however slight, which changes its terms, made by one party without the consent of the other, will discharge the party or a surety not agreeing to the alteration.

If both the parties to a contract agree to an alteration of it, they are still bound by it, but the surety of either will be discharged. If the surety, however, consents to the alteration, or if he subsequently, with a full knowledge of the facts, approves of it, he remains bound for the performance of the agreement.

Adding the words "$10 dollars and fifty interest," immediately after the words "value received," in a promissory note, is not a material alteration; such words would be construed to mean that a portion of the value received by the makers, consisted of ten dollars and fifty cents of interest.

This case is stated in the opinion of the court.

S. T. Logan, and U. F. Linder, for Plaintiff in Error.

E. H. Starkweather, for Defendant in Error.

Walker, J. This was an action of assumpsit, instituted on this note:

"*Bourbon, May* 27, 1857.

"On demand, we promise to pay N. Harback, or order, five hundred dollars, for value received.

H. H. COX.
J. D. GARDINER."

The declaration contained a special count only, to which was filed a plea of non-assumpsit, verified by affidavit. The trial was had by the court, without the intervention of a jury, by consent. The evidence on the trial showed that the note was executed by Cox, as principal, and Gardiner, as surety, and that Harback's agent, when the note was handed to him by Cox, and when Gardiner was not present, insisted that the note should have embraced the interest which had already accrued on the

claim, for which it was given. That Cox said he would not alter the note, but would make a memorandum at the bottom, which would make no difference, as he would pay it the next week, and then wrote at the bottom of the note, opposite and to the left hand of the signatures, the words, " $10. dollars and fifty interest." That when Gardiner was called on to pay the note, he urged Harback's agent to commence an attachment against Cox, and that they went to Charleston together, and by arrangement to which Gardiner was a party, suit was instituted against both Cox and Gardiner, and an attachment was sued out in aid, and Gardiner furnished security on the attachment bond. He, at the time, admitted he would have to pay whatever amount should not be made out of Cox by the attachment; and the words at the bottom of the note were erased at his request. That on the trial the signatures to the note were admitted to be genuine. On this evidence the court rendered a judgment in favor of plaintiff for $530.66 and costs, which is conceded to be the amount of the note and interest, exclusive of ten dollars and fifty cents mentioned in the memorandum. To reverse this judgment, the defendant below prosecutes this appeal.

It is urged that there was such an alteration of the note after its execution, as released Gardiner from liability. The doctrine is well settled that any material alteration made in any instrument in writing, by a party having an interest in its performance, or when made with his assent, and without the consent of the other party to the instrument, will avoid it, and discharge the party not agreeing in the alteration, from its performance. Any such alteration in an instrument, however slight, if it changes its terms, will have this effect. The law will not tolerate such changes in the evidence the parties have provided of the terms of their contract, and if so made, annexes as a penalty, the release of the other party from all obligation under the contract. This doctrine applies as well to securities to contracts as to the principal contractors. The surety has the unquestioned right to insist upon the contract as he entered into it, and any material alteration of the instrument by the other parties to it, without his concurrence or ratification, will release him from its performance. By such a change, when made by the principal contractors, if binding upon them, the contract as thus changed, is a new and different one from that executed by the surety, and as such he is not legally bound for its performance. But it is also true that if he consents that the alteration may be made, or, after it is made, he, with a full knowledge of all the facts, approves and ratifies the alteration made by the other parties, he would still be bound for the performance of the agreement.

It then remains to be determined whether the addition of these words at the bottom of the note, changed its legal effect. They follow the words "value received," which conclude the body of most notes. Had they been inserted before the note was signed and made a part of it, we are not able to perceive that they would have added any further liability than what the language already used had imposed. Occupying the position they did, at the conclusion of the note, they would rather seem to explain the preceding language used, than to import any new obligation. They seem rather to say that a portion of the value received by the makers, consisted of ten dollars and fifty cents of interest, than that they would pay such additional sum of money to the payee of the note. There is, we think, no fair mode of construction by which it can be held to create such an obligation. We think they neither do or even purport in the slightest degree, to change the legal effect of the instrument. But were this not the true construction, the acts of Gardiner, when the note was presented to him for payment, and when he had a full knowledge of all the facts, clearly amount to a ratification of the addition of these words, and a waiver of all right to insist upon a discharge. He at that time claimed no such discharge; but on the contrary, admitted his liability, and that he would have to pay such portion of the note as should not be collected of the principal in the note. He consented that the suit should be instituted against him and his principal, and also procured security in the attachment proceeding against Cox, and this memorandum was stricken from the note at his request, which restored that instrument to its original language, in every particular. So that in either point of view, we must think that the appellant was not discharged from his liability to pay this note, and that the court below committed no error in rendering judgment on it, in favor of appellee, and that the same should be affirmed.

Judgment affirmed.

The Jacksonville and Savanna Railroad Company, Appellant, *v.* Alvin Kidder, Appellee.

APPEAL FROM McDONOUGH.

Where a jury are to assess the damages sustained by persons from the construction of a railroad over their land, the plans and estimates of the company, for that portion of the road, should be admitted in evidence.

Jacksonville and Savanna Railroad Co. *v.* Kidder.

The railroad company would be bound to construct the road substantially according to the plans and estimates thus offered in evidence. If it should deviate from these so as to occasion additional damage to proprietors of the land, such damages could be recovered in an action on the case, or a court of equity would restrain the company from building the road, until the additional damages had been assessed and paid.

The railroad company would not be bound by the verbal representations and promises of the engineers and others, but such officers might be examined for the purpose of explaining the plans and estimates.

THE Jacksonville and Savanna Railroad Company was incorporated by a special charter, by an act approved February 14, 1855, and authorized to construct a railroad from Jacksonville, by the way of Liverpool and Canton, to Savanna, and by an amendment, to Galena. The company was authorized by the charter, to condemn the lands required for the construction of the road, either according to the provisions of the law concerning right of way, approved March 3, 1845, or the amendment thereto, approved June 22, 1852.

This proceeding was commenced by the company, under the law of 1845, to condemn a part of a tract of land owned by Alvin Kidder, the defendant, before a justice of the peace, in Fulton county.

A petition setting forth a description of the land, and specifying the part required for the construction of the road, alleging that the company and defendant could not agree on the amount of damages, and that defendant objected to the construction of the road over his land, and praying the justice to cause three householders to be summoned, according to the provisions of chapter ninety-two, Revised Statutes of 1845, to assess the damages, was presented to Henry Walker, J. P., on 29th September, 1857.

On the same day he summoned Ira Johnson, James C. Wilson and Harrison P. Fellows, who were sworn, and afterwards assessed and reported the damages at $100.

From this decision the defendant appealed to the Fulton Circuit Court, and at the November term, 1857, the venue was changed, upon the defendant's motion, to McDonough county.

At the April term, 1858, of the McDonough Circuit Court, the appeal was tried before WALKER, Justice, and the damages assessed by a jury, at $750.

On the trial of the case, the company produced *H. J. Vaughn*, as a witness, who testified that he was the chief engineer of the company, and had been since work was first commenced, to locate the road; that he made the preliminary survey, and had run and permanently located the line of the road as far as it had been, and the work upon the road had all been done under his superintendence. He further testified that the defendant,

Alvin Kidder, owned a farm adjoining, and within the corporate limits of the town of Farmington, Fulton county, consisting of sixty-nine acres, all enclosed, part timber, and the balance cultivated land; the farm was used mostly to winter stock; Kidder having a large farm one or two miles off, where he kept the stock most of the time; that there was a house and barn, both of some value, on the land. He further testified that the road of the plaintiff had been located across this tract of land, and the grading had been done; that the road ran across the land, of the width described in the notice, and occupying $4\frac{84}{100}$ acres, and the line of the road across the land was $89\frac{9}{10}$ rods in distance. There is a spring of water from which the defendant obtains his stock water, in the wood-land, on the west side of the road. The wood-land was now fenced from the meadow and cultivated land; a lane ran from the barn to the wood-land which was entered by a gate just on the line of the road. The road-bed, at the place where this gate stood, was on a level with the natural surface, without excavation or embankment. This was near the centre of the line of the road, as it ran across the land. The road, near the north line of the land, crossed a ravine, where a good passway for cattle, horses and wagons could be made under the road.

The witness further testified that the construction of the road across the land would be an advantage to it; that making a fair estimate for the value without the construction of the road, and the value of the land remaining after the deduction made for the use of the road, it would benefit the owner of the land about $2,400.

The plaintiff then offered to prove by the witness, that in the plan and survey made by the company they were to make a passway underneath the railway on the defendant's land, at the ravine near the north end, which would be safe for the passage of cattle, horses, wagons and teams, for the exclusive benefit of the owner of the land, and that if such passway was made, the inconvenience and disadvantage to the owner of the land by the construction of the road, would be much less than without it; to which the defendant objected, and the court sustained the objection and refused to admit the proof, to which decision of the court the plaintiff excepted.

The plaintiff then proposed to prove by the witness, that in the plan and survey of the company, which had been adopted by them, and which had been pursued so far as the work had progressed, the company was to make a crossing over the road, with a cattle-guard on each side of the crossing, and two gates, one on each side of the road, through which to pass over the road, at the end of the lane running from the barn to the wood-

land, and the same place where the plaintiff now entered the wood-land through one gate, and that with such provisions for crossing, the disadvantage to the owner of the land would be much less than without it; to which the defendant objected, and the court sustained the objection, and refused to admit such evidence, to which decision of the court the plaintiff excepted.

The plaintiff then proposed to prove, by the witness, that if a passage-way was made underneath the railway, at the ravine, and a proper crossing over the railway, at the end of the lane, running from the lane, the inconvenience and disadvantage from the construction across the land, would be much less to the owner of the land than it would be without them; to which the defendant objected, and the court sustained the objection, and refused to admit such evidence, to which the plaintiff excepted.

The plaintiff then called *Imri Dunn*, *Jonas Marchant*, and *Joshua R. Breed*, as witnesses, severally sworn, and each of them testified that the construction of the road across this tract of land would be a benefit to the owner, and enhance the price, and that after deducting all disadvantages arising, the owner would derive a benefit of from $1,500 to $2,700.

The defendant then called *Jacob D. Hand*, *E. Robinson*, *I. B. Dixon*, *Hiram Sperey*, *Jacob Hamlin*, and *M. Blackburn*, who were severally sworn, and testified that they were acquainted with the land, and the construction of the railroad across the land, after deducting all benefits, would be a damage to the owner of the land, and such witnesses placed the damage at various sums, from $600 to $2,000.

The jury found the damages at $750.00. A motion for a new trial was overruled, and the plaintiff prayed an appeal to this court.

Goudy & Judd, for Appellant.

C. L. Higbee, for Appellee.

Caton, C. J. The jury in this case were called upon to "assess the damages which they should believe such owner or owners would sustain, over and above the additional value such land would derive from the construction of the road." And the question is, whether the plans and estimates adopted by the company for that portion of the road which passed over the land in question, should have been permitted to go to the jury. If admitted, they would have shown a road-way under the railroad, at a ravine near the north line of the land, and also a road-way over the railroad, with cattle-guards and gates, at the

place where the lane now is, which is used by the owner for the passage of his cattle from one part of the farm to another.

We are satisfied that these plans and estimates should have been admitted. So long as it was practicable to so construct the road as to make it of greater or less damage or benefit to the land over which it passed, it was impossible for the jury to come to any correct conclusion, as to the extent of the damage or the amount of the benefit, without knowing how the road was to be built. A deep cut or a high embankment, in all probability, would occasion greater damage than would accrue if the road was constructed without either, and yet it was, no doubt, possible to make it in either mode. Indeed, it seems to us that the plan upon which the road was to be built, and the mode of construction, were of the utmost importance to enable the jury to come to a correct conclusion, and that it was not only the right but it was the duty of the railroad company to furnish full plans, profiles and estimates of that part of the road, and if they failed or neglected to do so, then the jury were authorized to presume that the road would be constructed in the mode the most injurious, within the bounds of reasonable probability. The objection, and the only objection which has been urged to the admission of the plans, etc. in evidence, is, that those plans may be changed, and the road constructed in a different and more injurious mode than there represented, and for such additional or increased damages the party can have no redress. It has been so held, perhaps, in one or two cases, but we cannot acquiesce in the reasoning by which those decisions are supported, and are by no means disposed to adopt them. Such a rule does not tend to completely protect the rights of either party. We do not hesitate to say that the company would be bound to construct the road substantially according to the plans thus put in evidence, and if its own or the public interest required a deviation from such plan to the injury of the owner of the land, he could recover those damages in an action on the case, or on the implied undertaking that the road should be constructed conformably to such plan. We would not be understood as saying that the verbal representations and promises of the engineers, or others, should be binding upon the company, or that they should be permitted to go to the jury to influence their finding one way or the other, unless they were sworn to, and in proper explanation of the plans, that they might be the more readily understood by the jury. In this way alone can complete justice be done to both parties. Thus alone can the jury be properly enlightened as to the real amount of the damage which will be sustained, and in no other legitimate mode can the owner of the land be properly protected against in-

creased injury, occasioned by a change of the plan, or the construction of the road in a manner not anticipated at the time of the assessment of damages. In this way the company may be protected from paying any more damage than it shall actually occasion, as well as compelled to pay all the real damage which result from the construction of the road. It was further said that the wagon-way under the railroad was not a part of that road, but foreign to it, and so of the cattle-guards and gate-ways, and particularly the last. All these are properly appurtenant to the railroad, and may be shown upon the plans and estimates of the road, and so also of fences, which, in that way, the company may oblige itself to build, although otherwise it might not be compelled to build them. Take this very case of the proposed road-way under the railroad, which is at a place where the railroad passes over a ravine, that might be passed by a fill, or a bridge sufficiently high for a convenient road-way. If such road-way would be at a convenient place to accommodate the owner of the land, it might very materially lessen the damages which he would sustain without it. Or it might be so inconveniently located as to lessen the damages in no appreciable degree. Of this the jury would be the judges. But assume the case where the damages would be actually diminished by one thousand dollars, and the road-way might be constructed by but an increased expense of one hundred dollars, if done when the work is progressing, while if the ravine were filled instead of arched or bridged, in order to save that small outlay, it would be afterwards impracticable for the owner of the land ever to make a road-way there, the making of the road-way when the work is in progress would be actually a saving of nine hundred dollars. It is for the general interest of society that this amount should be saved, and but simple justice to the company that it should be thus permitted to lessen the damages which it would otherwise be bound to pay. Should the company change the plan thus offered in evidence and preserved in the records of the court, and undertake to construct the road on a plan more injurious to the land, a court of equity would restrain them till the additional damages were assessed and paid.

We think the evidence was improperly excluded, and for that reason the judgment of the Circuit Court must be reversed, and the cause remanded.

Judgment reversed.

Walker, J., having tried this cause in the court below, took no part in this decision.

George C. Peak, Plaintiff in Error, *v.* James S. Shasted, Defendant in Error.

ERROR TO MACON.

A minor can only appear and defend a suit by his guardian. If the minor fail to appear, the plaintiff, before plea, should have a guardian *ad litem* appointed by the court.

If an infant appear in person, or by attorney, it is error in fact, which may be assigned in the court in which judgment may be rendered.

A judgment or decree against a minor without a guardian, or on appearance by attorney, is not void or voidable.

A judgment against a minor, to whom a guardian has not been appointed, may be set aside in the court where it is rendered, on motion. Where the judgment has been set aside, the defendant may make any defense he may be entitled to.

At the July term, 1858, of the Macon Circuit Court, Shasted as assignee, obtained a judgment, by default, against Peak, a minor, on a note dated 28th March, 1858.

At the November term, 1858, Peak filed an affidavit of his father, showing that the said George C. Peak was born on fourth November, 1837, with notice to Shasted, and service of a copy of affidavit and time of motion—and by his attorneys entered a motion to reverse, withdraw, annul and for nothing hold, said judgment by default. The parties appeared by their respective attorneys, and on argument (the facts of the affidavit not being denied) the motion was denied and overruled, and the counsel of the said Peak excepted.

The error assigned is, the improper refusal of the court below to allow the motion of the plaintiff to reverse, withdraw, annul and for nothing hold, the said judgment by default.

D. A. and T. W. Smith, for Plaintiff in Error.

Thorpe & Tupper, for Defendant in Error.

Walker, J. This was an action of assumpsit instituted in the Macon Circuit Court, on a note executed by Peak to William E. Shasted, and assigned by him to plaintiff below. Summons was duly issued and served to the July term, 1858, and at the return term, the defendant, failing to appear or plead, a default was entered, and a judgment rendered against him for the amount of the note and interest. At the November term following, Peak, after having given a notice, entered a motion to set aside the judgment, upon the grounds that he was, at the time the writ issued and the judgment was rendered, a minor under twenty-one years of age, and because no guardian appeared

or was appointed to defend the action. In support of the motion, he filed an affidavit of his father, from which it appears the defendant was a minor when the judgment was rendered, and for some months afterwards, but the court on the hearing overruled the motion. From this decision he appeals to this court.

The doctrine is familiar that a minor can only appear to defend by a guardian, and not in person or by attorney. And in case the minor fails to appear, to have a guardian appointed, it is the duty of the court, on application by plaintiff, to appoint a guardian, which, to be regular, must be done before plea. 2 McPherson on Infants, 359. And if an infant appear in person or by attorney, it is error in fact, and may be assigned in the court in which the judgment was rendered. 4 B. and Ad. 90; *Meredith* v. *Sanders*, 2 Bibb, 101. And a judgment or decree rendered without any guardian, or an appearance by attorney, is not void, but merely voidable on error brought. *Porter* v. *Robinson*, 3 A. K. Marsh. 253. It would then follow, that if the appellant was at the time of the rendition of this judgment, a minor, there was error in fact in its rendition, for the want of appearance by a guardian. The plaintiff should have applied to the court, if the defendant was a minor, and had a guardian *ad litem* appointed, and having failed to do so, he cannot object if the judgment is set aside, on its appearing that the defendant was a minor.

But it is urged that the only mode by which a judgment can be reversed for error in fact, is by writ of error *coram vobis*. That it may be done by this writ is true, but this court has repeatedly held that it may likewise be done by motion. *Slow* v. *The State Bank*, 1 Scam. R. 428; *Beaubien* v. *Hamilton*, 3 Scam. R. 213. By the former practice in England, it could alone be done by this writ, sued out of the court in which the supposed error existed; and this writ is still in use in some of the States of the Union, while in many of them it has gone into disuse, and has been superseded by motion to amend. *Pickett* v. *Signwood*, 7 Pet. R. 148.

The objection that it is an error in fact, and should be tried by a jury, is we think without force. If the fact is disputed, the court can hear and dispose of the motion, and if there are grounds for doing so, set aside the judgment, and let the defendant in to plead, and then the fact would be tried by a jury. When the court sets aside the judgment and the party files his plea, the plaintiff may reply any matter in avoidance of the plea that he might have done, had the plea been filed on the return of the process. The court could only permit the defendant to plead the matter complained of as error in fact.

So it will be seen, whether the one or the other course be adopted, the end is the same, and they are only different modes of accomplishing the same end. It is like the setting aside a default, or granting a new trial; the court only decides upon the sufficiency of the application for setting aside the judgment, and the finding of the court on that motion is not evidence on the trial of the issue subsequently formed.

By the affidavit filed in this case, it appears that the defendant was a minor at the time the judgment was rendered against him, and the record fails to show that there was any appearance entered for him by a guardian, and this is error for which the judgment should be set aside, and the defendant be permitted to make any defense he may be entitled to, on the grounds of his supposed infancy.

The judgment of the Circuit Court in overruling the motion to vacate the judgment was erroneous, and should be reversed and the cause remanded.

Judgment reversed.

William Essington, Plaintiff in Error, *v.* Thomas M. Neill, Defendant in Error.

ERROR TO CLINTON.

In an action of trespass *quare clausum fregit*, the defendant justified under A. B. as his servant, and produced in evidence a tax deed to A. B. on a sale in 1846 for taxes of 1845, and tax receipts for seven successive years, and proved that A. B.'s wife had built a small house on the premises, and that she had commanded defendant to commit the trespass: Held,

1st. That the sale for taxes having been on a different day from that prescribed by statute, was void; and that the deed derived under it, could not be set up as outstanding paramount title to defeat plaintiff's recovery, even if a license had been shown.

2d. That the law does not constitute the wife the agent of the husband, and in the absence of all proof, it could not be inferred, that she was authorized to take possession of the premises, or to give authority to remove and convert the property of another.

This was an action of trespass. The declaration was filed for March term, 1858, of the Clinton Circuit Court, against defendant, for committing divers trespasses upon the S. E. ¼, N. E. ¼ of section 9, T. 3, R. 2 West, in Clinton county, Ill.

Defendant filed four pleas:

1st. The general issue, upon which issue was joined.

2nd. *Liberum tenementum* in James Russell, for whom he, defendant, claimed to be the servant or agent, and therefore justified the trespasses.

3rd. That said James Russell had claim and color of title made in good faith for said land, and payment of taxes therefor, and actual possession thereof for seven successive years, prior to this suit, and therefore justified the trespasses.

4th. That said Russell had claim and color of title made in good faith, to wit: A deed deducible of record, etc., for said land, the same being vacant and unoccupied land, for seven successive years, etc., and that he had paid all taxes legally assessed thereon for said time, and justified the trespasses, etc.

Plaintiff filed seven replications, to wit:

1st. Denying the *liberum tenementum* in said James Russell.

2nd. Denying the possession of said land by said Russell under claim and color of title made in good faith for seven successive years, etc.

3rd. Denying payment of taxes upon said land by said Russell for seven successive years, under claim and color of title made in good faith, etc.

4th and 5th. Denying that said Neill was the agent or servant of said Russell.

6th. Denying that Russell had claim and color of title as alleged in defendant's fourth plea, etc.

7th. Alleges payment of taxes for said land for the years 1856 and 1857, by Gillespie and Sparks, from whom he, plaintiff, derives a better paper title, etc.

Upon all of which, issues were joined; trial by the court by consent, etc.

Plaintiff proved that defendant took and carried away and off said land, seven pieces of lumber belonging to plaintiff, which were valued at $3.50. Plaintiff also proved that he, plaintiff, built a frame house upon said land in February, 1858.

Plaintiff then offered in evidence a patent for said land in favor of William Lucas, and deeds from Lucas to Ferree, from Ferree to Gillespie and Sparks, and from Gillespie and Sparks to plaintiff.

Defendant proved that Mrs. James Russell, wife of said James Russell, had a shanty erected upon said land about two weeks before the house of plaintiff was built, and that James Russell was absent from the State, also, that he, defendant, was commanded by Mrs. Russell to take said lumber.

Defendant then offered in evidence the tax deed in this case, which was admitted.

Defendant then offered in evidence, tax receipts for the years 1849 to 1856 inclusive, paid by James Russell, which were admitted.

Plaintiff then offered in evidence, tax receipts for the taxes for said land for the years 1856 and 1857, paid by Gillespie and Sparks, from whom he, plaintiff, derives a better paper title, etc., which were rejected.

Plaintiff assigns errors:

1st. The court erred in admitting the paper claimed by defendant as a tax deed.

2nd. The court erred in admitting the tax receipt of 1849, as evidence offered by defendant.

3rd. The court erred in admitting tax receipts offered by defendant for the years 1850 to 1856 inclusive.

4th. The court erred in refusing to admit as evidence, tax receipts offered by plaintiff for the years 1856 and 1857.

5th. The court erred in giving judgment for defendant.

6th. The court erred in overruling plaintiff's motion for a new trial, etc.

KOERNER & SPARKS, for Plaintiff in Error.

W. H. AND J. B. UNDERWOOD, for Defendant in Error.

WALKER, J. This was an action of trespass *quare clausum fregit*, commenced by plaintiff against defendant in the Clinton Circuit Court. To the declaration filed in the case, the defendant plead the general issue; *liberum tenementum* in James Russell, under whom defendant justified as his servant; that Russell had claim and color of title made in good faith, and payment of taxes, and actual possession thereof for seven successive years prior to the commencement of this suit, and therefore the trespasses were justified; that Russell also had claim and color of title made in good faith, having a deed deducible of record, etc., for the land, the same being vacant and unoccupied for seven successive years, and that he had paid all taxes legally assessed thereon, and justified the trespasses. To each of these pleas there was a replication, and on them issues were formed to the country. The cause was tried by the court without the intervention of a jury, by consent. On the trial, the plaintiff proved that defendant took and carried away from the land, seven pieces of lumber, the property of plaintiff, which were worth $3.50, and that plaintiff, in February, 1858, built a frame house on the land. The plaintiff also deduced, by regular connected chain from the United States government, the title in the land to himself.

The defendant proved that the wife of James Russell had a small building of some kind erected upon the land, about two weeks before the house of plaintiff was built; that Russell was

absent at the time, and that defendant was commanded by the wife of Russell to take the lumber. Defendant read in evidence a tax deed on a sale in 1846, for the taxes of 1845, to James Russell, for the premises, and receipts for the taxes on the same, for the years 1849 to 1856 inclusive. The plaintiff then offered to read receipts for taxes on the land for the years 1856 and 1857, paid by A. J. Gillespie and J. Sparks, the persons of whom he derived title, which the court rejected. The court upon this evidence, found for, and rendered a judgment in favor of the defendant.

It was not contended, nor could it be, that the tax deed read in evidence by defendant, was paramount title. To have made it such, there must have been a compliance with the essential requirements of the revenue laws, authorizing sales for taxes. In this case, the deed on its face shows that the judgment under which this sale was made, was rendered at the Spring term, 1846, of the Clinton Circuit Court, and that the sale of this land was made on the 29th day of September, 1846, under a precept issued on the day previous. The 47th section of the revenue law of 1845, p. 13, requires the notice to be given for, and the sale to be made, on the fourth Tuesday next succeeding the day, fixed by law, for the commencement of the term of the Circuit Court, at which he shall apply for a judgment. The 46th section of the same act, requires the collector to apply at the first term of the Circuit Court in each year, for judgment against the delinquent list of lands for the taxes unpaid thereon. The law then in force, required the first term of the Clinton Circuit Court to be held on the first Monday of April in each year. This sale, then, was not on the fourth Tuesday next succeeding the day fixed for the commencement of the first term of the Clinton Circuit Court, but on a day several months after that time. And sales for taxes on a day different from that fixed by law, have been repeatedly held by this court to be void. *Hope* v. *Sawyer*, 14 Ill. R. 254; *Polk* v. *Hill*, 15 Ill. R. 131. If this sale was void, it could not be set up as outstanding paramount title to defeat plaintiff's recovery by a justification under it, even if a license had been shown.

But even if it were conceded that this tax title was all that is contended, and that it was color of title under the second section of the limitation law of 1839, and all taxes legally assessed upon the land had been paid under it for seven successive years, still the record fails to show that Russell had the possession of the premises. The evidence shows that his wife had caused a small building of some kind to be erected on the premises, but it wholly fails to show that she had any authority for so doing. The evidence fails to show that he had appointed

her his agent to take possession of this land, or for any other purpose. The law does not constitute the wife the agent of the husband, and in the absence of all proof, it cannot be inferred that she was authorized to take possession of these premises. The record also fails to show any authority in the wife, to give defendant power to remove and convert this property of plaintiff to Russell's or defendant's use. The defendant has therefore failed to show a justification for the acts complained of, and the court below erred in rendering judgment in his favor, and it should therefore be reversed, and the cause remanded.

Judgment reversed.

Margaret B. Lane, Plaintiff in Error, *v.* Francis Bommelmann, Defendant in Error.

ERROR TO ST. CLAIR.

A judgment for taxes which fails to show the amount of taxes for which it is rendered, is fatally defective. The use of numerals, without some mark or word indicating for what they stand, is insufficient, and cannot be explained by referring to other judgments entered in a corresponding manner, at different times.

In a sale of land for taxes, the law does not incline to liberal intendments; and the proceedings, to be valid, must be certain, and in strict compliance with the law authorizing them.

This was an action of ejectment, brought by the plaintiff in error, to recover possession of the east half of lot two, in the north half of claim 2209, survey 607, containing $69\frac{25}{100}$ acres. The cause was tried at the August term, 1856, of the St. Clair Circuit Court, by court and jury, and judgment rendered in favor of defendant. The plaintiff moved for a new trial, at common law, which was overruled.

The plaintiff proved title to the premises sued for, from the government of the United States down to Ninian W. Edwards. And then introduced a deed from Ninian W. Edwards *et al.*, bearing date 4th day of May, 1854, to said plaintiff, which deed contained the following description, viz:

"The following described land, situated in the county of St. Clair, and State of Illinois, to wit: Lots No. one, two, three, four, and five, being part of survey number 607, claim 2209, as described in a plat and survey made by John Stuntz and John Messenger, on the 5th day of November, 1835, as will more fully appear from a deed of allotment, by Elvira L. Edwards and Cyrus Edwards to the children of Ninian Edwards, and

John Cook, grandson of said Ninian Edwards, bearing date June 6, 1836; and recorded in the recorder's office in the county of St. Clair, State of Illinois, on the 27th June, 1836, in book H, pages 489 and 490.

In connection with said deed, and for the purpose of identifying the land, the plaintiff introduced the original deed of allotment and plat, and the record thereof. Plaintiff proved that defendant was in possession of the premises sued for, at the time of commencement of suit.

The defendant then offered the judgment of the St. Clair Circuit Court, for the taxes of 1845, which judgment had the following head and conclusion:

STATE OF ILLINOIS, } *sct.*
COUNTY OF ST. CLAIR. }

Be it remembered that D. W. Hopkins, sheriff of St. Clair county, and *ex-officio* collector, on Monday, the 23rd day of August, A. D. 1847, filed in the office of the clerk of the Circuit Court of said county, his report and certificate of publication, in the words and figures following, to wit:

A List of Lands and other Real Estate, in the County of St. Clair, and State of Illinois, on which the taxes remain due and unpaid for the year A. D. 1845, viz: (giving a description.)

Whereupon, afterwards, at a regular term of the Circuit Court for the county of St. Clair, begun and held in said county, on the 30th day of August, A. D. 1847, it being the second Monday after the third Monday of said month, the following proceedings were had by said court, to wit:

On the first Monday of the term, the sheriff, by W. H. Underwood, Esq., his attorney, enters his motion for judgment against the lands and town lots hereinbefore and in his said report mentioned and described, and afterwards, on the first Thursday thereof, Whereas, David W. Hopkins, collector of said county, returned to the Circuit Court of said county, on the 23rd day of August, 1847, the tracts and parts of tracts of land hereinbefore mentioned and described, as having been assessed for taxes by the assessor of the said county, for the year 1845, and that the taxes thereon remained due and unpaid on the day of the date of the said collector's return, and that the respective owner or owners have no goods and chattels within his county, on which the said collector can levy for the taxes, interest and costs due and unpaid thereon, for the year or years herein set forth. Therefore, it is considered by the court that judgment be and is hereby rendered against the aforesaid tract or tracts of land, or parts of tracts, in the name of the State of Illinois, for the sum annexed to each tract or parcel of land, being the amount of taxes, interest and costs due severally thereon, and

it is ordered by the court, that the said several tracts of land, or so much thereof as shall be sufficient, of each of them, to satisfy the amount of taxes, interest and costs annexed to them severally, be sold as the law directs."

The land in controversy was described as follows, in said judgment, with the heading, words and figures, viz:

NAMES OF OWNERS	DESCRIPTION	SECTION	ACRES	VALUATION	TAX	COSTS
	Surveys and Claims.					
	Survey.	Claim.				
Margaret B. Lane,	pt n 1-2 607	2209				
	lots 1, 2, 3, 4, 5,		693	2079	14|56	55

In no part of said judgment did it appear, by words, abbreviations, signs, or characters, whether the valuation and the amount of the tax and costs due on the said land, was in dollars, cents or mills, except as above described. Said judgment was entered in a book kept for that purpose, and there were several judgments for taxes of different years, of a like character, previously entered in said book, which had corresponding columns throughout said book, and the heading of the first page in said book is as follows:

NAMES OF PERSONS.	NO. OF ACRES.	DESCRIPTION. section. | township. | range.	VALUE.	TAX.	COSTS.

To the admission of which judgment in evidence, the plaintiff at the time excepted.

The defendant then offered in evidence, a precept, being a copy of said judgment without any additional heading, except that on the first page there is the mark, "$" over the column "Tax," and with the following certificate attached to the end of said judgment:

In Testimony Whereof, Theodore Engelman, Clerk of the Circuit Court, within and for said county [SEAL.] of St. Clair, has hereunto signed his name and affixed the seal of said court, this 13th day of September, A. D. 1847.

THEODORE ENGELMAN.

To the admission of which, in evidence, the plaintiff at the time excepted.

Defendant then offered a deed from David W. Hopkins, sheriff of St. Clair county, to Theodore Engelman, bearing date 19th June, 1850, purporting to convey, among other lands, the tract in controversy, as having been sold at the aforesaid tax sale; to the admission of which, in evidence, the plaintiff at the time excepted.

It was admitted that Samuel B. Chandler was sheriff of said county in 1845, and so continued till August, 1846; and that

the tax books were delivered to the sheriff, Hopkins, September 8, 1846. The plaintiff then proved by the clerk of the County Court of said county, that no taxes were due on the said land at the time of said trial. It was admitted by the parties that neither for the year 1845, nor since, had the plaintiff paid said taxes, but that since the sale the same had been paid by the purchaser or his grantee.

The plaintiff then proved that the County Court of said county assessed no county taxes on lands in said county, at their March term, 1845, and that said county tax, for which said land was in part sold, was assessed by said County Court, at its June term, 1845.

The jury found the defendant not guilty; and thereupon the plaintiff moved for a new trial at common law, because the court admitted to the jury improper evidence for the defendant, and excluded from the jury, proper evidence offered by the plaintiff, and because the verdict was contrary to the law and evidence; which motion was overruled, to which decision the plaintiff at the time excepted.

A. Williams, W. H. Underwood, and Stuart & Edwards, for Plaintiff in Error.

G. A. Koerner, for Defendants in Error.

Walker, J. This was an action of ejectment, commenced in the St. Clair Circuit Court, by plaintiff, against defendant. The action was for the recovery of the north half of a claim and survey containing 69 $\frac{25}{100}$ acres. On the trial below, the plaintiff proved title in herself by a regular chain from the United States government, and proved possession by defendant, of the premises at the time suit was instituted. The defendant then introduced a judgment of the St. Clair Circuit Court, for the taxes of 1845, in no part of which did it appear by any words, signs or characters, whether the valuation and amount of tax and costs due on the said land, was in dollars, cents or mills. The judgment was entered in a book kept for that purpose, in which were entered other judgments, for taxes of different years, having corresponding columns with the one read in evidence; at the heading of the columns of which, for valuation and amount of tax and costs were dollar-marks and abbreviations for cents. The defendant then introduced a precept issued on the judgment, and in it, over the column for tax, on the first page, is the "$," and then introduced a deed from the sheriff of St. Clair county to Theodore Engelman, dated the 19th of June, 1850, for this, with other tracts of land. The plaintiff, at the time, objected

to the reading the judgment, precept, and deed, by the defendant, as evidence, but the objection was overruled by the court. The jury found a verdict of not guilty, and plaintiff entered a motion for a new trial, which was overruled, and judgment entered against plaintiff for costs. To reverse that judgment, this writ of error is prosecuted.

We only propose to consider the third assignment of error, which questions the sufficiency of the judgment to support the sale of this land, for taxes. In the case of *Lawrance* v. *Fast*, 20 Ill. R. 338, it was held by this court, that a judgment for taxes, which fails to show the amount of taxes for which it was rendered, is fatally defective. And that the use of numerals without some mark or word indicating for what they stand, is insufficient. The objection to that judgment was the same that is presented in this. In that case, as in this, there was no character, word or mark at the head of the column of the valuation, or amount of tax, to indicate whether the numerals were intended for dollars, cents or mills; and we are left to conjecture which they represent.

That decision is conclusive of this question. In this case, for the purpose of obviating this objection, the defendant has resorted to prior judgments to this one, entered in the same book, at previous terms, and for the taxes of former years, where the dollar-mark is used at the heading of corresponding columns. But we are unable to perceive in what manner, or by what process of reasoning it can be aided by such judgments. They were for the taxes of different years, against different lands, and rendered at different terms of the court. It might as well be insisted that a judgment against one person, rendered at a different term of court, on a different contract, could explain an uncertainty in the amount of a judgment against another person. There is no connection whatever between these various judgments for taxes, and consequently one does not explain another. This is a proceeding in *rem*, and by which property is transferred by judgment and sale without personal service on the owner, and that too, for a sum that bears a very small proportion to its value; and the law does not incline to liberal intendments to sustain such sales. Such proceedings, to be valid, must be certain, and in strict compliance with the law authorizing them. We are therefore of the opinion that the court erred in admitting the judgment for taxes, the precept and the tax deed, in evidence, and for these errors the judgment of the Circuit Court is reversed, and the cause remanded.

Judgment reversed.

Charles A. Sargent, Plaintiff in Error, *v.* Orlando B. Howe, David B. Morgan, and George W. Seaman, Defendants in Error.

ERROR TO ST. CLAIR.

Where A. executed three notes in favor of B., and conveyed property to C. in trust to secure their payment, and B. assigned two of the notes to D.: Held, that the assignment carried with it, as an incident of the debt, the security, and that D. succeeded to all the rights of the assignor under the trust deed.

In case of non-payment of the notes assigned at maturity, the assignee had a right to call on the trustee to sell all, or so much of the trust property, as would be necessary for their payment.

A court of equity might in such case, under the general prayer for relief, compel a trustee to sell the trust property, and apply the proceeds towards paying the debt secured; or, if he is proved to be an improper person to act, might remove him, and appoint a suitable person to execute the trust.

Complainant, who is plaintiff in error, filed his bill in chancery in the St. Clair Circuit Court, alleging that Howe executed to Morgan three notes, two for $500.00 each, and one for $1000.00, payable, the first in nine, the second in fifteen, and the third in twenty-four months, from date, and dated March 28th, 1857, together with a deed of trust to Seaman, in the usual form, to secure the payment of the notes, with power to sell in case either note was not paid—that Seaman accepted the trust—that Howe is insolvent—that the first two notes were assigned by Morgan to complainant—that Seaman, though notified in writing of the assignment, and required to sell, refuses so to do, and is in conspiracy with Morgan to defraud complainant. Prayer, that another trustee be appointed, and for general relief.

Defendants filed a general demurrer to the bill, which was sustained, and the bill dismissed.

To this the complainant excepted, and brings the case to this court by writ of error—assigning for errors:

1st. That the court below erred in sustaining the demurrer to the bill.

2nd. The court below erred in not rendering a decree in behalf of the complainant.

W. H. and J. B. Underwood, for Plaintiff in Error.

Meyer & French, for Defendants in Error.

Walker, J. The bill in this case alleges that Howe executed to Morgan, his three several promissory notes, the first for $500, due in nine months, the second for $500, due in fifteen

months, and the third for $1000, due in twenty-four months, and each dated on the 28th day of March, 1857; and on the same date, for the purpose of securing the payment of the same, conveyed certain real estate to Seaman, as a trustee, with power to sell if either note should not be paid at maturity, by giving notice, etc. The bill also alleges that Morgan assigned the two notes first falling due to complainant, and that they had matured, and remain unpaid; that Howe is insolvent, and Seaman and Morgan have combined to defraud complainant, and that Seaman, after being notified and requested to make sale of the trust property, fails and refuses. To this bill defendants filed a demurrer, which the court sustained, and dismissed the bill. To reverse that decree, the plaintiff prosecutes this writ of error.

A court of equity has jurisdiction of trusts and trustees; and rather than a trust shall fail from death or the disability of a trustee to act, or when he is not a proper person to execute the trust, will appoint a suitable trustee. And a court of equity, in case of neglect or refusal of a trustee to perform the duties devolving upon him under the trust, will, upon a proper application, compel him to execute it. Such a jurisdiction is peculiar to a court of equity, and doubtless originated from the necessity of preventing fraud and injustice. When confidence has been reposed in the trustee, and he has undertaken to perform the trust, it would be manifestly unjust, to permit him to deprive the parties in interest of all benefit in the trust fund. If the trustee, after receiving title to property in trust, as a pledge for the payment of the debt of a third party, might refuse to apply it according to the terms of the trust deed, and the court were not to afford relief, it would be to tolerate gross injustice. But such is not the law.

Then what were the rights of complainant in this case? It is the well established doctrine, that the debt is the principal thing, and that a mortgage or pledge to secure its payment is only an incident; and that the assignment of the debt, also passes the mortgage or pledge without being referred to in the assignment. The mortgage or pledge being only an incident of the debt, and annexed to it, passes with it. And the assignee of the debt, takes the security by the assignment, in the same condition, and to the extent it was held by the payee, at the time of the assignment, as a security for the debt assigned, and succeeds under it, to all the rights of the assignor. And a satisfaction of the debt releases the mortgage or pledge. This deed of trust was given to secure these notes, and is in that respect the same as a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third per-

son instead of the creditor. They are both intended to, and do secure the debt. When the payee assigned these notes to complainant, the lien he held on this property to secure their payment, passed with them, to complainant by the assignment. And he succeeded to the equitable rights of the assignor in the trust property, to the same extent that he held it as a security, for the payment of the notes assigned.

There can be no question of the right of the payee or assignee, to foreclose a mortgage given to secure the payment of several sums, falling due at different times, when default shall be made in payment of those first maturing. And as the complainant by the assignment of these notes, has succeeded to all the rights which the payee held under them, it follows that he has a right, upon the maturity of these notes, and a default in their payment, to insist upon a sale of all or so much of the trust property, as may be necessary for their payment. Having this right, neither the trustee or Morgan has any right to prevent its sale, and delay the complainant in collecting his money. The bill alleges that the maker of the notes is insolvent, and the demurrer admits the truth of the bill, and if he is insolvent, the creditor has strong claims to be permitted at once to collect his debt out of this trust fund.

If it is true that the trustee has combined with Morgan to defraud complainant, upon that fact being established, he should be removed, and a proper person appointed to execute the trust. But if on the contrary, he is not guilty of the combination to defraud complainant, and is in other respects a suitable person to act, then he should not be removed. If the allegations of the bill are true, the trust property, or so much of it as may be necessary, should be sold, and the money applied in payment of these notes. Under the general prayer for relief, the court has power to compel the trustee to proceed and sell the property, in the manner, and on the terms provided in the deed, and to apply the proceeds in satisfaction of the debts secured by the fund; and the court, under the general prayer for relief, if the proof on the hearing should require it, might remove the trustee, and appoint a suitable person to execute the trust.

The decree of the Circuit Court is reversed, and the cause remanded, with leave to defendants to answer the bill.

Judgment reversed.

Jonas Weatherford, Appellant, *v.* Josephus Cunningham, Appellee.

AGREED CASE FROM MORGAN.

Where A. purchased from B. one hundred acres of land, for the sum of $1,700.00, before conveyance A. sold half the land to C. for $850.00, but C. agreed to pay B. $180.00 for a choice of halves of the land to B. and the land was conveyed upon these terms: Held, that B. was to pay $670.00, and C. $1,030.00, for their respective halves of the land.

This cause, by agreement of parties, is certified to the Supreme Court, to be reviewed on the following agreed case, to wit:

Plaintiff contracted with one Lewis Massie, for sale and conveyance of 100 acres of land for $1,700. Before the execution of a deed to him, he sold one half of the land to defendant, at the same rate as above, who agreed to pay Massie $180 for choice of the halves of the land; and they, plaintiff, defendant and Massie, agreed that the plaintiff was to execute deeds to them respectively, and that the defendant was to pay the $180 to plaintiff. He executed a deed to the defendant for the consideration of $1,030, and to Massie for the consideration of $670. Of the $1,030, the defendant paid the plaintiff $940, and refused to pay any more. Massie paid the $670, the consideration of the deed to him. Plaintiff sued the defendant for the $90, before a justice of the peace, and recovered a judgment for the same and costs; from which the defendant appealed, and the judge of said court, by consent, without a jury, tried the case, and reversed the judgment of the justice of the peace, and gave judgment in favor of the defendant for costs in this and the Justice's Court. From which judgment of reversal, the plaintiff appealed, and executed appeal bond for the next term of the Supreme Court of this State; when and where said judgment of reversal is to be reviewed on this agreed case, without any other or further record; and without exception to any matter of form. And so this case is to be certified by the clerk of said court, to the Supreme Court of this State for the next January term.

Cyrus Epler, for Appellant.

D. A. and T. W. Smith, for Appellee.

Breese, J. The price of the land as agreed, was seventeen hundred dollars, of which Massie and Cunningham were to pay to Weatherford, equal portions, that is, eight hundred and fifty

dollars each. To secure the choice in the division of the land, Cunningham agreed to pay Massie one hundred and eighty dollars, and by a subsequent agreement, to pay it to their common creditor, Weatherford. This sum of one hundred and eighty dollars, paid by Cunningham to Weatherford on Massie's account, reduced Massie's indebtedness to him to six hundred and seventy dollars, and increased Cunningham's by the same amount; he is to pay Weatherford, therefore, the price of one half the land as originally agreed, *plus* one hundred and eighty dollars for the choice, making the amount due from him to Weatherford, ten hundred and thirty dollars. Suppose Cunningham, instead of buying of Massie one half the land, had bought of Weatherford, and agreed to pay him one hundred and eighty dollars premium for the choice. Clearly he would owe Weatherford $850, *plus* $180—in all, ten hundred and thirty dollars.

The judgment of the Circuit Court is reversed, and judgment entered here for ninety-four dollars and fifty cents, the balance due with interest, in favor of the appellant.

Judgment reversed.

William R. Miller, Appellant, *v.* Gabriel Marckle, Appellee.

APPEAL FROM MORGAN.

It is erroneous to decree the foreclosure of a mortgage, alleged to have been executed in fraud of creditors, where no consideration was advanced by the mortgagee.

Where a transaction is tainted with fraud, as between the parties to it, a court will not assist either, but will leave them in the position in which they have placed themselves.

This case was submitted upon the following agreed state of facts. The decree was rendered by Woodson, Judge, at October term, 1858, of the Morgan Circuit Court.

At the October term, A. D. 1858, of the Morgan Circuit Court, Gabriel Marckle filed his bill for the foreclosure of two mortgages executed by William R. Miller, on the same tract of land. Miller, at the same term of said court, filed his answer on oath, alleging that one of the mortgages was executed by him, to secure a note which he had executed to Marckle, without any good and valuable consideration, and that the same mortgage and note were executed by him, not to secure any

debt due and owing from him to Marckle, but were executed wholly and solely for the purpose of securing his property from his creditors, until he could get means to settle with them.

And at the same term of court, Marckle filed his replication to said answer, and the cause coming on to be heard on bill, exhibits, answer and replication, the court granted a decree of foreclosure of both of the mortgages, deciding that Miller had no right to make defense predicated on his own fraud; and the propriety of that decision, is the question which the parties agreed should be certified by the clerk of the said Circuit Court to the Supreme Court of this State, second grand division, January term, A. D. 1859, there to be reviewed without any further or fuller record.

The errors assigned are:

1st. The court erred in decreeing a foreclosure of both of said mortgages against defendant below.

2nd. The court erred in overruling the defense set up by defendant below, in his answer to complainant's bill.

3rd. The court erred in not dismissing complainant Marckle's bill, as to the alleged fraudulent mortgage.

C. Epler, and Knapp & Case, for Appellant.

D. A. and T. W. Smith, for Appellee.

Breese, J. From the agreed case, we think it clear, the Circuit Court erred in passing a decree of foreclosure of the mortgage, alleged to have been executed in fraud of creditors, for which the mortgagee had advanced no consideration.

We have examined carefully the numerous cases cited by the counsel on both sides, and draw from them the conclusion we have above announced.

The second section of our statute, (Scates' Comp. 542,) title "Frauds and Perjuries," is understood to be, substantially, a copy of the act of 13 Eliz. ch. 5, and of 27 Eliz. ch. 4, and they are but in affirmance of the common law, as it really was at and prior to the passage of those acts. *Cadogan* v. *Kennett*, Cowp. 434; *Hamilton* v. *Russell*, 1 Cranch, 309, 316; *Wilt* v. *Franklin*, 1 Binney, 502; *Hudnel* v. *Wilder*, 4 McCord, 295, 297; *Ewing* v. *Runkle*, 20 Ill. R. 448.

By this act, voluntary conveyances made to delay, hinder or defraud creditors, or to defraud or deceive purchasers, as against such creditors and purchasers only, are deemed fraudulent and void. A conveyance executed for such purposes, and without any consideration, or colorable only, and under the expectation that it would be surrendered to the grantor, or the property recon-

veyed to him, is no doubt binding on the parties, and their representatives. The cases refered to in 1 Am. Leading Cases, 59, cited by counsel for appellee, fully establish this principle, if authority was necessary. It seems so plain a proposition as scarcely to need the support of authority. The statute interposes only in favor of creditors and purchasers, for a valuable consideration, leaving the contract and conveyance as between the immediate parties, as they stood at the common law, and binding. But this refers to executed contracts only. All the cases cited by the counsel for the appellee, relate to such contracts or conveyances, and are recognized as law. In all such cases courts will not interfere to disturb them. If money has been actually paid, or property transferred, and the grantee put in possession, courts will not compel the money or property to be restored, or the party ousted. They will not, on the one hand, undo what has been done, nor on the other, perfect what has been left unfinished. Suppose the position of these parties reversed, and the appellant was seeking by bill in chancery, to rescind the mortgage, and for a surrender of the notes? The question carries with it its own answer. The court would not interfere—it would leave the parties where it found them; aiding neither. We would say, you executed the notes and the mortgage for a fraudulent purpose—the act is binding on you, and you cannot have our aid to compel their surrender. So we say to the appellee here—you have the notes and mortgage—you were a willing party to a purposed fraud—we will give you no assistance to enforce the one or the other—equity aids not iniquity. Had an absolute deed of the premises been made, and the party put in possession, the court would not interfere to oust him.

To this extent is the doctrine as laid down by Story, 1 Story's Eq. Jurisprudence, sec. 298, page 317. "In general," he says, "where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not, at present, interpose to grant any relief, acting upon the known maxim, *in pari delicto potior est conditio defendentis*."

In note 3 to this text, he says, "I say *at present*, for there has been considerable fluctuation of opinion, both in courts of law and equity, on this subject. The old cases often gave relief, both at law and in equity, when the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort." Many cases

at law and in equity are referred to as supporting this modern doctrine, wherein the distinction is clearly recognized between contracts fully executed, and those which are executory merely—those which require no extraneous aid from courts or otherwise, to consummate them, and those which do require such aid.

A mortgage is but a security for the notes, which are the evidence of the debt, and requiring the aid of a court to foreclose the equities, it is, consequently, executory, and comes within the distinction we have endeavored to establish. We say to the party holding them, make the most you can of your position, but do not ask us to render you any assistance. We will leave you as we find you.

A strong case confirmatory of the views we have presented, is to be found in 10 Maine R. (1 Fairfield) 71, *Smith et al.* v. *Hubbs, Adm'r of Hubbs.* In this case it was insisted that a person could not defend himself by alleging and proving his own turpitude,—that when the plaintiff has proved the contract, and which appears to be fair and legal, that the defendant shall not be permitted, by way of defense, to prove that the contract was fraudulent and illegal, between the plaintiff and himself, and thus avail of his own wrong and violation of law.

Mellen, C. J., says, "Notwithstanding the emphatical manner in which the counsel contended for the above distinction, we are not aware of its existence except under a limitation which is not applicable to the case before the court. That limitation we will state. There is a marked and settled distinction between *executory* and *executed* contracts of a *fraudulent* or illegal character. Whatever the parties to an action have *executed* for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally *contracted to execute*, the law refuses to compel the contractor to execute or pay damages for not executing, but in both cases, leaves the parties where it finds them. The object of the law in the *latter* case is, as far as possible, to prevent the contemplated wrong; and in the *former*, to punish the wrong-doer by leaving him to the consequences of his own folly or misconduct."

Another case is to be found in 20 Wendell R. 24, *Nellis* v. *Clark*, where this distinction between executed and executory contracts is fully recognized. So in the case in 2 Foster, (N. H.) 523, *Demeritt* v. *Niles.*

The case of *Jones and Wife* v. *Read*, 3 Dana, (Ky.) 540, is to the same point. That case was this—The owner of a lot, with the intent to defraud a creditor, conveyed it to her daughter, and secretly took her daughter's bond for a re-conveyance, or the payment of a certain sum, which bond the mother after-

wards assigned to another daughter as an advancement. The first daughter married, and she and her husband sold the lot, and covenanted to convey it to a stranger, who, on being sued for the purchase money, filed his bill to have this incumbrance of the secret bond removed, or the contract rescinded. On the hearing, the court held that this bond, thus founded on a fraudulent conveyance, was itself infected with the fraud, and not an available equity against the title to the lot.

So in *Walker et al.* v. *McConnico*, 10 Yerger (Tenn.) 228, the court held that a promissory note executed without consideration, and with a view to protect the maker's property from his creditors, cannot be enforced against the maker by the payee.

In *St. Johns* v. *Benedict et al.*, 6 Johnson Ch. 111, on a bill filed for the specific performance of an agreement, where it appeared to have been made to defeat or defraud a creditor of the plaintiff or an intervening purchaser at a sheriff's sale, under a judgment and execution against him, the court refused to decree a specific performance. The court say in this case, "Shall this court help a party in the performance of an agreement made on purpose to defraud creditors?" "The court will not interfere to enforce the specific performance of a contract iniquitous and fraudulent in its very foundation."

In *Bolt* v. *Rogers*, 3 Paige Ch. (N. Y.) 154, the court say, "Whenever two or more persons are engaged in a fraudulent transaction to injure another, neither law or equity will interfere to relieve either of those persons as against the other, from the consequences of their own misconduct."

It is pertinently asked by the appellant's counsel, if the maker of notes may, in a court of law, successfully defend against them, by showing that they were executed in fraud of creditors, why may he not, in a court of equity, interpose the same defense, when the mortgage given to secure those notes, is sought to be foreclosed?

As a general principle, it is true that the same defense may be interposed against a suit upon the mortgage as against the notes for which the mortgage is but security. The mortgage must share the fate of the notes, and whatever will defeat the notes, should defeat the mortgage. The principle applying to the one is equally applicable to the other, and that principle is, as we have endeavored to maintain, that courts will not lend their aid to enforce contracts or agreements executory in their nature, originating in fraud. A promissory note, without the aid of a court to compel its payment, is but of little worth, and so with a mortgage; neither can be enjoined without the aid of a court, unless the mortgage contains a power to sell, and in

this view it is but an executory contract. Originating in a fraudulent design, we do not see how a court of equity can preserve its distinctive characteristics, by aiding either party. It has nothing to do with frauds except to expose them, and, in proper cases to relieve against them—never to carry into effect, as between the parties, their own fraudulent designs.

One case has been much insisted on by the counsel for the appellee, as opposed to the views we have presented, which deserves some attention. It is the case of *Hawes* v. *Leader*, Cro. James, 270, and reported also in Yelverton, 196, and is the basis of the doctrine as found in Roberts on Fraudulent Conveyances, 641, also cited by him.

That case does conflict with the authorities we have examined and to which we have inclined. That case is this: "Debt against the defendant as administrator of Thomas Cookson, deceased; wherein the case appeared to be, that the said Thomas Cookson, for £20 paid by the plaintiff into his hands upon 9 the February 2 Jac., granted all his goods mentioned in a schedule annexed to the deed, and gave possession of them by a pewter dish, with a covenant, that he, his administrators, etc., should safely keep and quietly deliver them unto the plaintiff on his demand; and bound himself in £40 to the plaintiff for the performance of that covenant: Thomas Cookson afterwards died, and upon the 16 March, Anno 6 Jac., the plaintiff demanded the goods of the defendant being his administrator, who would not deliver them; whereupon the plaintiff brought this action, and in his declaration shews in *specie*, what goods were contained in the schedule. The defendant pleaded the statute of 13 Eliz., cap. 5, of fraudulent deeds and gifts, and further says that Cookson the intestate was previously indebted to sundry persons to £100, and made the deed of gift while so indebted, etc.; and that it was made of fraud and covin betwixt Cookson and the plaintiff to deceive his creditors. To this the plaintiff demurred, and it was adjudged for him, on the ground among others, assigned, that the statute makes the deed void only as against creditors, but not against the party himself."

In this case, the question was not made, whether a court ought to aid in the recovery of the goods or leave the parties as they were, and was not considered. It has not been followed by other courts, and does not seem to us so satisfactory and salutary as a rule, as the one we have laid down.

The rule we have adopted seems best calculated to frustrate the designs of parties who engage in transactions of a fraudulent character, saying to them most emphatically—keep what you have got, be it notes or mortgages, but seek not our aid to enforce the one or the other, or on the other hand, to relieve against them.

If an agreement be executed, this court will not rescind it; if executory, this court will not aid in its execution.

Another case to which reference has been made, *Findley* v. *Cooley*, 1 Blackf. 262, is against the views here expressed, and it may be sufficient to say, that the attention of the court in that case was not drawn to the distinction between executed and executory contracts—between those not requiring the aid of a court to enforce, and those which do require such aid. The case seems to have been decided on the effect of the conveyance which was the executed contract, and not the notes which were the executory contract, and to which the maxim, "where parties are in equal fault, the condition of the defendant should be regarded as the best," would apply.

The decree of the court below is reversed.

WALKER, J. I concur in the decision in this case, but do not concur in all of the reasoning in the foregoing opinion.

C. J. CATON, not having heard the arguments in this cause, gave no opinion.

Decree reversed.

JOHN WYATT, Plaintiff in Error, *v.* JOHN HEADRICK, Defendant in Error.

ERROR TO GREENE.

If a plea has been filed in the Circuit Court, and immediately withdrawn, and retained until after a judgment has been rendered by default, and is then placed among the papers, for the purpose of entrapping the plaintiff, the Circuit Court may, at any time, even after error brought, upon request, strike such plea from the files.

THIS was an action of assumpsit on a note, brought by defendant in error. The declaration contained one count, on the note. The defendant below, by consent of plaintiff's counsel, was given time to plead, the rule expired, and there was a judgment by default, for want of plea, for amount of note. Afterwards, a plea of the general issue, bearing file of date prior to judgment, appeared of record. Defendant below sued out a writ of error, and at the last term of the Supreme Court, assigned for error the rendition of judgment with an unanswered plea on file. The cause was continued, by consent, till the present term of this court.

At April term, 1858, of the Greene Circuit Court, defendant in error, having given previous notice, moved the said court to strike said plea from the record, for reasons filed, and appearing of record. Plaintiff in error appeared, and on his application, the motion was continued. At a special term of the said Greene Circuit Court, begun 23rd of August, 1858, said motion was heard and allowed, and said plea stricken from the files as no part of the record; all of which proceedings are, by leave of the court, made part of the record in this court, by filing of a certified copy at this term; and thereupon, errors assigned are joined.

W. D. Wyatt, and J. B. White, for Plaintiff in Error.

Knapp & Case, for Defendant in Error.

Caton, C. J. A state of case may well have existed which authorized the court below to strike the plea from the files, even after error brought. Instances have occurred where a plea was handed to the clerk, and marked as filed; and then, instead of being left with the papers, that it might be seen and answered by the other party, it has been withdrawn till after a judgment by default, and then placed among the papers, for the mere purpose of entrapping the plaintiff into an erroneous judgment by default. In such a case, it would be the duty of the Circuit Court to strike the plea from the files, at any time when called upon to do so. Whether this is such a case, we have not examined to see, as that question is not before us. No complaint is now made that the plea was improperly stricken from the files, for upon that decision no error is assigned. It is, therefore, admitted that it was correctly done.

That cured the only error which is complained of, which is the rendering a judgment by default, when there was a plea upon the files. It having been properly stricken from the files it ceased to be a part of the record of the cause, and is to be considered as if it had never been there.

The judgment must be affirmed.

Judgment affirmed.

Frederick Schultz, Appellant, *v.* Joseph Lepage, Appellee.

APPEAL FROM ST. CLAIR.

A judgment will not be reversed because the court below admitted improper evidence, if sufficient legal evidence appears in the record to sustain the verdict.

This was a suit commenced before a justice of the peace, by appellee against appellant and one Henry Solomon, defendants below, for killing and converting to their own use, hogs of the appellee, plaintiff below. An appeal was taken to the St. Clair Circuit Court, Snyder, Judge, and on the trial evidence was introduced tending to show that Schultz and Solomon had killed and converted to their own use, three hogs belonging to Lepage. There was, also, proof of injuries done to a sow, belonging to Lepage, by Schultz's dogs, and a tender of three dollars by Schultz to Lepage, to pay for this damage; which testimony was objected to by defendant. The appellant, defendant below, asked the court for the following instruction, which was refused:

"That this suit is brought in trespass, for hogs converted by defendants to their own use, and not for hogs or a sow killed by the dogs of the defendant, without their fault; and that, if the jury believe that Schultz did not know of his dogs killing the sow, and did not cause her to be killed, they cannot find the value thereof for the plaintiff, notwithstanding the tender of three dollars by Schultz."

The jury found a verdict for plaintiff for twenty-two dollars; and Schultz appeals to this court.

Z. M. Walsh, N. Niles, and G. Koerner, for Appellant.

W. H. and J. B. Underwood, for Appellee.

Breese, J. The evidence in this case fully establishes the trespass complained of by Lepage. The facts stated by Longood, the principal witness, show, most conclusively, that these hogs, the property of Lepage, were killed by Schultz and converted to his own use, and that their value was twenty-two dollars. This leaves any inquiry about the sow, worried by the dogs, for which Schultz tendered three dollars as amends, unnecessary.

As to the instruction asked for by the defendant, it was properly refused, because the plaintiff's claim for three hogs, besides the sow, was fully made out by the proof. The value of the

sow was not included in it, for the three hogs the witness saw butchered, were worth, two of them, seven dollars each, and one, eight dollars; making the amount found by the jury.

It is immaterial, as this court has frequently decided, that improper evidence has been admitted, so that they find sufficient legal evidence in the record to sustain the verdict. This we find in this case, and accordingly affirm the judgment.

Judgment affirmed.

George Ball, Plaintiff in Error, *v.* James E. Bruce, Defendant in Error.

ERROR TO EDGAR.

An action on the case for seduction may be sustained, not only by a parent, but by a guardian, master or other person, (or brother-in-law) standing in *loco parentis* to the person seduced.

If the person seduced is a minor, the action will be sustained, whether she resided with the plaintiff or elsewhere, at the time of the seduction; if she was legally under the control of, or might be required to perform service for the plaintiff.

If the person seduced is not a minor, she must reside with and render service for the plaintiff; but slight acts of service will be sufficient to sustain the action.

The damages need not be measured by the services rendered, but may be exemplary.

This is an action of trespass on the case, brought by George Ball against James E. Bruce for the seduction of the sister-in-law of the plaintiff, one Eliza Alsup, an orphan girl, aged about fourteen years.

The declaration alleges that she was an orphan, and the sister-in-law of plaintiff, under his care and in his service; that the defendant, Bruce, fraudulently and for the purpose of debauching and seducing her, and depriving the plaintiff of her service, etc., enticed away and obtained the custody of the said Eliza Alsup, and while she was so wrongfully under him and in his custody, did debauch her, etc., and that subsequently she was delivered of a child, and that plaintiff incurred a heavy expense in nursing and taking care of her, and in loss of service, etc., for which the suit is brought.

The defendant filed a demurrer to the declaration, and for cause of demurrer, set out that the declaration does not show that she owed the plaintiff any service, or that he had any power to take her person to his possession, and that he does not claim to be the parent or guardian of said Eliza, nor does he allege

that he has any contract of apprenticeship with or concerning the said Eliza by which he could control her person against her will.

The court, HARLAN, Judge, presiding, sustained the demurrer to the declaration and rendered judgment in favor of the defendant for costs. The plaintiff excepts to the judgment of the court sustaining the demurrer, and brings the case upon writ of error to this court, to reverse the judgment of the court below, and assigns for error that the judgment of the court is contrary to law.

A. GREEN, for Plaintiff in Error.

S. P. READ, for Defendant in Error.

WALKER, J. This was an action on the case, instituted by plaintiff against defendant for the seduction of Eliza Alsup, the sister-in-law of plaintiff. The declaration contains one count, which alleges, that she was an orphan, and the sister-in-law, and servant of, and was under the care, of plaintiff. That defendant, fraudulently, and for the purpose of debauching and seducing her, and depriving plaintiff of her services, enticed her away from plaintiff, and obtained her custody, and while she was so wrongfully in his custody, he debauched her, and that she was subsequently delivered of a child, and that plaintiff in consequence thereof incurred great expense in nursing and taking care of her, and in loss of service.

To this declaration defendant filed a demurrer, which was sustained by the court, and a judgment was rendered against the plaintiff for costs; to reverse which, this writ of error is prosecuted.

The action on the case for seduction may be maintained by the parent, guardian, master, or other person standing in *loco parentis*, for debauching the daughter, ward, or servant. And when the seduction is of a minor, the parent, guardian or person occupying the place of a parent, may maintain the action whether the minor resides with the plaintiff at the time of the seduction, or elsewhere. If the minor be legally under the control of, and may be required to perform service for the plaintiff, that gives the right to maintain the action. If, however, the person seduced be over age, she must reside with, and render service for the plaintiff, to authorize him to recover, although slight acts of service are sufficient. The master has the same right of recovery for debauching and seducing his apprentice or servant that the parent has; but in such cases it must be averred and proved that the relation of master and ser-

vant in fact existed at the time the injury was committed. It is, however, not necessary to prove a contract for service; but evidence must be given of acts of service, though slight evidence will suffice, such as making tea, mending clothes, or other such like acts. The allegation and proof of service are necessary because the action is based upon the loss of service, and without such loss the plaintiff cannot recover, although the jury are not confined to its value in assessing damages, but may take into consideration the wounded feelings of the parent, the disgrace brought upon the family, and the loss of the society of the child.

It has also been held that plaintiff may recover where the person seduced did not reside with him, at the time of the seduction, if the defendant by fraud and deceit obtained possession of her, as a servant, when he intended to and did seduce her while under his control. And it is a question for the determination of the jury, whether he hired her *bona fide* as a servant, or whether it was only a pretense wickedly to get possession of her person, to seduce her. If the object of the defendant be with the wicked intention of seducing her, then the relation of master and servant is not established between them, so as to protect him from an action by the person standing in *loco parentis*, or by the master. Fraud avoids such a contract precisely as it does any other, and will not protect the defendant from liability for the seduction.

The declaration in this case avers every fact necessary to maintain the action. It is alleged that plaintiff was the master and that the girl seduced was his servant, and that plaintiff had been put to expense by her confinement, and that he had lost her services by reason of the seduction. That she was in his care and custody as his servant, and that defendant, with the wicked, fraudulent and unlawful intention of seducing her, enticed her from the plaintiff, and obtained her custody and control as his servant, and while she was so wrongfully under his care and custody he debauched and carnally knew her. No defect is perceived in this declaration, either in substance or in form. If plaintiff was the master, and she was the servant, and in consequence of her seduction he was deprived of her services, why may he not recover as any other master for the seduction of his servant? Or if this loss was produced by the fraud of defendant, we conceive it can make no difference that plaintiff occupied the relation of brother-in-law to the seduced, as well as that of her master. Even if it were conceded that the relation of brother-in-law gives no right to recover for the seduction of his sister-in-law, it surely would not prevent him from recovering when she was a member of his family rendering him service,

or when she has, for the fraudulent purpose of being seduced, been enticed from his custody and service. Our laws cannot be subjected to the reproach, that they afford no remedy for so flagrant a wrong, because the victim has no parents or guardian, but is the servant of a relative. Such a wrong cannot be sanctioned by courts of justice, as to permit a man by fraud to get the custody of a mere child, for the purpose of seduction, and while under his care and protection, to accomplish his purpose, and then be heard to say as a defense that owing to her misfortune in not having parents or a guardian, he has incurred no liability. The law is surely not so impotent in its power to protect the weak and inexperienced against the wicked and depraved, as not to punish such wrongs by inflicting damages, commensurate to the injury.

This declaration is substantially sufficient, and the court below erred in sustaining the demurrer to it, and the judgment on the demurrer must be reversed and the cause remanded.

Judgment reversed.

George C. Peak, Plaintiff in Error, *v.* Henry Pricer, use of, etc., Defendant in Error.

ERROR TO MACON.

The fact that a court has appointed a guardian *ad litem* for a party to a suit, is conclusive evidence of his infancy, for that purpose alone, and does not affect the question of infancy, which may be subsequently raised by the proper plea.

When the court appoints a guardian *ad litem* to an infant defendant, it is the duty of the judge to see that a proper defense is interposed; and it is error for the court to permit the guardian to withdraw a plea, and allow a judgment by default to be entered against the infant.

It is also the duty of the court, in such a case, to see that a defense is made for the infant.

This was an action of assumpsit on a promissory note, commenced by Pricer against Peak and another, in the Circuit Court of Macon county, Emerson, Judge.

It appearing to the court that Peak was a minor, under the age of twenty-one years, W. E. Nelson was appointed his guardian *ad litem*, who filed pleas for his ward, and entered appearance as attorney of Shasted, the other defendant, and on the same day pleas were withdrawn by *agreement of parties*, and judgment was entered against the defendants. The pleas that were filed and withdrawn, were non assumpsit and infancy.

Peak, one of the defendants below, now brings the case to this court by writ of error, assigning as errors:

That the guardian *ad litem* withdrew pleas filed by him, and agreed to a judgment against his ward.

That the court below suffered the guardian *ad litem* of plaintiff in error, to withdraw pleas that had been filed, and to agree to a judgment against him, said plaintiff in error.

D. A. and T. W. Smith, for Plaintiff in Error.

Thorpe & Tupper, for Defendant in Error.

Caton, C. J. Before the court could appoint a guardian *ad litem* for the infant, it necessarily had to find the fact of infancy. The act of appointing the guardian, shows that that fact was found by the court to exist, and for that purpose, and that purpose alone, such finding was conclusive of that fact. Upon a plea of infancy, formed upon the record, as a matter of defense, such preliminary finding by the court could have no influence. The court finds the fact of infancy for the purpose of appointing a guardian to make defense, upon mere suggestion, where it is not denied, and without strict legal proof that it is true, while a plea of infancy interposed by the guardian, must be sustained by legal proof, the same as any other plea. After the guardian was once appointed, and until he was discharged or removed by order of the court, the defense could only be conducted by him, and it became his duty to make a proper defense for the infant, and also the duty was imposed on the court to see that such defense was made, or, at least, to see that some defense was made. It was error, therefore, for the court to allow the plea which had been filed by the guardian, to be withdrawn by him, and to render a judgment by default against the infant.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

John C. Bailey, Appellant, *v.* Joshua A. Moore and Ira Y. Munn, Appellees.

APPEAL FROM MORGAN.

A certificate of discharge, in bankruptcy, is a release of the bankrupt from liability on his covenants in a warranty deed.

Bailey *v.* Moore et al.

In 1836, A. conveyed premises to B. by a warranty deed; in 1838, A. was in possession of the premises by his tenant, C.; in 1839, C. took another lease of the same premises from D., who held a hostile title, and was forced to pay rent to D.; in 1843, the premises being unoccupied, D.'s grantee took possession of them. In an action by B. against A., on his covenant of warranty, it is held that the attornment by A.'s tenant to D. in 1839, was not an eviction, and that the cause of action did not accrue until 1843.

A tenant has a right to attorn to one who has acquired his landlord's title, but not to one who has acquired a title hostile to the landlord; although it may be a better title.

THIS was an action of covenant brought by John C. Bailey, against Joshua Moore and Ira Y. Munn, upon a general covenant of warranty in a deed of conveyance in fee of Lots 19, 20, 21, 22, 23, 24, in block No. 4, in Collins' Addition to the town of Naples. The deed was executed to Bailey by said Moore and Munn, and by Charles Collins and his wife, on the 1st day of September, 1836.

The declaration is in the usual form in such cases, averring the death of Collins before the suit, and averring that said Collins' Addition to Naples, was laid out upon the east half of the north-east quarter of section 13, in township 15 north, and range 14 west of the 3rd principal Meridian of Illinois, and assigning, as a breach of the covenant, that one Catharine Lynch, on the 7th of March, 1843, entered upon the premises described in the deed, and upon the land on which said lots were laid out and located, (having paramount and better title to the same, not derived from said plaintiff, Bailey,) and ejected and expelled the said Bailey from the same, and that said Catharine, and persons claiming under her, have from that time to the present, withheld possession of said premises from said Bailey.

By stipulation of counsel, the defendants were to file the plea of "*Non est factum*," and under that plea, they might jointly or severally give in evidence any matter of defense that would be good if specially pleaded—joint defense, statute of limitations—several defense of Ira Y. Munn, that he was discharged and certificated as a bankrupt by the District Court of the U. S. for Illinois, on the 7th February, 1843, under the act of Congress of August 19th, 1841.

The cause was tried by the court, WOODSON, Judge, without a jury, upon the following evidence, and the written stipulation of counsel, to admit the following facts as proven:

1st. That the east half of the north-east quarter of section 13, in township 15 north, range 14 west of the 3rd principal meridian in Illinois, was patented by United States to Isaac Keyes, on the 21st of January, 1829.

2nd. That said Keyes conveyed said land in fee simple, by deed with warranty to Patrick Lynch, September 16th, 1831.

3rd. That said Lynch conveyed said land in fee simple, by deed with warranty to Charles Collins, April 18th, 1836.

4th. That said Collins conveyed in fee simple, by deed with warranty, one undivided third of said land to each of said defendants, Moore and Munn, on the 4th of June, 1836; reciting and stating in both said deeds, that said tract of land is situated immediately adjoining the old town of Naples, and includes Charles Collins' Addition to said town, and being the same land bought by said Collins of Patrick Lynch.

5th. That in the year 1835, and before said Lynch conveyed to Collins, three judgments were obtained against Lynch, which were liens upon the land when sold by him to Collins. Executions upon these judgments were levied upon said land and the same sold on the 23d of January, 1836, to Amos Bonesteel, and the land not being redeemed, Bonesteel obtained a sheriff's deed on the 2nd July, 1839, and thereby acquired the title in fee.

6th. Said Charles Collins was, during the year 1838, by his tenant, William Dunbar, who occupied and cultivated the same, in possession of said land; and Dunbar continued to occupy and cultivate the same until the 1st March, 1840. In February, 1839, said Bonesteel and Dunbar executed a sealed lease of said land for one year for $100 rent, payable by Dunbur to Bonesteel the 1st February, 1840. Bonesteel sued Dunbar for said rent, and obtained judgment at the October term, 1840, of the Scott Circuit Court, which was affirmed by the Supreme Court, (see 3 Scam. R. 32.) The pleadings in said case are admitted to be as recited in the opinion of the court.

7th. Catharine Lynch acquired title in fee simple to said land, from said Bonesteel and his mortgagees, on the 7th of March, 1843, by deed of that date, made in pursuance of a decree in chancery, and was on that day in actual possession of said land, claiming title to the same, and she and her grantees in fee have continued in possession, claiming title, to the present time.

8th. Patrick Lynch died in the fore part of the year 1837—said Charles Collins died in the year 1849.

9th. The plaintiff, Bailey, never was in actual possession of the premises conveyed to him by Moore, Munn and Collins, as above stated; nor was he ever in actual possession of any part of the east half, north-east quarter, section 13, township 15 north, range 14 west, above mentioned.

10th. The defendant, Munn, obtained a certificate of discharge in bankruptcy, by the District Court, U. S. for Illinois,

on the 7th of February, 1843, under the act of Congress of August 19th, 1841, upon his petition filed July 6th, 1842.

11th. Said Charles Collins and his wife Adeline, (the latter relinquishing her dower therein,) and defendants, Moore and Munn, on the first day of September, 1836, executed and delivered to the plaintiff in this suit, the deed with covenant of warranty, which is the foundation of this suit.

12th. All the aforesaid deeds and conveyances were, at their dates, duly acknowledged and recorded in the counties where said town lots and land were then situated.

The plaintiff, Bailey, also offered in evidence the deed in his declaration mentioned, and the following receipt, which was admitted to have been signed by Charles Collins, one of the grantors of the plaintiff:

"Received, Naples, February 22nd, 1840, of William Dunbar, one hundred dollars in full for rent of the Lynch farm for 1839.

CHARLES COLLINS."

The plaintiff then proved by *Holloway W. Vansyckle*, that witness resided in the town of Naples, from some time in the year 1836 up to 1850; that witness was well acquainted with Charles Collins and William Dunbar; that said Dunbar occupied and cultivated the east half of the north-east quarter of section 13, in township 15 north, range 14 west of third principal meridian in Illinois, (commonly called the Lynch tract or farm,) during the years 1838 and 1839, and to the Spring of 1840; that witness saw Collins and Dunbar frequently during the years 1838 and 1839, and understood from both of them in conversation had with them during those years, that said Dunbar was occupying said land as the tenant of said Collins; that said land lies in the immediate vicinity of Naples, and witness knows that Dunbar boarded a number of hands for Collins in the year 1838; that witness never knew nor heard that Amos Bonesteel claimed to be the landlord of said Dunbar, or to be entitled to the rent of said land for the year 1839, until after the trial between Bonesteel and Dunbar, at the October term of the Scott Circuit Court, 1840; that the prices of lots in Collins' Addition to Naples, on the 1st of September, 1836, varied from fifty to seventy-five dollars each. Witness also stated, upon his cross-examination, that he had no personal knowledge of the lease or contract between Collins and Dunbar, respecting the rent of aforesaid premises.

The plaintiff also proved by *George M. Richards*, that he resided in the town of Naples from some time in the Spring of 1837, to some time in the Spring of 1839, when witness removed about eight miles from there, but was afterwards often at Naples. Witness was well acquainted with Charles Collins and

William Dunbar, and knows that said Dunbar occupied and cultivated the east half of the north-east quarter, section 13, township 15 north, range 14 west of the third principal meridian in Illinois, (commonly called the Lynch tract or farm,) during the years 1838 and 1839, and to the Spring of 1840; that said tract of land lies in the immediate vicinity of Naples, and witness understood from both said Collins and Dunbar, in conversations had with them in the years 1838 and 1839, that said Dunbar was occupying said land as the tenant of said Collins, and witness some time in the Spring of 1839, went on to the aforesaid premises, and obtained from Dunbar for said Collins, some corn towards the rent due Collins for the year 1838. Witness knows that Collins had a number of hands boarded at Dunbar's in the year 1838. Witness never heard or knew of Amos Bonesteel claiming, or having anything to do with the rent of said land for the year 1839, except that said Dunbar, in a conversation with witness, sometime in the latter part of 1839, said he didn't know but he had got himself into a snap; he had promised to pay rent to both Collins and Bonesteel, and he reckoned he would have to pay rent to both of them. Witness stated that the prices of lots in Collins' Addition to Naples, varied in 1837 from fifty to seventy-five dollars each. Witness stated, on his cross-examination, that he had no personal knowledge of any lease from Collins to Dunbar, for said premises.

Plaintiff then proved that defendants, Moore and Munn, and said Charles Collins, sold, on the 1st of September, 1836, a number of lots in block four, of Collins' Addition to Naples, for seventy-five dollars each.

Plaintiff also proved that defendant, Moore, was the security for said Dunbar, on the appeal bond for appealing the case of *Bonesteel* v. *Dunbar*, for the rent of above land for 1839, from the Scott Circuit Court to the Supreme Court, and decided by the latter at the July term, 1841.

Upon the foregoing evidence the Circuit Court found for the defendants, and judgment was therefore rendered that the plaintiff take nothing by his suit, and that the defendants recover of the plaintiff their costs therein expended; from which judgment the plaintiff appealed to this court.

Stryker & McClure, for Appellant.

D. A. and T. W. Smith, for Appellees.

Caton, C. J. The certificate of discharge by the court in bankruptcy was a release of Munn from his liability upon this covenant. *Bates* v. *West*, 19 Ill. R. 134. The only remaining question in this case, not settled by the decision in *Moore* v.

Dodd, 17 Ill. R. 185, is, whether the lease which Dunbar took of Bonesteel constituted an eviction of the grantees in the deed, and was a breach of the covenant of warranty. This lease was executed in February, 1839, at which time Dunbar was in possession of the premises, under a lease from and as tenant of Collins, one of the grantors in that deed. By taking the lease from Bonesteel, Dunbar could not discharge himself from his obligations as the tenant of Collins, and thrust Collins out of the possession of the premises, unless he had a right to attorn to Bonesteel. The tenant had only a right to attorn to one who had acquired the title of his landlord; he had no right to attorn to one who had acquired an outstanding title hostile to that of his landlord, although it might be a better title. But admitting that the tenant had a right to attorn to Bonesteel, and renounce Collins as his landlord, after Bonesteel received his sheriff's deed, until that time he had no such right, for Bonesteel had no title, and he was in law as much a stranger to the premises as if he had not purchased them at the sheriff's sale. That deed was not executed until July, 1839, five months after the execution of the lease. When he took the lease of Bonesteel, he could do no act to the prejudice of Collins, his landlord, nor does it appear that he ever attempted to avoid the payment of rent to Collins. The truth is, no doubt, that he paid rent to both, for this court held in 3 Scam. R. 34, that having taken a lease of Bonesteel and agreed to pay him rent, he was bound to do so, and that he should not be permitted to say that he had no authority to lease the premises, although he might also have to pay rent to Collins for the same premises and the same term. It was his own folly if he agreed to pay rent twice. Certain it is, that by the well settled rules of law, Collins was not ousted of his possession by this lease. The law would have protected him and Bailey his grantee in that possession, until Bonesteel should turn them off by an action of ejectment. Afterwards it is true they voluntarily abandoned the possession and left the premises vacant, in which condition they remained till Mrs. Lynch took possession in 1843. If Collins was in a position to maintain his possession, and insist that the occupancy by Dunbar was in law his possession, he could not, if now living, be permitted to say that he was ousted of that possession and evicted from the premises, when by so doing, he could interpose the statute of limitations to defeat a recovery for a breach of his covenant of warranty; nor can the other parties who joined with him in the execution of the deed. We are of opinion there was no eviction till 1843, and consequently till that time, there was no breach of the covenant, and till then, the cause of action did not accrue.

The judgment is reversed and cause remanded.

Judgment reversed.

The People, Plaintiffs in Error, *v.* Thomas Worthington, Defendant in Error.

APPEAL FROM PIKE.

The legislature has the right, under the constitution, to impose a tax upon all credits, whether for land sold, and unpaid for, or otherwise. Money loaned, as also money due for land, is taxable, whether the land has been conveyed or not.

This is a case arising under the revenue laws of this State, and comes up from the county of Pike. It appears by the papers filed in this case that the defendant sold several tracts of land previous to April 1, 1857; that part of the purchase money was paid down, and notes taken for the payment of the balance; that Worthington executed bonds for deeds in some cases, and in others, deeds, and took mortgages.

That none of said lands were taxed in the name of said Worthington for 1857, but in the names of the purchasers.

That Worthington refused to list said notes for taxation for 1857; that the assessors of the town of Pittsfield, thereupon assessed against said Worthington, for moneys and credits, $60,000, and notified him thereof, and of the time and place of the meeting of the board of reviewers.

At the meeting of the board of reviewers said defendant appeared, refused to make affidavit as to the value of said notes, but offered to exhibit said notes and the contract upon which they were made, and filed with said board his protest. The board thereupon reduced the assessment to $26,314.

That said Worthington took an appeal to the board of supervisors to their September meeting, 1857; which board, at their September meeting, 1857, made a total abatement of the above assessments.

The lands above referred to, were sold for between thirty-five and forty thousand dollars.

The action of the board of supervisors and the facts herein, were then certified to the auditor of public accounts, by the county clerk of Pike county, October 16, 1857.

The petition of the defendant to the board of supervisors states, that if defendant were compelled to pay tax on the notes he would be subject to double taxation, as he was bound to see that the taxes on said lands were paid, or lose his lien thereon, retained to secure the payment of the notes, etc.

The auditor thereupon notified the county clerk of Pike county, of his objections to the decision of said board of supervisors, and of his intention to apply to this court to have their decision set aside, under the provisions of the revenue laws.

This case has been twice argued in this court.

It is insisted on the part of the auditor, that the notes are taxable property, and were properly listed or assessed for taxation, and that the board of supervisors erred in abating or cancelling said assessment.

J. B. White, and Logan & Hay, for the People.

J. Worthington, *Pro se.*

Caton, C. J. The second section of the ninth article of the constitution declares that: "The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." The first question to be considered is, what is meant by the word property, as here used? What did the framers of the constitution intend to make the subjects of taxation? The word property is not alone used in our language to denote tangible things, but is properly applied to denote intangible rights of value. One may have a property in a patent right or a copy right, which is as much ideal as is a right of action. We may safely assume that it was the policy of the convention which framed this clause of the constitution, that each person pay a direct tax in proportion to the pecuniary interests which he has in the State, and to be protected and defended by the laws. While this policy dictated the clause, it must have been known that to do so absolutely, was impossible. No system of revenue laws was ever yet framed, and none can ever be framed, which will practically carry out this system in perfection. A thousand insurmountable difficulties intervene to prevent its impartial execution. Some properties are so intangible that they cannot practically be reached, or so imaginary in value that they cannot be justly estimated. This may be so of a copy right or a patent right or a franchise, all of which may have value, and are, therefore, properties; and yet, so far as we are advised, no State has ever undertaken to make them the subjects of direct taxation. The convention must have known that a requirement of the legislature, to enumerate as the subjects of taxation, every thing, and every right, and every claim which might properly be termed property, and to enforce from it a direct revenue, in proportion to its actual intrinsic value, could never be complied with, and the most that could have been intended was, that it should approach as nearly to it as was practicable. To require it absolutely is utopian, and not to be attained by mortals. The more, however, it is found practicable to subject all to this direct tax, the nearer is this consti-

tutional requirement approached, and consequently it is impossible to conceive of a constitutional objection that it has embraced any species of property which it is practicable to assess, by fixing a determinate value upon it. And yet such is one, if not the principal objection here. If the objection be that notes and mortgages, and other securities for moneys due or to become due, are made the subjects of taxation, the objection can only be sustained upon the ground that the rights evidenced by such papers, are not property. This is to assume that it was the intention of the convention to use the word property in its most limited sense, as embracing only things physical and tangible. Thus to limit the subjects of taxation would establish an inequality more unjust and oppressive than any thing which is ever likely to occur from the system adopted by the legislature under the constitution. The burthens of taxation would then fall upon those who are least able to bear them, while those who would be the least incommoded by the payment of taxes, would escape altogether. At least, this would be the case to a very great extent. Those whose fortunes are invested in money loaned, and whose income is the interest thereof, while they require as much the protection of the government, and are more expense to it in the enforcement of their rights, than any other class of citizens, shall these escape taxation altogether, and those to whom the money is loaned, and who have invested that money in lands and stock, and other tangible property, be required to bear the whole burthens of the State? The very statement of the proposition must shock the sense of right and justice of every man. Such never could have been the design of our constitution. The constitution means as it declares, that each shall pay a tax in proportion to the property which he has, whether that property consists of farms or mortgages; of visible substances or choses in action. It is not to be denied that this rule of taxation must in some, nay, in many instances, operate unequally and even oppressively; and such may be the case of the defendant here. He sells a piece of land and gives a deed, and takes notes and a mortgage to secure the purchase money. He is taxed for the amount due on the mortgage, and the purchaser is taxed for the land, and if the purchaser neglects to pay these taxes, then the seller must do it himself or lose his security. This is a hardship, no doubt, but like many other hardships which befall mankind, it results from the failure of another to perform his duty, and must be provided against by greater caution in selecting a purchaser, or in seeking satisfaction of him, for the taxes paid on the land. It may be true, in one sense, to say that it is double taxation to tax the horse which is sold and also the note which is given for the purchase

money; and so is it to tax the note which is given for one hundred dollars borrowed money, and also the money which is borrowed; and so we might go on throughout the whole system of human transactions which involves a credit for things tangible, which are within the State and subject to taxation; and even so it is, if they are beyond this State, for the presumption is that they are taxed wherever they may be. Whatever rights, credits or choses in action which may be taxed, are so much over and above the money and other physical objects within the State, and are in the same sense, double taxation; for those very credits must ultimately be paid with those physical objects, if they are ever paid. To say there shall not be double taxation in this sense of the term, is at once to say that no credits of any sort shall be taxed; and all those whose fortunes consist in loaned money or other credits, must be allowed the benefit and protection of the laws, and be exempt from the burthens incident to the making and enforcing them. If, in any country, this has been deemed just and equal, such is presumed not to be the case generally, where direct taxation is resorted to.

It can hardly be necessary to say anything in vindication of the right of the people, in their primary capacity when framing their constitution, to exempt from taxation or to tax, either rights or credits, or any other interest or property. No provision of the Federal Constitution has been referred to, restraining the exercise of such right by the people of the State; nor is there any compact between the Federal and State governments forbidding it; and if not thus restrained or forbidden, the right of taxation in the State is as absolute and unrestrained as it is in the parliament of Great Britain, or in any other government. Although we might think that the provisions of the constitution on the subject of taxation are unjust and unequal, or even arbitrary and oppressive, neither the legislature nor the courts can, for any such reason, disregard them. It is the duty of all to bow to the supreme majesty of the constitution, as embodying the will of the people by whom it was adopted. The only legitimate inquiry upon this point then is, what is the true meaning of that portion of the constitution which confers upon the legislature the taxing power?

To ascertain what was intended to be embraced within the meaning of the word property, it is proper to remark that the same word was used in the old constitution and in the same connection. The corresponding provision in the old constitution was in these words: "That the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has, in his or her possession." In order to bring the two directly together, it may be well to

repeat the quotation from the new. It is this: "The General Assembly shall provide for levying a tax, by valuation, so that every person and corporation shall pay a tax to the value of his or her property." If there be any difference in the two provisions, that in the new constitution is the broadest, the first only in terms subjecting property *in possession* to taxation, while there is no such restriction in the last. We will now examine what meaning was given to the word property during the thirty years the old constitution continued in force. The first section of the old revenue law, under that constitution, was this: "All property, real and personal, within this State, shall be liable to taxation, subject to the exceptions hereinafter stated." The third section is as follows: "The term personal property, shall be construed to include all household furniture, goods and chattels, all ships and vessels, whether at home or abroad, all moneys on hand and moneys loaned, whether within or without the State, all public stocks, stocks in turnpikes, bridges, insurance companies and moneyed corporations; also, all commissions, and every species of property not included in the description of real estate." With this broad, though proper, explanation of the meaning of the word property before them, showing how it had been understood and applied in the old constitution, when the same word was used in the same connection by the convention which framed it, can any one doubt how they intended it should be there understood? Had they intended that it should there receive a more restricted meaning than had been ascribed to it in the old constitution, they would, beyond doubt, have distinctly expressed such intention. Their silence on the subject is equivalent to an express declaration that the word should continue to have as broad a signification as had been before given to it. But, as if to silence all cavil or dispute about the power of the legislature to impose a tax upon everything of value, whether tangible or intangible, the last section of the same article of the constitution provides as follows: "The specifications of the objects and subjects of taxation, shall not deprive the General Assembly of the power to require other objects and subjects of taxation to be taxed in such manner as may be consistent with the principles of taxation, fixed by this constitution." The principle of taxation here referred to is, undoubtedly, the *ad valorem* principle, except in the cases specified in the last part of section two of the ninth article, where the legislature is authorized to depart from the *ad valorem* principle.

With such unmistakeable evidence of the intention of the convention, as to what they intended to authorize and even require to be taxed, we cannot doubt, and probably no one else

will doubt, that the legislature had authority to impose a tax upon all debts according to their real value. Of the right of the people to confer this power upon their legislature, by their constitution, we have already spoken, and will again refer to it, presently.

After the most careful consideration which we have been able to give this subject, with the assistance of a second argument of the cause, we are very clearly of the opinion, that the legislature had the right to impose the tax upon all the rights and credits which were due to the defendant, as well as to those due to all others.

We have thus far considered this question as if it were now for the first time presented to this court for its consideration. Such is not the case. It has, in fact, been already twice decided by this court. The first is the case of *Trustees, etc.* v. *Mc Connell*, 12 Ill. R. 138, where we held that money loaned was a proper subject of taxation. It was held to be property under our constitution. Again, in *The People, etc.* v. *Rhodes*, it was held, that money due for land sold by contract, but not conveyed, was the proper subject of taxation, as well as the farm, the title to which Rhodes still held for the security of the purchase money. The objection in this last case, like the one before us, was, that it was a double taxation; but a little reflection will show that it was no more so, than in the case of loaned money, or credit given for any other consideration. Take the case of loaned money: there the money in the hands of the borrower, as well as the credit or evidence of the debt in the hands of the lender, is taxed, and that is in the same sense a double taxation. And so of any other credit given for any other consideration. The credit is taxed in the hands of one, and the thing or subject matter for which the credit was given, is taxed in the hands of the other. Whenever a credit is given, a new *property* is created in the hands of the creditor, which before did not exist, and when the debt is paid, that property is annihilated. This is a kind of property which is not the product of manual labor. When political economists speak of property as the product of physical labor, they can only mean physical property; and they cannot refer to this ideal property, which is created only by the giving of credit. And yet, this last is embraced within the true definition of property as expounded by all law writers and lexicographers. It is synonymous with estate, when applied to or speaking of human wealth. A man may be as truly worth a thousand dollars, or have wealth to that amount, when it consists of well-secured credits, as when it consists of lands or coin. The man who has a farm worth a thousand dollars, sells it to one who has nothing, and

takes his bond and mortgage for the purchase money; he is no poorer by the operation. He is still worth the thousand dollars, although it is in a different form. Then his wealth consisted in a physical, tangible object—the farm—now it consists of an intangible, ideal subject—the credit—but he is, nevertheless, as rich as he was before; and for this wealth, in this form, may be as justly taxed now, as then. It may be true that the purchaser is no richer than he was before, but still he may be taxed for the farm which he owns and has in his possession, although he owes as much for it as it is worth. It is undoubtedly true, that both together are now worth no more in the aggregate than they were before, while in fact they are together taxed to twice the amount which they were before. Here, then, is, if you please, a double taxation, when you aggregate the entire interests of the two, and view them as concentrated into the hands of one representative, but this right of double taxation is not so hostile to the natural right of the citizen or subject, so shocking to our sense of justice, and so subversive of divine law, as to forbid its adoption in the fundamental laws of civil society. Nay, so far from this, its reasonableness and justice have so commended it to the general sense of propriety of mankind, that it has generally, if not universally, been adopted in civilized states, as well the most free, as the most despotic; and that, too, without a murmur of complaint, even by those great and enlightened statesmen and jurists, who laid so deep and substantially the foundations of this Republic, or who have framed the constitutions of the several States. It is not for the courts to say, that the advancement and enlightenment of the present day, have so far dispelled the clouds which obscured the understandings of those who have gone before us, that we may say, the exercise of this right was but a usurpation of power by society itself, which no time could sanction and no acquiescence could approve. It is beyond dispute or cavil, that it was the intention of the framers of the constitution that the property in credits should be taxed, and that they intended, not only to sanction, but to enjoin this sort of double taxation, and the whole is reduced to a question of power in the people, in adopting their organic law, thus to declare. Of their power so to do, we cannot doubt. It is not for us to question or to vindicate the policy which dictated this provision. With all those arguments, the object of which is to show that the true principles of political economy have been violated in thus taxing trade and commerce, the transfer of property on credit, and the loaning of money, by those who have not the industry or the capacity to profitably use it, and thus enrich the State, to those who possess both, we have nothing to do. Ours is the more

humble province of determining the true intent and meaning of the law makers, when they enact within the pale of their power. We have no doubt that the people had the right, in framing their constitution, to direct this tax to be levied, and that the legislature when imposing it, but carried out the intention of the constitution in letter and in spirit.

The judgment below is reversed, and the judgment of the Board of Reviewers is affirmed.

Judgment affirmed.

Marvel C. Walters, Administratrix, etc., Plaintiff in Error, *v.* The People, on the relation of Nathan Beadles, Defendants in Error.

ERROR TO FULTON.

Possession and occupancy, when applied to land, are nearly synonymous terms, and may exist through a tenancy. The definition of the word occupancy as given in a case between these parties in 18th Illinois, 194, approved.

Occupancy of the "homestead," may be by means other than that of actual residence on the premises, by the widow or child.

The abandonment of the homestead by a widowed mother, would not prejudice the rights of the children.

This opinion of the court, was upon a rehearing of this cause, as reported on page 194 of the eighteenth volume of these Reports, where the facts are fully stated. The petition for a rehearing was filed by the defendants in error.

Ross & Shope, for Plaintiff in Error.

Goudy & Judd, for Defendants in Error.

Breese, J. The question to be determined is, how is the homestead to be occupied? In the opinion pronounced in this case, (18 Ill. R. 194,) a definition was given by the court of the term "occupancy," which we approve. "Occupancy" and "possession," when applied to land, are nearly synonymous, and may in contemplation of law, exist in the same manner by and through a tenancy.

In the case of *Kitchell* v. *Burgwin and Wife*, *ante*, p. 40, we have said, that the debtor himself, to have the benefit of the exemption of the homestead, must show that it is the actual residence of the family, but it is not necessary when a home, residence or settlement has once been acquired on lands, that there

should be continuous, actual occupation to secure the land from forced sale. If the citizen or family should leave in search of another home, the first would remain until the second should be acquired. If a husband remove his wife and family into another county, and without providing them a home, abandon his wife, she might again resume possession of the homestead.

Our act (Scates' Comp. 576,) provides, sec. 1, "That in addition to the property now exempt by law from sale under execution, there shall be exempt from levy and forced sale under any process or order from any court of law or equity in this State, for debts contracted from and after the fourth day of July, A. D. 1851, the lot of ground and the buildings thereon occupied as a residence, and owned by the debtor being a householder and having a family, to the value of one thousand dollars. Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead until the youngest child shall become twenty-one years of age, and until the death of such widow."

This requirement,—"some or one of them continuing to occupy such homestead," can, in our judgment, be fulfilled by means other than the actual residence by the widow or child, if there be one, on the lot or premises. It is evidently the intention of the act, to give the widow and family a home, which shall be not only her refuge in her affliction, but afford her means of support for herself and her children. Besides, great care is expressed for the children, by the provision that the exemption shall exist until the youngest shall become twenty-one years of age, making no distinction between males and females, to the latter of whom, the exemption is extended three years beyond their majority. Now by what process can this youngest child be deprived of the right secured to it by this act? Suppose it was a child at the breast, and an orphan, the mother having died also, would it be contended, that the little infant must actually reside on the lot? Would not occupancy of the premises by a tenant fulfill the requirements of the statute? How else could the infant enjoy the benefit of the exemption expressly given, until he or she shall become twenty-one years of age?

The widow in this case, became a mother after the death of her husband, and under the circumstances stated in the evidence, and whether that departure from her home was an actual abandonment or not without the *animus revertendi*, can make no possible difference, as it is not her alone but her infant child also, whose interests, raising, sustenance and life are involved, that are to be considered. She could do no act by which the child can be deprived of the right secured to it. Her abandonment of

the homestead could not prejudice it. Its rights do not depend upon her, nor can she waive them, or destroy them. In a just sense of the law then, she is considered as occupying for the benefit of her child as well as herself, though such occupancy may be by tenants.

We do not see any reason for disturbing the decision as already pronounced. We did think the timber tract of twenty-two acres ought in justice be exempted also, as necessary for fuel to support the homestead, but as the statute confines the exemption to one lot of ground only, and this is not adjoining, but a mile distant, it is difficult to say they constitute but one tract, and we have not the power so to decide. That tract will be sold to pay the debts, whilst the homestead tract of seventy-two and one-half acres, will be exempted for the benefit of the widow and her infant child. We adhere to the former decision of this court.

John Crabtree, Plaintiff in Error, *v.* William Kile *et al.*, Defendants in Error.

ERROR TO EDGAR.

In impeaching the credit of a witness, his general reputation is the subject of inquiry, not particular facts. The impeaching witness must be able to state what is generally said of the person to be impeached, among his associates.

It is error to permit one witness to speak of the character of another, unless he knows what the general character of that other is.

Where a vendor of chattles, having title, sells with warranty as to quality; and a consideration is given, and possession is taken under the sale, the vendee must rely on the contract of warranty, to recover for any loss resulting from defects covered by it. And the vendee, without the concurrence of the vendor, cannot rescind the sale, so as to revest the title in the vendor. Therefore a notice of the defect or an offer to return the property is unnecessary, in order to recover damages.

Damages for a breach of warranty of chattels sold, may be recovered in an independent suit, or they may be set off, in an action on the contract for the sale of them.

Where diseased cattle were sold, under a warranty of their healthiness, the measure of damages is the difference between the contract price agreed upon for healthy animals, and their value as diseased animals at the time of delivery, together with any other immediate injury resulting from the breach of warranty.

If cattle were bought, warranted to be in health, the purchaser notifying the seller at the time, that he designed to ship them directly to New York to sell for beef—and he did so ship them, the purchaser may recover for loss and expenses incurred, on those that showed disease or died on the passage.

THIS was an action of assumpsit, brought by Kile & Nichols originally in the Edgar Circuit Court against John Crabtree, on a promissory note, dated October 4th, 1856, for $2,550.00, executed by Crabtree to Kile and Nichols, for a lot of eighty-one head of fat cattle sold by plaintiff to defendant, and removed by change of venue to Coles county.

The declaration contains a special count upon the note, and the usual common counts.

The defendant pleaded the general issue, with notice that he would give in evidence that the note was executed in payment for a lot of fat cattle sold by plaintiff to defendant for the New York market; that the plaintiff warranted the cattle sound and free from the disease called milk sick or trembles; that said cattle had the disease at the time, and that it developed itself on the way to New York, to which market the defendant shipped the cattle, and that about forty head were lost and died on the way, in consequence of it; also that the residue of the cattle, in consequence of their diseased condition, were of no value in market and wholly lost to defendant, by reason of which he sustained great damage by the said breach of the warranty of the plaintiffs, and incurred necessarily heavy expenses in doctoring and taking care of the cattle, and by the delays occasioned in consequence of the diseased condition of the cattle; all of which he wishes to set off by way of recoupment against the plaintiff's claims on the note, and asks judgment for the balance that may be found due him.

There were, also, notices of other grounds of defense, in consequence of the diseased condition of the cattle which the defendant proposed to offer in evidence, founded on deceit, fraudulent concealment, fraudulent representations of the plaintiff, etc., going some to partial and others to entire failure of the consideration of the note sued upon, and by way of recoupment and set-off.

On the trial of the case the plaintiff offered in evidence the note which is in the words and figures following:

$2,550.00. *Paris, Illinois, Oct. 4th,* 1856.

Twenty days after date I promise to pay Kile & Nichols or order, twenty-five hundred and fifty dollars, for value received.

Signed, JOHN CRABTREE.

With the following credits endorsed upon it: "Received, Nov. 4th, 1856, on the within note, one thousand dollars. Kile & Nichols." "Credit on the within note by twelve steers, at thirty-four dollars each, being four hundred and eight dollars. Oct. 12th, 1856. Kile & Nichols."

And the plaintiffs then rested their case.

The defendant then offered in evidence the foregoing credits on the note, and proved by *J. W. Blackburn* that Kile, one of the defendants, admitted the note was given for the eighty-one head of cattle. That he was acquainted with Kile and Nichols farm, at Mulberry Grove, and that milk sick prevailed in that vicinity in 1846–7, and since; that the grove is three miles long, with a slough through it; that the disease is generally supposed to be east of the slough in the heavy timber; that the house is two or three hundred yards west of the slough; that the slough runs into a pasture or feeding lot; the milk sick prevails only in the fall, after frost, and prevails most in dry seasons.

Claybaugh proved that he was present when defendant bought the cattle, that the plaintiff, Nichols, insured them sound and free from milk sick or trembles; that defendant informed Nichols at the time, that he was buying for the New York market, and that he did not want them if they had trembles or had run where they could get it; that Nichols again repeated that he would insure them free from milk sick, and that they had not run in the grove where it prevailed. Defendant then agreed to take them on these conditions, at $34 per head, eighty head of them; this was the latter part of September, 1856, near the last, or perhaps the 1st day of October. No one was present when the bargain was closed, but plaintiff Nichols, defendant and witness. The cattle were to be divided the next day, or within a day or two; Crabtree was to have the pick out of the whole lot of cattle which was on the farm. Where Crabtree lived, there was no milk sick.

John Hayns proved that he went with the defendant Crabtree, after the cattle, that while they were separating them in the lot where they were, Crabtree said that if they had the sick stomach or trembles, he did not want them. Nichols said he need not be afraid, he would insure them free from it; that they had not run in the grove where it was.

Several other witnesses swore to the fact of the warranty, and also that the cattle were diseased; that some of them died on the route to New York, and that others were left on the way; that they were sent forward soon after they were purchased, by railroad to New York, for sale, for beef.

Titus, introduced by defendant, stated he was acquainted with the general reputation of Lacy, (a witness sworn for defendant below,) for truth and veracity; think I have heard a majority of his neighbors speak of it; they don't speak well of it for truth and veracity.

French, also, proved that his reputation for truth and veracity was bad.

The defendant objected, at the time, to the evidence of witnesses in reference to Lacy's character, and asked the court to exclude it, because said witnesses did not state that they knew his general character for truth and veracity, or that they had ever heard a majority of his neighbors speak of it. The court overruled the objection, and permitted the evidence to go to the jury.

On the examination of Moses Crabtree in chief, the defendants asked the following question: "What expenses were necessarily incurred in consequence of the cattle being diseased, and the disease developing itself on the way?" to which the plaintiff objected, and the court sustained the objection and did not permit the witness to answer; and the defendant excepted to the ruling of the court sustaining the objection, and refusing to permit the witness to answer.

There was a trial by jury before EMERSON, Judge, and a verdict and judgment for plaintiffs, in the court below, for the whole amount claimed.

A. GREEN, and READ & BLACKBURN, for Plaintiff in Error.

LINCOLN & HERNDON, for Defendants in Error.

WALKER, J. That the credit of a witness for veracity may be impeached by general evidence, is one of the well established rules of law. But in *impeaching* the credit of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts. The regular mode of examining into his general reputation is to inquire of the witness, whether he knows of the general reputation of the person in question among his neighbors, and what that reputation is. The practice in the English courts is to further inquire, whether from such knowledge he would believe that person upon his oath. The inquiry must be made as to his general character, where he is best known. It is not enough that the impeaching witness merely states what he has heard "others say," for they may be few. He must be able to state what is *generally said* of the person by those among whom he associates, and by whom he is known; for it is this only that constitutes his general reputation or character. And it is error to permit the impeaching witness to speak to the character of the person unless he is acquainted with such general character. In this case, neither of the witnesses, Dole and Wright, state that they knew what Lacy's general character was, and consequently their evidence in regard to his character for truth and veracity, was improper, and should have been excluded by the court, when asked by defendant.

The inquiry also arises as to the right of defendant to recover damages on this warranty, and whether they may be set off in this suit, and as well as the measure of damages on a breach of warranty on the sale of these cattle. The rule is laid down by Chitty that, "It is not necessary to offer to return the goods previous to an action for the breach of an express warranty, or at any other time. The purchaser may resell, and declare specially for the loss, or difference; nor is there any occasion even to give *notice* of the breach of warranty to the seller; but the not giving such notice will be a strong presumption against the buyer that the goods, at the time of the sale, had not the defect complained of, and will make the proof much more difficult. If there has been no offer to return the goods, the measure of damage is merely the difference between the sum given and the real value, although there has been no resale by the vendee." Chit. Cont. 362. And the same rule is laid down by Story, in his work on Sales, 393, and it is believed to be the true rule. And, "where the vendor of a warranted chattel, whether it is a specific chattel or not, sues for the price or value, it is competent to the defendant, the purchaser, in all cases, to prove the breach of warranty in *reduction of the damages;* although the goods were sold at a fixed price and have not been returned, or have been resold by the defendant, the vendee." Chit. Cont. 363.

These authorities seem to proceed upon the ground that when the vendor has title and sells with warranty as to quality, and the purchase money is paid, or notes or bills given, and possession taken, and nothing farther remains to complete the sale, that the title passes, and the vendee must then rely on the contract of warranty to cover any loss resulting from defects covered by the warranty. And that he, by no subsequent act of his, without the concurrence of the vendor, can rescind the contract and revest the title to the property in the seller. And for that reason a notice of a defect, or an offer to return the property, is not necessary. The rule may be different in cases of a breach of warranty of title, which is not necessary to be determined in this case. And in case of fraudulent sales, as the purchaser upon discovering the defect has the right to rescind, it may be that he should give notice or offer to return before he can recover back the purchase money. We cannot perceive any reason why the party, when he has received the property with the warranty, that he should be required to give notice, or to return the property, before he may maintain an action for a breach of the warranty. The sale is not conditional, that the title shall only pass in the event that the contract of warranty is not broken. And if it is a complete cause

of action without offering to return, or of giving notice of a breach of the warranty, the damages may be set off in this case, notwithstanding they are not liquidated, as they grow out of the contract sued upon. *Nickolls* v. *Ruckells*, 3 Scam. R. 300. Or they may be given in reduction of damages, when the suit is for the purchase money.

The ordinary remedy on a breach of warranty of this kind, where the price has been paid, is by an action upon the warranty. In such an action he may recover the difference between the price paid and the actual value of the property at the time and place of delivery, with all its defects and vices. So, also, if he sustain other additional injury which is the immediate result of the breach of warranty, or a natural incident thereto, he may recover damages therefor. Story on Sales, sec. 454. The measure of damages in this case would, therefore, be the difference in the contract price and the value of the cattle at the time of their delivery in their then diseased condition, together with any other immediate injury resulting from the breach of warranty. These cattle were purchased to be put immediately into the New York market, for beef, and this the defendant in error knew when he made the warranty of soundness. They were not purchased for feeding purposes, nor as cattle diseased with the milk-sickness, to be treated and cured on speculation. And their value at the time of their purchase and delivery must be fixed with reference to the purposes for which they were purchased, and not with reference to other objects not contemplated by the parties at the time. The plaintiff in error had no knowledge of the cattle being diseased until after he had removed them, nor is there any evidence in the case that such cattle could have been sold to persons with a knowledge of their diseased condition. The plaintiff in error had the undoubted right to rely upon the warranty, and to act in good faith upon the supposition that they were sound, until the disease manifested itself; and then he had a right to sell them for the best price he could obtain for such cattle. He was not bound to change his purposes and delay his trip for weeks, months, or even longer, to see if those attacked with disease would recover, nor was he bound to find a speculator and dealer in diseased cattle, affected with milk sickness. If he acted in good faith and with prudence in freighting the cattle, he had a right to recover the expenses incurred on those that died or manifested disease, which they had when purchased, before reaching New York. But after discovering that they were diseased, it became his duty to dispose of them without incurring further expense, and if he did so, such expense would not be the proximate and natural

consequence of the breach of warranty, and would not be recoverable.

If there was fraud in this case, then, to have rendered the sellers liable for the costs of keeping the cattle left on the way, notice should have been given to them of the intention to rescind the contract. But in this case there was no such notice, nor was it urged that any fraud was committed in making the sale of the cattle.

We are of the opinion that the judgment of the Circuit Court should be reversed and the cause remanded.

Judgment reversed.

The Terre Haute, Alton and St. Louis Railroad Company, Appellant, *v.* Jacob Augustus, Appellee.

APPEAL FROM EDGAR.

In an action on the case, at common law, against a railroad company, for killing cattle, negligence should be averred and proved; it is otherwise if the action is brought under the statute.

In such an action it is error to instruct, that if the defendant did not fence the road as required by statute, and cattle were killed by cars of defendant, that defendant is liable, whether the killing resulted from negligence or not.

Jacob Augustus commenced an action of trespass on the case against the Terre Haute, Alton and St. Louis Railroad Company, in the Edgar Circuit Court, and filed his declaration, alleging that the Terre Haute, Alton and St. Louis Railroad Company, with the locomotive and cars under the management and control of its agents, on the first day of January, 1856, by and through the negligence, etc. of its servants, and from the carelessness and neglect of the company to enclose their road by a good and sufficient fence, to keep off stock, as required by the statute, run upon and struck three cows, three steers, three heifers, six hogs and one sheep, of the value of $500, and injured them so that they died. The defendants below filed the plea of the general issue, and the cause was tried by a jury, Harlan, Judge, presiding, and a verdict was rendered for the plaintiff below for $153.

The evidence showed that the stock alleged to have been killed, had been found lying dead near the defendant's track, having apparently been struck or run over by the defendant's cars, and that the value of the stock was about $160.00.

The court, at the instance of the plaintiff below, instructed the jury:

"That it was the duty of the defendants to erect and maintain fences on the sides of their road, sufficient to prevent cattle, sheep, horses and hogs from getting on such railroad, except at the crossing of public highways, and within the limits of towns, cities and villages, and when it was through lands lying at a greater distance than five miles from any settlement, and except when such fence is not necessary to prevent stock from getting on the track of such railroad from lands adjoining the same; and if the jury believe, from the evidence, that the defendants did not fence their road as required by the statute, and that the cattle of the plaintiff were killed by the locomotive and cars of the defendant, after the 13th day of August, 1855, then the said defendant is responsible to the said plaintiff for the value of said cattle, and it is not necessary to show a want of due diligence, and the jury must so find."

To which instruction defendant below excepted.

The defendant below, upon the rendering of the verdict by the jury, moved for a new trial, which motion the court overruled.

Levi Davis, and Read & Blackburn, for Appellant.

A. Green, for Appellee.

Breese, J. This is an action on the case, brought by Augustus against the Terre Haute, Alton & St. Louis Railroad Company, for negligence in running their cars, by which the cattle and hogs of the plaintiff were killed. The declaration is at common law, and not under the act of the legislature, entitled "An act to regulate the duties and liabilities of railroad companies." Laws of 1855, p. 173.

Under this act, it is not deemed necessary for the owner of the property killed, when no fence has been erected, to allege and prove carelessness or negligence on the part of the company, in running their trains. It is sufficient, in such case, to prove the fact of killing. At common law, the plaintiff, averring negligence in running the trains, must prove it before he can recover.

In this case, there is a total absence of all proof on that point. The killing only, and the value of the animals, was proved.

The action being at common law, it was erroneous to instruct the jury, that "if they believe, from the evidence, that the defendants did not fence their road as required by the statute, and

that the plaintiff's cattle were killed by the cars of the defendant, after the 14th of August, 1855, then the defendant is responsible for the value of the cattle, whether the killing resulted from the negligence of the defendant, or not, and they must so find."

This instruction would be proper had the declaration brought the case within the statute.

The judgment is reversed, and the cause remanded, with leave to the plaintiff to amend his declaration.

Judgment reversed.

The Terre Haute, Alton and St. Louis Railroad Company, Plaintiff in Error, *v.* Peter Vanatta, Defendant in Error.

ERROR TO MONTGOMERY.

A passenger in a railroad car, when asked for his fare, offered, without any explanation, a ticket which was void by reason of having a hole punched in it, and refusing to pay his fare, was ejected from the car, but without any aggravating circumstances, three or four miles from a station. Held:

1st. That attempting to use such a ticket, without explaining how he obtained it, was evidence of wrong on his part.

2nd. That the company had a right to put him off for non-payment of fare, at a regular station, but not elsewhere.

3rd. That his attempt to impose upon the railroad company, must mitigate the damages.

4th. That if he was attempting to use the ticket to ride from one station to another, he was only entitled to nominal damages.

5th. That no special injury being shown, a verdict for $1,000.00 was so excessive as to require that the judgment be set aside.

Courts will not, in cases sounding in damages, interfere with the verdict of a jury, unless the finding is so manifestly unjust, as to show partiality, prejudice, or misapprehension, on the part of the jury.

This was an action on the case commenced by Vanatta against the Railroad Company in the Montgomery Circuit Court, Rice, Judge, to recover damages for being put off a train. The evidence showed that when the conductor called upon Vanatta for his fare, he offered a lay-over ticket, with a hole punched in it, which was void by the regulations of the company, and as he refused to pay his fare, the conductor put him off the train, about three miles from a station. Vanatta made no resistance, and no violence or unnecessary force was used. It also appeared that the weather was cold, and that there was snow on the

ground. There was a trial by a jury, and a verdict for Vanatta, plaintiff below, for $1,000. The railroad company bring the case to this court by writ of error.

S. W. Moulton, for Plaintiff in Error.

A. J. Gallager, for Defendant in Error.

Walker, J. In this case the parties only present the question, whether the damages found by the jury are excessive. The defendant in error was put off of plaintiff's cars, three or four miles from a station, the weather at the time was cold, and the ground covered with snow. When called on for his fare by the conductor, he offered a lay-over ticket with a hole punched in it, which by the usages of the road was void; without being punched it would have been good for his passage, but as it was, it appeared to have been used to the extent of the purpose for which it had been issued, and was cancelled. It does not appear that at the time he offered it, nor at any subsequent time, or even on the trial, he gave any explanation of how he became possessed of it, or why he offered it instead of his fare. Whether he had been imposed upon in purchasing it, had found it, or had used it on a former occasion, does not appear. Having in his possession such a ticket, and attempting to use it as genuine, clearly required that he should have rebutted by proof, the presumption that he was attempting to use it improperly. If he came fairly and honestly by the ticket and was not attempting to impose upon the company, he doubtless could have shown it by evidence. But failing to do so, he must be presumed to have been in the wrong, and the company, if he were, had the undoubted right to put him off their train at a regular station. This was held to be the rule in the case of the *Chicago, Burlington and Quincy R. R. Co.* v. *Parks*, 18 Ill. R. 460. This court in that case say, if a passenger refuse to pay the fare required by the tariff of the railroad company, he may be ejected from the cars at any regular station, but not elsewhere. The defendant not having paid, or offered to pay his fare, was liable to be ejected from the cars at any regular station; but the company became liable for the injury they inflicted upon him, by putting him off at a different point on their road, notwithstanding his first wrong. If he were guilty of attempting to impose upon the company, while they violated the law in the manner of ejecting him from their cars, his previous wrong must be held to mitigate the damages. He would not under such circumstances be entitled to the same amount of damages as if wholly free from fault. The company had the right to remove him from the cars,

but not at the point at which it was done. The evidence too, fails to show that the conductor's manner was offensive, or that he acted in any other than the kindest and most gentlemanly manner that could be adopted under the circumstances. No malice or wanton conduct is shown on the part of the conductor, nor does it appear that he attempted to expose the situation of the defendant in error, to the passengers, at the time he was ejected. Nor does it appear that there was any special injury or loss sustained beyond having to walk three or four miles. There is no evidence that it produced sickness, or that his business suffered in the slightest degree. If it was the object of the defendant to defraud the company by using this ticket to get from one station to another, he must clearly be entitled to no more than nominal damages.

Whilst, in all cases which sound in damages, courts seldom are called upon to review the finding of the damages assessed by a jury, and when called upon, rarely interfere to disturb their verdict, yet it is their duty, in cases where the finding is flagrantly wrong and excessive, to interpose. But as a rule they should never do so unless the finding is so grossly unjust and disproportioned as to make it manifest that the jury have acted under prejudice, partiality, or under a clear misapprehension of their duty, and the facts of the case. If courts had no such power, cases might occur in which the greatest wrong and injustice would be perpetrated. In this case we are unable to perceive any proportion between the injury inflicted and the damages assessed. Even if the defendant in error had been free from all suspicion of an attempt to impose upon the company, it seems to us, under the evidence in the case, that this verdict must strike any unprejudiced mind as grossly excessive. And for that reason we feel that it is our duty to interpose, and to reverse this judgment, and to remand the cause for further proceedings.

Judgment reversed.

Thomas J. Buntain, Plaintiff in Error, *v.* Rufus Dutton, Defendant in Error.

ERROR TO EDGAR.

Where a party had purchased a reaper, which had been in his use, for a less price than the value of a new machine, and gave his note for the purchase money, he cannot defeat the payment of the note on the ground that a subsequent promise was made by an agent of the vendor, to do some repairs to the machine.

THIS was an action of assumpsit on a promissory note, brought by Dutton against Buntain. The declaration contains a special count upon the note and the usual common counts. The defendant pleaded the general issue, with notice that he would give in evidence that the note sued upon was given for a reaper and mower, which was the sole consideration for which it was executed; that the plaintiff, by his agent, warranted and agreed that the machine should do good work, and that it proved to be wholly worthless and would not work as warranted, and that, therefore, the consideration had wholly failed. There was also further notice, setting up partial failure of consideration by reason of the machine failing to do such work as the plaintiff, by his agent, warranted it to do. Upon the trial of the case, HARLAN, Judge, presiding, the plaintiff offered in evidence the note sued upon, which was for the sum of one hundred and sixty-five dollars, dated June 27th, 1856, and due eight months after date, and then closed his evidence.

The defendant then introduced as a witness, *Fergus M. Blair*, who testified that the note offered in evidence by the plaintiff was made by the defendant in consideration of a reaping and mowing machine, which witness, as agent for plaintiff, sold to defendant; he also proved that J. S. Davis, of Terre Haute, was also agent of plaintiff at that time, and has been for several years past; he also proved that at the time defendant purchased the machine he sold it to him as the agent of plaintiff; that afterwards the business was placed in the hands of Davis, who was also plaintiff's agent. The machine was the same referred to by Newell; witness sold it to defendant at the price named in the note; defendant had the machine in his possession at the time and for near a year previous; witness did not warrant it, and sold it for less to defendant on account of its being a little out of order, and having been used; the regular price was $200, on credit, or $180, cash down; took less, because he refused to warrant it.

The court rendered a judgment for the plaintiff for the amount of the note and interest, to which defendant excepts, and assigns for error that the judgment of the court is contrary to the law and evidence of the case.

A. GREEN, for Plaintiff in Error.

READ & BLACKBURN, for Defendant in Error.

BREESE, J. The idea seems to be entertained by the appellant's counsel, that the promise on the part of Davis, the agent of the plaintiff, Dutton, to adjust fast gearing to the reaping

machine, was a new and independent contract, superseding the original contract, and that as he did not so adjust it, he has no right to recover on the note. It should be borne in mind that this promise of the agent was wholly gratuitous, without any consideration whatever, and in no sense binding—it was, *nudum pactum*. It is proved conclusively by the testimony of Fergus M. Blair, who was introduced by the defendant, the appellant, that at the time he purchased the machine, he himself, as the agent of the plaintiff, sold it to him, and that the defendant had it in his possession nearly a year before he bought it—that he did not warrant it, and sold it for less than the price on account of its being out of order and having been used—the regular price was $200 on time, or $180 cash, and witness agreed to take $165 at eight months for it—and that in consideration of the credit and the reduced price, he would not warrant it, and the defendant expressly agreed to take it at his own risk.

The voluntary promise of the plaintiff to fix the machine, which he was under no obligations whatever to make, cannot be tortured into a new contract of such efficacy as to prevent a recovery upon the note. That contract is in full force, and the defendant all the time owed the debt, and was bound to pay it.

The judgment is affirmed.

Judgment affirmed.

Abner F. Spencer, Appellant, *v.* Lyman Langdon, Adm'r, etc., of William C. Porter, deceased, Appellee.

APPEAL FROM PIKE.

Letters of administration from another State, certified under the seal of the Probate Court, by the sole presiding judge, by whom the records are kept, there being no clerk, are admissible in evidence.

Where a similiter has been added to a special plea, concluding with a verification, and the parties proceeded to trial without objection, it is too late to object in this court, although the similiter was a nullity, and no answer to the plea.

Such a defect in pleading is cured by the sixth section of the statute of Jeofails.

This was a suit in the Pike Circuit Court, brought by defendant in error against plaintiff in error, upon two promissory notes executed to defendant's intestate. The declaration counted upon said notes; also had a count upon a judgment of the Court of Common Pleas of Defiance county, Ohio, rendered against the defendant.

Several pleas were filed to the declaration: Nul tiel record,

nil debet, failure of consideration as to the notes; also a plea denying that plaintiff was administrator as alleged.

The answer to the plea of failure of consideration as to the notes, was in the words following: "and plaintiff doth the like."

The cause was tried by the court, WALKER, Judge, without a jury. Upon the trial, the plaintiff produced in evidence the record of a judgment or decree of the Court of Common Pleas, of Defiance county, Ohio.

The clerk of the court certifies the record in the usual form, and the judge certifies that the person named in the certificate is clerk of said court, and that his attestation is in due form.

There is no date to the judge's certificate.

The copy of the letters of administration offered in evidence, are certified by the sole presiding judge, etc., of the Probate Court of Defiance county, Ohio, and keeper of the records thereof, there being no clerk of said court.

The notes were also given in evidence.

Objection was made to the reception of all the evidence. The court found the issue for plaintiff, and gave judgment for him.

LOGAN & HAY, for Appellant.

C. L. HIGBEE, for Appellee.

CATON, C. J. The first question presented by this record is, whether the certificate of the record of the court of probate in Ohio, is sufficient under the act of Congress. That certificate is by the sole presiding judge of the court, under the seal of the court, by whom the records of the court are kept, there being no clerk. This objection has been sustained in Massachusetts and New Hampshire, and has been overruled in Connecticut, Pennsylvania, Vermont and Kentucky. The decisions in the latter States, we consider more in conformity to the spirit and intention of the act of Congress, and will be adopted by this court. We are therefore of opinion that the Circuit Court decided properly, in admitting the record in evidence.

A special plea was filed, concluding with a verification; to which a similiter was added; upon which, the parties went to trial without objection. To this replication the defendant below now objects. It is too late to raise that objection now. The similiter was a nullity, and was no answer to the plea. The parties by agreement, went to trial, with a plea unanswered. This was decided to be no ground for reversing the judgment in the case of *Ross* v. *Reddick*, 1 Scam. R. 73. And upon the same principle was the case of *Bruzzle* v. *Usher*, Breese R. 14,

decided, where it was held that if the parties go to trial without any plea, the objection was waived, and the judgment was affirmed.

But we have no sort of doubt that this defect of pleading was intended to be cured, and was cured, by the sixth section of our statute of jeofails. That is as broad as our language could make it, to cure defects and omissions in pleadings, by which it was the design of the legislature to cut off all advantages arising from the carelessness and omissions of clerks and attorneys, where no objection should be made before trial, so that the courts might render judgments according to the very right of the case, without regard to such errors; which are in substance technical, though they may be substantial in form.

The judgment must be affirmed.

Judgment affirmed.

WALKER, J., having tried this cause below, took no part in the decision of the case.

BENJAMIN F. BRISTOW *et al.*, Plaintiffs in Error, *v.* ALEXANDER T. LANE *et al.*, Defendants in Error.

ERROR TO MORGAN.

If a general demurrer is filed to a declaration which contains more than one count, if one of them be good, the demurrer must be overruled.

A third party may maintain an action on a promise made to another for his benefit.

THE declaration in this case, which was demurred to, is as follows:

Alexander T. Lane, etc., partners, trading and doing business under the name, style and firm of A. T. Lane & Co., of Philadelphia, plaintiffs in this case, complain of Benjamin F. Bristow and Benjamin Newman, defendants in this case, summoned, etc., in a plea of assumpsit. For that, heretofore, to wit: on the 22nd day of March, A. D. 1857, at, to wit: at the county aforesaid, one Moses Clampit was indebted to the said plaintiffs in the sum of one hundred and ninety $\frac{91}{100}$ dollars, with interest thereupon from the sixth day of September, 1856, and due and payable six months after the date thereof, on, etc., at, etc.; and the said Clampit being so indebted as aforesaid, the said defendants, in

consideration that the said Moses Clampit would convey to them, the said defendants, certain real estate situated in Jacksonville, in the county aforesaid, they, the said defendants, undertook and promised the said Moses Clampit to pay his, said Clampit's, debts in the city of Philadelphia, and in the city of New York, contracted by the said Clampit in the Spring of the year 1856, in a reasonable time thereafter; and the said plaintiffs aver that in consideration of the said agreement, the said Clampit did then and there convey to the said defendants the real estate aforesaid by deed, which deed was then and there accepted and received by the said defendants, of and from the said Clampit; and the said plaintiffs aver that the debt to them as aforesaid, is one of the debts contracted to be paid by the said defendants as aforesaid, whereby and in consideration of the premises, the said defendants then and there became liable to pay them the said sum of money in said notes specified, with interest thereon as aforesaid, when they should be thereunto afterwards requested; and being so liable, then and there undertook, etc.

2nd Count. For that heretofore, to wit: on the 22nd day of March, 1857, at, to wit: at the county aforesaid, the said defendants made their certain agreement, in writing, with one Moses Clampit, which said agreement is in the words and figures following, to wit:

"We hereby agree and bind myself to compromise with the creditors of Mr. Clampit, in Philadelphia and New York, lift the notes held against him in the said cities, contracted in the Spring of 1856: *provided*, in the compromise I can make such arrangements as not to sustain any loss by Mrs. Clampit withholding her signature from a deed to their house and lot in Jacksonville.

(Signed) B. F. BRISTOW,
B. NEWMAN."

"The above obligation is in consideration of a house and lot deeded to me by Mr. Clampit, this March 22nd, 1857.

B. F. BRISTOW,
B. NEWMAN."

By which said agreement the said defendants therein bound themselves to pay certain debts for the said Moses Clampit, contracted in the cities of Philadelphia and New York, in the Spring of the year 1856, provided the same could be done without loss to them by reason of Mrs. Clampit, the wife of the said Moses Clampit, refusing to join her husband in a deed heretofore made by the said Moses Clampit, conveying a certain house and lot in the town of Jacksonville, in said county. And the plaintiffs aver that the said Moses Clampit was then and there indebted to the said plaintiffs in the sum of one hundred

and ninety dollars, with interest thereon from the sixth day of September, 1856, according to a certain note of the said Moses Clampit, dated March 6th, 1856, due and payable to the said plaintiffs six months after the date thereof; and the said plaintiffs further aver that the said debt was contracted by the said Moses Clampit with the said plaintiffs on the day and date of the said note, in and at the city of Philadelphia, and the said plaintiffs did then reside in the said city of Philadelphia; and said debt was and is one of the debts referred to and included in the agreement aforesaid; and the said plaintiffs further aver that the said defendants had, before the commencement of this suit, acquired a good and complete title to the real estate aforesaid. By reason of the premises the said defendants became liable to pay to the said plaintiffs the said sum of money in said note mentioned, with interest as aforesaid, when they should be thereunto afterwards requested; and being so liable, they undertook and promised, etc.

Error assigned: the court below erred in overruling the demurrer to each of the counts of the declaration.

J. W. Strong, and D. A. and T. W. Smith, for Plaintiffs in Error.

I. L. Morrison, for Defendants in Error.

Breese, J. This was a demurrer to a declaration containing two counts, not several to each, but to "both counts." The demurrer was overruled, and we think correctly, as there is no substantial objection to either count. But if the first count be defective, the second is good, and the rule is well settled, that on a demurrer to a declaration containing more than one count, if one of them be good, the demurrer must be overruled. *Young* v. *Campbell et al.*, 5 Gilm. R. 83; *Walton* v. *Stephenson*, 14 Ill. R. 77.

But it is objected that the declaration shows no cause of action in favor of the plaintiffs, as they are not named in the written undertaking of the defendants—that there is no privity between them, they being strangers to the consideration.

It was formerly held as a rule of law that no stranger to the consideration of an agreement could have an action on such agreement, although made expressly for his benefit; and this is now the rule in England. *Price* v. *Easton*, 1 Barnwell & Adolphus, 433. In this case, Littledale, J., said, "This case is precisely like the case of *Crow* v. *Rogers*, and must be governed by it." That case is reported in 1 Strange, 592, and is in assumpsit, the plaintiff declaring that whereas one John Hardy

was indebted to the plaintiff in seventy pounds, upon a discourse between this Hardy and the defendant, it was agreed that the defendant should pay the plaintiff's debt of seventy pounds, and that Hardy should make the defendant a title to a house. Then he avers that Hardy was always ready to perform his part of the agreement, and that the defendant, in consideration thereof, promised to pay the plaintiff. The defendant demurred, in writing, that there was no consideration moving from the plaintiff to support this promise; and the case of *Browne* v. *Mason*, 1 Ventris, 6, and 2 Kebler, 457–527, was cited; where A, being severally indebted to B and C, and having a debt due him from D, C, in consideration that A would permit him to sue D in his name, promised to pay B. And it was held that this being matter of no trouble to the plaintiff or benefit to the defendant, he was a stranger to the consideration, and could maintain no action.

On the other side was cited the case of *Dutton* v. *Poole*, 1 Ventris, 318–332, where it was held that assumpsit lay for the daughter upon a promise by the heir to pay her portion, in case the father would not fell timber; and the case of Rolls' Abr. 32, where goods were given to A, on consideration to pay B twenty pounds, and it was resolved B might maintain assumpsit. The court gave no opinion, but adjourned the case until it was moved again, and without much debate, the court held, the plaintiff was a stranger to the consideration, and gave judgment for the defendant.

This case, decided "without much debate," is the substratum of all the ruling of the British courts on this question, up to this time.

In this country the right of a third party to bring an action on a promise made to another for his benefit, is generally asserted, and is the prevailing rule with us. *Hind* v. *Holdship*, 2 Watts (Penn.) R. 104; *Arnold et al.* v. *Lyman*, 17 Mass. R. 400; *Hall* v. *Morton*, ib. 575; *Hinkley et al.* v. *Fowler*, 15 Maine R. 285.

This doctrine was fully examined in the case of *Carnegie et al.* v. *Morrison et al.*, 2 Metcalf, 381, and Shaw, C. J., in delivering the opinion of the court, adopted the case of *Dutton* v. *Pool*, 1 Ventris, 318, which the court, in 1 Strange, 592, *Crow* v. *Rogers*, did not recognize. The Chief Justice says, "It seems to have been regarded as a settled question ever since reports have been published in this State, rather than as an open question to be discussed and considered. The position is, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act,

may maintain an action for the breach of such engagement." Ibid. 402.

The case of *Arnold et al.* v. *Lyman*, 17 Mass. R. 400, is a case very like the one before us. There a debtor in failing circumstances, placed property in the hands of the defendant and took from him a written agreement reciting such deposit, and promising to pay certain debts enumerated, and amongst them that of the plaintiff. The court considered the consideration good, though it moved from the debtor of the plaintiff, and not from the plaintiff himself; and although the debtor might have maintained an action on this promise, had he been compelled to pay his debt to the plaintiff, yet the plaintiff might maintain an action in the first instance if he elected to affirm the act done in his behalf, by the debtor, and avail himself of the promise of the defendant made for his benefit.

In the case before us, real estate was conveyed by the debtor of the plaintiffs to the defendants, on their written undertaking to compromise with his creditors in Philadelphia and New York, and take up the notes held against him in those cities, for debts contracted in the spring of 1856. Now though the plaintiffs are not named in this undertaking, all that is necessary for them to show is, that this debt for which they sue, or this note, was given by their debtor who made the arrangement with the appellants, either in New York or Philadelphia, in the spring of 1856. The creditors affirm this act of their debtor for their benefit, by bringing this suit.

In *The Delaware and Hudson Canal Co.* v. *The Westchester County Bank*, 4 Denio (N. Y.) 97, the court say, "We consider it now well settled as a general rule, that in case of simple contracts, the person for whose benefit the promise is made may maintain an action in his own name upon it, although the consideration does not move from him." See also *Farrow* v. *Turner*, 2 A. K. Marshal (Ky.) 496.

The doctrine of these cases has been recognized by this court in two cases, *Eddy* v. *Roberts*, 17 Ill. R. 505, and *Brown* v. *Strait*, 19 ib. 89, and we see no reason to question its correctness.

The judgment of the court below is affirmed.

Judgment affirmed.

John Bickerdike, Appellant, *v.* Daniel Dean, Appellee.

APPEAL FROM PIKE.

A justice of the peace has not jurisdiction to levy a fine for continuing an obstruction to a highway.

This was an action originally instituted before a justice of the peace, to recover the penalties provided for in the tenth section of the road laws, for obstructing and *continuing an obstruction* in a public road after notice to remove the same.

On the trial of the cause in the Circuit Court, judgment was rendered for the informer, the plaintiff below, and the defendant below brings the case to this court.

The notice served upon the defendant to remove the obstruction was as follows:

"*To Mr. John Bickerdike, Sr., John Bickerdike, Jr., George Bickerdike, William Booland, Richard Bickerdike, and William Bickerdike:*

"You, and each of you, are hereby notified to remove the obstructions which you have placed in the public road leading from Detroit to Griggsville, both in Pike county, Illinois. Said obstructions are on that part of the road passing over the north-west quarter of the south-west quarter of section thirty-six, in township four south of the base line, range three west of the fourth principal meridian. If such obstructions are not moved, suit will be commenced for the penalty fixed by law.

HIRAM DEAN,
Overseer of Roads of District No. 10, *of said Township.*"

Defendant objected to the giving of this notice in evidence, which objection was overruled. This was the only notice given in evidence.

Plaintiff adduced evidence tending to show that defendant had obstructed a road leading from Griggsville to Detroit, which ran over the land described in the notice, and that the obstruction was continued for several days after the service of the above notice, and furthermore gave evidence tending to show that the road so obstructed had been used as a public road for over twenty years.

There was a judgment for plaintiff, for ten dollars debt, besides costs.

Logan & Hay, for Appellant.

C. L. Higbee, for Appellee.

Caton, C. J. The appellant was convicted before a justice of the peace, for continuing an obstruction in a public highway.

We decided in the case of *Crosby* v. *Gipps*, 19 Ill. R. 309, that a justice of the peace has no jurisdiction of the offense, and for that reason this judgment must be reversed.

Judgment reversed.

Hugh M. Alwood, Plaintiff in Error, *v.* William A. Ruckman, Defendant in Error.

ERROR TO TAZEWELL.

Where one lets a piece of land for the purpose of having a single crop raised upon it, of which the lessor is to have a part, for the use of the land, and the cultivator a part, for his labor, the relation of landlord and tenant does not necessarily exist, but the parties may be tenants in common in the crop; but the relation of landlord and tenant may exist, where the letting is for a year, and the rent is to be paid in a part of the crop; and the parties will not be tenants in common in the crop.

In an action of replevin, for a stack of wheat, where a defendant defends, by stating that he is tenant in common of the wheat, his plea will be defective if he sets out a history of the tenancy; the plea should aver the tenancy, etc., and then prove on the trial the facts which show him to be a tenant in common.

This was an action of replevin, brought by Ruckman against Alwood, in the Mason Circuit Court, and taken by change of venue to Tazewell, and tried before Harriott, Judge, and a jury, at the April term, 1858.

The action was brought for taking a stack of wheat; the affidavit, bond and declaration, were in the usual form.

The defendant pleaded *non cepit*, property in himself, and upon both which issue was joined. And also filed a third plea, to which a demurrer was interposed and sustained, which third plea was withdrawn. The defendant then filed the following additional plea:

And for a further plea herein, defendant saith *actio non*, etc., because he says that said wheat, in said declaration mentioned, was wheat grown and raised upon the farm known as the A. J. Alwood farm, in Mason county, Illinois, during the year 1857. And defendant avers that he leased the said farm to the said plaintiff heretofore, to wit: on the first day of March, 1857, upon which to raise said crop of wheat for said one crop only; and defendant avers by terms of said agreement, said defendant was to have one-third of all the grain grown upon said farm, during said year of 1857; and defendant avers that said wheat, in said declaration mentioned, was the same wheat grown and raised upon said farm for the year 1857; and said defendant

avers that he took said wheat as his portion of said crop, raised upon said premises, as aforesaid, as he lawfully might, and this he is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him. And he prays a return of said wheat, together with his costs, in this behalf, etc.

To which additional plea a demurrer was interposed and sustained, and defendant abided by the plea.

A jury was then called, and found the issues for the plaintiff.

The only error assigned is, sustaining the demurrer to the additional plea.

James Roberts, for Plaintiff in Error.

H. Fullerton, for Defendant in Error.

Caton, C. J. The law is too well settled to admit of dispute, or to require authorities for its support, that where one lets to another a piece of land, for the simple purpose of raising a single crop upon it, of which the owner of the land is to have a part, and the one who cultivates it is to have a part, to pay him for the cultivation, that in that case, the relation of landlord and tenant need not necessarily exist, but that the parties may be tenants in common in the crop which is raised. The law is, however, equally well settled, that there may be a leasing of land from year to year, or for a single year, where the relation of landlord and tenant may exist, although the rent is to be paid by a portion of the crop, in which case, the parties are not tenants in common of the crop raised, but the title of the whole is in the tenant, until the rent stipulated is paid. Whether the letting be of one kind or the other, must in general, as in most other contracts, depend upon the intention of the parties, although this intention must in most cases be inferred from the circumstances which attend the case. In general, the question of possession will determine the matter. Take the case where the tenant moves on to the farm, and occupies and controls it exclusively, as if it were his for the time being, and is by the agreement so to occupy it for the year, it would be deemed to be in his exclusive possession, and it would be held to be a lease of the farm for the year, although the rent was to be paid in a part of the crops, the amount of which was to be determined by the amount of the crops raised; when the tenant would be held to be the exclusive owner of the crop, until the stipulated rent was set off to the landlord. On the other hand, in a case where the owner of the farm resided upon it, and continued to exercise control over it as the owner, and

allows another to cultivate a crop upon a part, or even the whole of it, and is to receive a portion of the crop as his compensation for the use of the land, we should not presume a tenancy, nor hold the person who cultivates it, to be in the exclusive possession of the portion which he cultivates, and the parties would be tenants in common of the crops. There the cultivator would not have even the right of entry after the crop was off. These examples may border on the extremes, between which there may be an infinite number of gradations, among which, it may be difficult to draw the true line of demarkation, but the difficulty must always be one of fact and not of law, for the principles of law by which they are controled, are very plain and simple. When the facts are doubtful as to whether the possession and control are absolute and exclusive in the tenant, or jointly in the owner of the land and the cultivator of the crop, and whether the right of entry continues for the year, or only till the crop is removed, the inclination will be, and should always be in favor of the latter conclusion.

By testing these pleas by this law, we see they are entirely insufficient to show a tenancy in common in the property replevied. A plea must be taken most strongly against the pleader. These pleas do not affirmatively show a case, where the owner of the land continued in the possession and control of it, either by himself, or jointly with the defendant; or that it was the understanding and intention of the parties when the arrangement was made, that the plaintiff should go away and be as a stranger to the land as soon as the crop was off, but rather the reverse. They show the leasing of an entire farm, and certainly do not deny that the tenant had the absolute and exclusive possession and control of it, for the entire year. If the fact were otherwise, the presumption is, that it would have been so stated in the strongest manner which the proof would sustain. Indeed it was quite unnecessary for the plea to have attempted to set out the history of the tenancy or occupancy, or how the defendant claimed to be tenant in common of the grain replevied. That was a pleading of the evidence. It would have been sufficient to have averred that he was tenant in common of the wheat, wherefore he took it, etc., and then proved the facts on trial, which he supposed tended to establish his title, as a question of law. It was quite immaterial how he became such tenant in common, but the plea contains no such averment.

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

Judgment affirmed.

Jeptha Dixon, Assignee of John Dixon, Plaintiff in Error, *v.* John N. Buell, Adm'r, etc., Defendant in Error.

ERROR TO CALHOUN.

Equity treats the assignee of a contract, not assignable at law, as the party in interest, and will afford him relief in a proceeding instituted in his own name.

A lessor can assign his interest in a lease, by an endorsement on it, so as to pass the equitable right to his assignee, to receive the rent when it becomes due.

The County Court has equitable jurisdiction in the allowance of claims, against the estates of deceased persons, for money due, and may adopt equitable proceedings, in so far at least as to permit a claimant in such a case to proceed in his own name, even when he is an assignee.

This suit was commenced by filing account in the Probate Court. Judgment against estate for $208.40. John N. Buell, administrator of the estate of John N. Buell, deceased, appealed to the Circuit Court.

Bill of exceptions shows that a jury was waived by parties, and a trial by the court. On the trial, plaintiff gave in evidence a lease executed by the said John Dixon and John N. Buell, deceased, under their respective seals, dated the 16th day of December, 1851, wherein the said Dixon assigns and leases to the said Buell, deceased, certain real estate therein described, for the period of five years, at an entire rent of $350, to be paid by annual installments of $70 each; the first installment on the 1st of January, 1853, and the other installments to be paid, one on the 1st of January of each successive year; on the back of which lease is the following assignment, to wit:

"I, John Dixon, for value received, do hereby assign and set over the within bond, and all my right, title and interest therein, to Jeptha Dixon. Witness my hand, this 4th day of March, 1852.

JOHN DIXON." [seal.]

The account filed before Probate Court, and which was allowed therein, was for the last three installments. Plaintiff also proved by a witness who was present when said assignment was made, that said lease had been left with him by the parties thereto for safe keeping—that said Buell, deceased, was present at the time of said assignment, and requested witness to go and get said lease that said assignment might be made, and that he, Buell, at the time of said assignment, acquiesced and assented thereto.

The plaintiff having closed his testimony, the defendant moved the court to non-suit the plaintiff, on the ground that the action should have been brought in the name of John Dixon; which motion was allowed by the court, Woodson, Judge, presiding. Whereupon judgment was rendered against plaintiff for costs.

The errors assigned are, that the court erred in non-suiting the plaintiff; and in rendering judgment against plaintiff, and in not rendering judgment in his favor.

KNAPP & CASE, for Plaintiff in Error.

W. GRIMSHAW, for Defendant in Error.

WALKER, J. Even if it were conceded that this lease does contain mutual covenants, it would not follow that it is not assignable in equity. Almost every description of agreement may be transferred so as to vest in the purchaser the right to enforce it by proceedings in equity. Whilst in many cases the party may obtain complete relief by an action at law in the name of the original party for his use, yet in other cases the beneficial holder may proceed in equity in his own name to enforce the contract. Equity treats the assignee of a contract, not assignable at law, as the party in interest, and affords him relief in a proceeding instituted by him in his own name; whilst courts of law require the proceeding to be in the name of the owner of the legal interest, unless it be in cases where the legal title vests in the purchaser by delivery.

This was a lease of real estate for five years, at a yearly rent of a specific sum of money. The contract of lease was transferred by endorsement in writing, by the lessor to plaintiff in error, in the presence of, and with the approbation and consent of the lessee. Now, even if this endorsement did not pass the legal interest in the rent, to plaintiff in error, there can be no doubt that it passed the equitable right to him, to receive the money when it became due, according to the terms of the contract.

Then if the Probate Court has equitable jurisdiction in the allowance of claims against the estates of deceased persons, there was no error in instituting this proceeding in the name of plaintiff. This court held, in the case of *Moore* v. *Rogers*, 19 Ill. R. 349, that, "the statute providing for the settlement of estates of deceased persons, empowers the County Court to adjudicate upon all 'claims' presented for allowance, and provides the mode and time of exhibiting them for allowance; and although the words *claims*, *demands*, and debts, are used in the statute in apparently the same connection, we are satisfied that mere equitable money demands are within their meaning, and therefore, within the jurisdiction of the County Court." The demand in the case under consideration was only a money demand, and it therefore follows that the County Court had

jurisdiction of this case, if it were only an equitable assignment. And if it had such jurisdiction, no objection is perceived to that court adopting the forms of equitable proceedings, in so far at least, as to permit the claimant to proceed in his own name to obtain the allowance. Then, whether it was a legal or equitable assignment, it can make no difference, as in either case the plaintiff had a right to proceed in his own name in that court, and the court below erred in dismissing the cause and rendering judgment against plaintiff for costs, and that judgment should be reversed and the cause remanded.

Judgment reversed.

The Town of Petersburg, Plaintiff in Error, *v.* Grigsby Metzker, Defendant in Error.

ERROR TO MENARD.

The powers of all corporations are limited by the grants in their charters, and cannot be extended beyond them.

When the charter of a town authorized the Board of Trustees to inflict such punishment for any offense against the laws of the incorporation, as may be provided by law for like offenses against the laws of the State: Held, that this did not authorize the passage of an ordinance imposing a fine of from five to fifty dollars for an assault, etc., the minimum fine for such an offense, under the laws of the State, being three dollars.

The town of Petersburg, in the county of Menard and State of Illinois, had filed before one J. J. H. Pillsbury, a police justice, in and for said town, a complaint against said defendant, charging him with violating the 2nd section of ordinance No. 7, of the town ordinance, by-laws of the town of Petersburg. The said defendant was tried before the justice and fined ten dollars, and thereupon he appealed to the Circuit Court of Menard county.

This cause came up for trial at the May term of said court, 1858, before Harriott, Judge, of said circuit, and was tried by the court, without the intervention of a jury, by agreement. The plaintiff read the town charter, amendments, etc., and produced the evidence, but the defendant notwithstanding, moved the court to dismiss the complaint and proceeding, because the whole ordinance was inconsistent with the laws of Illinois, and contrary to the constitution, and therefore void. The court heard the motion and after taking the same under consideration, granted it, and dismissed the case for the reasons aforesaid.

The 2nd section of the ordinance is as follows, to wit:

No. 7. Disturbance of the peace. Sec. 1st. Be it ordained, etc. If any person or persons who shall be guilty of an assault and battery or any affray within the corporate limits of the town of Petersburg, shall, on conviction thereof, forfeit and pay not less than five dollars, nor more than fifty dollars.

Sec. 2nd. Be it, etc. Any person or persons who shall disturb the peace and quiet of the town of Petersburg, or any of the families or inhabitants within the corporate limits thereof, by loud and unusual noises, blowing horns, etc., quarreling, etc., threatening to injure the person or property of another, etc., such person or persons shall, on conviction of any one of said offenses, be fined in the sum of not less than five dollars, nor more than fifty dollars.

These are the sections of the ordinance as read and proved on the trial.

The court quashed the whole proceedings, dismissed the case, and made the town pay the costs; to all which rulings and decisions the town, by its attorney, then and there excepted.

Lincoln & Herndon, for Plaintiff in Error.

Thomas P. Cowan, for Defendant in Error.

Breese, J. The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them. The act incorporating the Town of Petersburg, (Laws 1841, page 333) provides, sec. 7, "That the board of trustees of said town shall have power to impose fines and forfeitures for the breach of any ordinance, and provide for the collection thereof; and to direct by ordinance such punishments to be inflicted for any offense against the laws of the corporation, as is, or may be provided by law, for like offenses against the laws of the State."

In pursuance of this power, the town authorities duly passed and published ordinance numbered seven, of two sections, under the first of which the defendant was arrested and convicted. That section is as follows: "Be it ordained, etc. Any person or persons who shall be guilty of an assault, or assault and battery, or an affray, within the corporate limits of the town of Petersburg, shall, on conviction thereof, forfeit and pay not less than five, nor more than fifty dollars."

The law of the State in such cases fixes the minimum at three dollars. (Scates' Comp. 690.)

The corporation, by their charter, can prescribe no greater punishment for an assault and battery committed in the town

limits than is provided by the State law for the same offense. The charter controls the exercise of the power by the corporation.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WOODSIDE *et al.*, Plaintiffs in Error, *v.* WOODSIDE *et al.*, Defendants in Error.

ERROR TO ST. CLAIR.

A judgment, rendered on the trial of a feigned issue, directed out of chancery, is an interlocutory judgment, from which no appeal or writ of error can be prosecuted.

A writ of error, in such a case, may be dismissed at any stage of the proceedings, although errors may have been joined. The joinder in error gives jurisdiction of the persons only, not of the subject matter.

A suggestion that the plaintiff in error will, at the next term, file the record of the decree, finally dismissing his bill, will not obviate this objection. The whole case must be brought up by one record, upon which may be assigned errors on the trial of the feigned issue.

PLAINTIFFS in error filed their bill in chancery in the St. Clair Circuit Court, to set aside the will of John Woodside, deceased, alleging that he was not of sound mind and memory at the time of making his said supposed will. The defendants' answer denied this allegation, and to the answer the plaintiffs filed a general replication. The court ordered a feigned issue at law to try the validity of said will. The jury found the issue for the defendants in error, and the court thereupon rendered judgment on said feigned issue, for costs against the plaintiffs in error. To reverse that judgment this writ of error is prosecuted.

UNDERWOODS, for Plaintiffs in Error.

G. TRUMBULL, for Defendants in Error.

BREESE, J. The record in this case merely shows a writ of error on a judgment rendered for costs, on a verdict found on the trial of a feigned issue, directed out of chancery. This judgment was interlocutory only, from which an appeal or writ of error will not lie. There must be a final decision of the chancery cause before either party can have any part of it reviewed in this court; such a decision of the whole case as settles the rights of the parties respecting the subject matter of the

suit, and which concludes them until it is reversed. That case is still pending for the action of the Circuit Court. This objection was made on the argument, and is a good one, and has been so held by this court. *Hayes* v. *Caldwell*, 5 Gilm. R. 35; *Pentecost* v. *Magabee*, 4 Scam. R. 326; *Cornelius* v. *Coons*, Breese R. 15; *Fleece* v. *Russell*, 13 Ill. R. 31. The fact that errors were joined before the objection was made, can make no difference, as it is a case in which no writ of error can be prosecuted. *Crull* v. *Keener*, 17 Ill. R. 249. The joinder in error gave jurisdiction of the person, but not of the subject matter. If the objection had been made at any stage of the proceedings, in *Rigg* v. *Wilton*, 13 Ill. R. 15, to which reference is made by plaintiffs in error, it would have been sustained. It was not made, and is, therefore, no rule for this case. The plaintiffs, in their petition for a rehearing, suggest they will, at the next term of this court, file with this record, the final decree dismissing the bill, at their cost. This, we think, would not mend the matter. The whole record of the case must be brought here, in the regular way, by appeal or writ of error, and the errors must be assigned on that record, among which might appear the errors on the trial of the feigned issue. The whole case must be brought here by one proceeding, either by appeal or writ of error. We cannot receive it in parcels.

The writ of error must be dismissed.

Writ of Error dismissed.

John Holland, Plaintiff in Error, *v.* Kibbee and Lathrop, Defendants in Error.

ERROR TO MORGAN.

A. sold property to B. for $3,500.00, with an agreement that A. was to receive one-half of the excess beyond this sum, for which B. should afterwards sell the property; B. contracted to sell the property to C. for $3,700.00, but before the first payment fell due, C. sold the property to D. for $5,075.00; B. then interfered to prevent D. from paying the purchase money to C., but received it himhimself and conveyed directly to D. In order to effect this arrangement, B. paid $500.00 to C. and $50.00 to D. Held, that if A. seeks to recover one-half of the profit arising from this arrangement, he must credit B. with the $550.00 paid to effect it.

This was a bill in chancery, filed in the Morgan Circuit Court, Woodson, Judge, by defendants in error, against plaintiff in error, stating that on the 18th of June, 1852, they conveyed to Holland one-half of a lot in Jacksonville for $1,000 cash,

and his two notes for $1,250 each, at one and two years date, with annual interest; and if Holland should sell the property afterwards at a profit, deducting the costs of improvements made by him, he was to pay them half the profits; and that he spent in improvements upon the property, about $160. Deed was recorded without recording the agreement; and that deed was in possession of Holland, and not subject to their control. That he, or those claiming under him, occupied the property until the last of 1856, or first of 1857, when he *pretended* to sell the property to Doty and Anthony for a feigned consideration; that at the time of the pretended sale, no money was paid and no notes given; that first payment was to have been made on or before 1st March, 1857. That on 24th February, 1857, Doty and Anthony caused the property to be sold at auction for one-third cash, and two-thirds at one and two years time, with ten per cent. interest; and that on such terms the property was sold to William Hamilton for $5,075; that Holland never executed deed to Doty and Anthony, nor did he complete his pretended sale to Doty and Anthony, but it was somehow cancelled by the parties, and Holland and wife executed deed to Hamilton for consideration of $3,666.66; that Hamilton made two of his notes for deferred payments to Holland, and not to Doty and Anthony, for $1,333.33 each, and a lien was reserved to secure payment of notes; that another note was executed by Hamilton for a part of consideration of sale to Doty and Anthony, and by them transferred to Holland; that notes given by him to complainants had been paid; that the sale of Holland to Doty and Anthony, was merely colorable, and not in good faith, but was intended by Holland to conceal the true consideration, and to avoid rightful accounting to complainants; and that consideration expressed in deed from Holland to Hamilton, is not truly stated; and that the execution of one of said notes by Hamilton to Doty and Anthony, and by them endorsed to Holland, was a mere contract of Holland, and all done at his instance for fraudulent concealment of the true consideration of said sale, and to cheat and defraud complainants. They charge that all the consideration of the auction sale passed to Holland, and not to Doty and Anthony, or if anything was paid to them, it was a mere *bonus*, and was very small, and for their time and trouble in carrying out this arrangement; and that no part of the sum of $5,075, paid and to be paid by Hamilton, was paid to Doty and Anthony, but that all the money paid by him was paid to Holland. Complainants charge that they are entitled to account of one-half of profits of sale to Hamilton, deducting $3,665; that profits are $1,410, and that they are entitled to one-half, and that Holland

failed and refused to account. Prayer for process, and that he answer on oath, and be held to account for half sale to Hamilton, deducting $3,500, and what Holland expended in making improvements; and that he be decreed to pay same, with interest from the date the same was received; and for general relief.

Holland answered 19th October, 1857, admitting his purchase of complainants, and says that he contracted with them to pay them half the profits of sale, within two years of his purchase, deducting what he paid, and improvements he might make; that he made improvements to amount of $233.15; that there was on the margin of the deed of complainants to respondent, the contract charged by them, except that the conveyancer omitted to state the limitation of two years. Denies that he made pretended sale to Doty and Anthony, or any other person, for feigned consideration. Says that sale to Doty and Anthony was for good and valuable consideration, and in good faith, and denies that there was any money or notes taken or given in the sale. Admits auction sale to Hamilton for $5,075, and that he, respondent, did not convey property to Doty and Anthony. Says he executed them a bond for a deed, in the penalty of five hundred dollars, to convey to them, if they paid one thousand dollars, first installment, by 1st March, 1857. That Doty and Anthony represented themselves as unable to comply with terms of sale to them, and requested that he, respondent, would take, in lieu thereof, their claim against Hamilton as purchaser, and he took said claim, paying them five hundred dollars in cash, and it was agreed, as part of the arrangement, that respondent, to save trouble of two conveyances, should convey directly to Hamilton, and that notes of Hamilton should be made directly to respondent. Denies that any note was made by Hamilton to Doty and Anthony, and that any note of Hamilton was assigned by them to respondent. Says that the consideration of his deed to Hamilton was because of the two sales, and that he, respondent, had paid Doty and Anthony five hundred dollars, as aforesaid, and he, respondent, did not wish to charge himself a larger consideration in his deed to Hamilton, than he, respondent, had contracted for with Doty and Anthony. Denies all fraud, and says transaction referred to in the bill, was commenced and completed in good faith.

Replication filed.

Doty testified as follows: We, Doty and Anthony, purchased house and lot of Holland about last of 1856; there was a written contract recorded at Jacksonville; consideration of contract, $3,700; first payment 1st March, 1857, $1,233.33; $1,233.33, 1st March, 1858; and $1,233.33, 1st March, 1859; warranty deed to be delivered at last payment. We completed

the contract and made our notes for payments. Besides above, we made a note of three hundred dollars to Holland; that he did not want Kibbee and Lathrop to find out the bargain that they were entitled to one-half of it, and that he wanted whole profit to himself. Saw written contract on margin of deed, to effect that Holland should pay to Kibbee and Lathrop half of what he got, more than he paid them for property. Our contract with Holland was to be recorded; don't know whether it was or not. We sold property to William Hamilton for $5,150, he to make payments corresponding, as far as they went, with ours to Holland; sale made for benefit of myself and Anthony; title was in Holland, who made deed to Hamilton, who bound himself to pay purchase money to Holland. Anthony and myself sold property at auction to meet the demand that Holland had against us. I heard that Holland forfeited his contract—that it was cancelled—and that he paid us five hundred dollars. This forfeit was to relieve him from the contract made with us. He would be making more money in deeding the property to Hamilton than to us. Before sale to Hamilton, I heard from Holland that he made something like the three hundred dollars that was separate and apart from the contract. He said he wanted this concealed from Kibbee and Lathrop; that if they found it out, they would demand of him one-half of it. We had no other interest in the property than the contract above spoken of, on which we paid nothing. Don't think that the transaction between Holland and Hamilton was to avoid the trouble of double conveyancing, and did not understand that Holland gave us five hundred dollars for our trade with Hamilton. The five hundred dollars was paid after our contract with Holland. I know nothing in relation to this, only what I have been told. Know of no agreement to defraud Kibbee and Lathrop, except as to the concealment of the three hundred dollar note. Holland told me he was under written contract to Kibbee and Lathrop to pay them one-half of the money received over and above what he paid them. Don't remember hearing of any limitation of time, or as to any mistake of conveyancer. The sale of the property by Holland to me was in good faith. It was after the auction sale that the five hundred dollars was paid by Holland. We took that way of meeting the payments with him. Can't say certainly whether it was a forfeit on the contract with us, or whether it was a bonus on the contract with Hamilton. I was not there. It was my understanding that it was regarded by the parties as a forfeit on the part of Holland in his contract with us.

Anthony testifies substantially as Doty, except that he states that the property was sold to Hamilton for $5,075.

Deposition of *William Hamilton* states, that he bought property at auction sale of Doty and Anthony for $5,075; terms, one-third cash, and other two-thirds at one and two years, equal installments, from 1st March, 1857, with ten per cent. interest. Holland resided on premises at time of sale; witness told him he would like to buy, if he could get time on first payment; Holland told witness that most of the first payment was coming to him, if sale took place from Doty; witness told Holland he wanted time till last of April or middle of May; he assented, and sale took place as above. Question being made as to time of possession, Doty said 1st March, 1857; Holland objected, saying that he was to have possession until last of March or 1st of April; Holland was excited; witness told him as he had given time on first payment, he, (Holland,) should have upper part of house until he removed his family to Minnesota; Holland told witness not to advance money to Doty to enable him to make first payment to Holland; that there was a bond for five hundred dollars which he would forfeit to Doty, and pay witness half of $575; witness told Holland that he was not then able to advance anything to Doty; Holland afterwards stated to witness that bond was so drawn that he could not forfeit it, and insisted that witness should not advance any money to Doty; that he thought he would be able to bring him to terms; that he had heard that Doty had been trying to borrow money, and did not succeed. Holland afterwards told witness that he had made arrangements with Doty, and had made a small shave of one hundred dollars, of which he gave me fifty dollars. Holland then drew up six notes, three payable to himself; of the two first, one was for $1,333.33, payable to himself, the other to Doty and Anthony, on the 1st March, for $358—two of other four made payable to Holland, each for $1,333.33, due respectively 1st March, 1858, and 1st March, 1859; the remaining two to Doty and Anthony, for $358 each, time as last mentioned. Holland afterwards stated to me that he had bought the three $358 notes, and that he had made a good shave on them. This transaction took place between witness and Holland, Doty and Anthony not being present. Some two or three weeks afterwards, Doty told me that Holland had forfeited his bond and paid him five hundred dollars. The two first notes, viz.: one for $1,333.33 to Holland, and one of $358 to Doty and Anthony, I paid to Holland shortly before he left. The price that witness bid for property was $5,075; didn't recollect consideration expressed in deed. All of notes that witness had paid, were paid to Holland, and two of notes were not yet due, and were unpaid. The day before Holland left for Minnesota he told witness that half of what property brought over what

was paid Kibbee for it (the value of improvements made by Holland to be allowed him) was to go to Kibbee. Witness thinks that improvements were valued at about $160 or $165. When Holland spoke of Kibbee, witness understood him to refer to Kibbee and Lathrop, and when of Doty, witness understood him to refer to Doty and Anthony. Holland paid me the fifty dollars when I paid him first payment. Don't recollect whether Holland handed me the fifty dollars, or I reserved that sum when I paid him.

There was a decree on foregoing pleadings and proofs, "that the complainants in this case are entitled to have of said defendant the account of the profits realized upon the sale of the premises described in complainants' bill; and it appearing to the court that the said profits amount to the sum of $1,420," and that Holland pay half that sum, and six per cent. interest from 24th February, 1857, to wit: $756.06, within sixty days, with six per cent. interest, and in default thereof that execution issue, and that defendant pay costs of suit. And complainant brings the case to this court by writ of error—assigning for errors,

1st. That decree ought not to have been rendered against Holland for any sum.

2nd. That decree was rendered against him for too much by some $360.

D. A. AND T. W. SMITH, for Plaintiff in Error.

I. L. MORRISON, and J. W. STRONG, for Defendants in Error.

CATON, C. J. A careful examination of this record will show that this decree was unquestionably for too much. The complainants were entitled to one-half of the profits, which the defendant should make on a resale of the premises. He paid for the premises, to the complainants, three thousand five hundred dollars, and then agreed to sell them to Doty and Anthony for three thousand and seven hundred dollars, and gave them a bond for a deed, upon their payment of the purchase money. In order to meet these payments, they agreed to sell the same premises to Hamilton, for five thousand and seventy-five dollars. By a system of management, by no means to be commended, the defendant, in order to realize as much of this enhanced value of the premises as possible, induced Hamilton to abandon the purchase from Doty and Anthony, and refuse to pay them the purchase money, whereby they were prevented from meeting their payments to the defendant, thus enabling him to insist upon a forfeiture of their purchase, and in order

to secure acquiescence in this forfeiture he paid them five hundred dollars; and in order to induce Hamilton to co-operate with him in this ingenious scheme, and to take the premises of the defendant at the price which Hamilton had agreed to pay Doty and Anthony, the defendant gave Hamilton fifty dollars. Thus by an expenditure of five hundred and fifty dollars, he was enabled to realize for the premises five thousand and seventy-five dollars, instead of three thousand and seven hundred dollars. Now, so long as the complainants are seeking to enjoy the fruits of this piece of management and finesse by claiming one-half of the profits arising from the sale to Hamilton, they cannot be permitted to repudiate the means by which he was enabled to make that sale. It cost him five hundred and fifty dollars to affect that arrangement, and we think it quite cheap enough. And they should not complain at being required to bear their proportion of this expenditure.

The evidence also shows, that the defendant had put upon the premises improvements to the value of one hundred and sixty dollars, which we must assume increased their value to that amount, and consequently increased the price for which they were sold by the amount of the value of the improvements; so that, that amount should be taken from the amount of the sale, before we can arrive at the profits to be divided. The enjoyment of the premises by the defendant may be fairly set off against the interest of the original purchase money; so that neither of these items need be taken into the account. Upon the principles above laid down, the account should be stated by charging the defendant with the amount of the sale to Hamilton, $5,075, and by crediting him with the original purchase money from Kibbee and Lathrop, $3,500; the $500 paid to Doty and Anthony, to get them to release their purchase of the premises, the fifty dollars paid to Hamilton, to secure his co-operation in the defendant's scheme to get the benefit of the sale to him, and the $160, the value of the improvements, leaving to balance, $865, which is the true amount of profits; for one-half of which, with interest, the complainants are entitled to recover. The decree is reversed and the suit remanded, with directions to enter a decree accordingly.

The judgment of this court heretofore entered in this cause, is reconsidered, and the decree of the Circuit Court is reversed, and the suit remanded, with instructions to enter a decree in accordance with the opinion of this court.

Decree reversed.

John B. Thompson, Appellant, *v.* John E. Haskell, Appellee.

APPEAL FROM CASS.

A return to a service of summons is good, if signed by the sheriff, although the signature has not to it anything to indicate by what authority he served the process.

A court is presumed to know its own officers, and especially the sheriff.

The assessment of damages by a clerk, is in lieu of the finding of a jury, and will be valid, although the declaration has the common counts in addition to the special count, upon the obligation sued on.

Haskell sued Thompson on a guarantee of a note. The declaration contained a special count on the note; there were also the common counts for money had and received. There was a judgment by default, upon an assessment of damages by the clerk, upon all the counts in the declaration. The sheriff's return to the service of summons was signed "James A. Dick," without anything added to the signature to indicate who James A. Dick was, or what office he held.

The errors assigned are, that the writ did not appear to be executed by the sheriff, or any authorized officer; and that the clerk assessed damages, there being a common count in the declaration which was not *nol prossed*.

D. A. and T. W. Smith, for Appellant.

J. Grimshaw, for Appellee.

Breese, J. This was an action of assumpsit, by Haskell against Thompson, on his written guarantee of a promissory note. The declaration counted on this guarantee, and contained also the common count for money had and received. A copy of the note and written guarantee was filed as follows: "Copy of note which will be offered in evidence under all the counts of the above declaration."

The summons is in the usual form, with this return endorsed on it:

"I have served the within summons by reading the same to the within named John Bradley Thompson this 20th April, A. D. 1858.

JAMES A. DICK."

A default was had, and the clerk assessed the damages, on which final judgment was entered, and an appeal prayed and allowed; and it is now assigned for error, first, The return on the writ as not appearing to be made by the sheriff or any au-

thorized officer, and second, The assessment of damages by the clerk when there was a common count not dismissed. As to the first error, the record recites that "the said summons was delivered to James A. Dick, Esq., sheriff of said Cass county." But independent of this, the rule is, where an act is done in the exercise of an official duty by one holding that office, it is not necessary to add to his signature a designation of his office, to make the act valid. The court will, *ex officio*, take notice of it. A court is presumed to know its own officers, and all public officers in civil affairs, within its jurisdiction—certainly the sheriff of its own court. *Shattuck* v. *The People*, 4 Scam. R. 481; *Irving* v. *Brownell*, 11 Ill. R. 416; *Stout* v. *Slattery*, 12 Ill. R. 162; *Rowley* v. *Berrian*, ib. 200.

As to the second error assigned, the fifteenth section of the Practice Act (Scates' Comp. 261,) provides, "In all cases where interlocutory judgment shall be given in any action brought upon a penal bond, or upon any instrument of writing for the payment of money only, and the damages rest in computation, the court may refer it to the clerk to assess and report the damages, and may enter final judgment therefor without a writ of inquiry, and without empannelling a jury for that purpose."

An assessment of damages by the clerk, in such case, is of the same force and effect as the finding of a jury upon an inquiry of damages.

By our statute of Amendments and Jeofails, (Ibid. 252, sec. 11,) a judgment after an inquiry of damages is put upon the same footing as a judgment on a verdict, and it cannot be stayed or reversed for any omission or fault which would not be sufficient to stay or reverse a judgment upon a verdict.

It will not be denied that a verdict in such a case, without specifying the count to which the evidence was applied, would not be set aside, and for the simple reason that the note is applicable to both counts, and it is filed with the statement that it will be offered in evidence under both counts.

A judgment by default then, in such a case, on a writ of inquiry, executed by a jury, without anything to show to what count the jury applied the evidence, would be sustained. The assessment by the clerk, being in place of a finding by the jury, must consequently be sustained. The judgment shows, from its amount, that no evidence other than the note, could have been received under the common count, for that and the interest upon it, make up the amount of the judgment. We see no error in the proceedings, and affirm the judgment.

Judgment affirmed.

Abraham B. Bunn, and S. S. Goode, Appellants, *v.* William Prather, and Matthew Sheppard, Adm'rs of Charles H. Sheppard, deceased, Appellees.

APPEAL FROM MACON.

An attorney agreed with a father to institute proceedings for the division and sale of land held by the father and his daughter in common, and the father agreed to pay for such services $500.00 when the land should be sold and the purchase money become due, or the usual fee in case the attorney should fail to procure the division. The father died after an order for the sale had been entered by the court, but before the sale had taken place; and the guardian of the daughter had the suit dismissed: Held, that the attorney was only entitled to the usual fee for his services.

Where the law casts a duty on a party, the performance shall be excused by the act of God, but where a party by his own contract engages to do an act, it is deemed his own fault that he did not exempt himself from responsibility in certain events.

This was a suit commenced in the County Court of Macon county, by Bunn and Goode, on a written contract between them and Charles H. Sheppard, deceased, and by them appealed to the Macon Circuit Court at the November term, 1858, and tried by said court without the intervention of a jury, and judgment rendered for plaintiffs for $40.00, from which plaintiffs appealed.

The bill of exceptions shows that plaintiffs introduced in evidence the following contract:

Article of Agreement, Made and entered into by and between A. B. Bunn and S. S. Goode, of the city of Decatur, and State of Illinois, of the first part, and Charles H. Sheppard of the same place, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of five hundred dollars to be paid by the said Charles H. Sheppard as hereinafter mentioned, have agreed and do hereby agree to commence and carry through the necessary legal proceedings for the partition and sale of the following described real estate owned by the said Sheppard and Ann Amelia Sheppard, his daughter, to wit:

The east half of the north-west quarter of section 4, the north-west quarter of section 5, and the south half of the north-east quarter of section 5, all in township 16 north, range 3 east of the third principal meridian, situate and being in the county of Macon and State of Illinois. Said proceedings to be commenced in the next July term of the Macon county Circuit Court. In consideration of which, the said Sheppard hereby agrees to pay to the said Bunn and Goode the sum of five hundred dollars, as soon as the land shall be sold and the purchase money for the same shall be due; and it is hereby agreed that if the said party of the first part should fail to get an order of court authorizing the sale of the said premises, then the said Sheppard is only to pay to said Bunn and Goode, the ordinary or usual fee for such services. In witness whereof, we have hereunto set our hands and seals, this 10th day of June, A. D. 1857.

A. B. BUNN, [seal.]
S. S. GOODE. [seal.]
C. H. SHEPPARD. [seal.]

Plaintiffs then offered in evidence the petition for partition filed in the Macon Circuit Court in case of *Charles H. Sheppard*, v. *Ann Amelia Sheppard.*

Also the summons in said cause, and return of service.

Also order of court appointing *Guardian ad litem* for infant defendant.

Also answer of said *Guardian ad litem.*

Also order of court for the appointment of commissioners to make partition in said cause.

Also report of said commissioners.

Also the order of court directing the sale of said premises by the master in chancery of Macon county.

Also introduced a witness who testified that he was the publisher of the Illinois State Chronicle, a newspaper published in Decatur, Illinois, and that the notice of sale was duly published in his paper.

Also introduced an order of court, which shows that death of Charles H. Sheppard was suggested, and that said cause was dismissed from the docket upon motion of his personal representatives.

This being all the testimony for plaintiffs, the defendants thereupon produced a witness who testified that in the absence of any special contract, the services rendered by said Bunn and Goode in the said cause were worth the sum of $40.

The court rendered judgment in favor of plaintiffs for $40, whereupon the plaintiffs moved the court for a new trial, which was refused.

Bunn & Gallagher, for Appellants.

S. G. Malone, for Appellees.

Walker, J. It is insisted by the plaintiffs that by the death of Charles H. Sheppard, they were excused from waiting for their money until the land should be sold and the purchase money should become due, as they had stipulated by their agreement. Or, if they were not excused from waiting until that time by his death, that the dismissal of the proceeding for partition by the guardian of his daughter, after his death, had that effect. It is a familiar principle of law, "That when the *law* casts a *duty* on a party, the performance shall be excused by act of God; but when a party, *by his own contract*, engages to do an act, it is deemed his own fault and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility in certain events; and in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable acci-

dent, or other contingency, although not foreseen, by or within the control of the party." Chitty on Contracts, 568. In this case the agreement to wait for the payment of the larger sum named in the contract, was absolute and unconditional. The plaintiffs were attorneys, and must have known, that in the event of the death of either the father or the daughter, that the tenancy in common existing between them in this land, would by that event terminate, and the survivor become sole seized of the land. And upon the happening of that event, they also must have known that there would not be such an estate in the survivor as the court could partition; and knowing these facts, if they had desired to have avoided the contingency, they should have provided against it in their agreement. The duty, to wait until a sale of the land was procured under a decree of the court, was not imposed by the law, but was created by the agreement of the parties, and the death of Sheppard, although an inevitable accident or contingency, over which the plaintiffs had no control, did not excuse them from a compliance with their agreement.

Nor did the dismissal of the proceeding instituted for partition by the guardian after the death of Sheppard, in any manner change the rights of the parties. By the death of Charles H. Sheppard his undivided half of these premises vested by descent in his daughter, the other tenant in common, and she thereby became sole seized of the entire property. And when that event occurred, the court lost all jurisdiction of the subject matter, and could not make partition of the land, or its proceeds upon a sale. There was, then, but a sole interest in the land, and the fact that there had been a previous order of the court for the sale of this property unexecuted, did not affect the title, so as to prevent the father's interest from descending to the daughter. By the descent of the father's interest in the land to the daughter, and she becoming the sole owner, the proceeding for partition abated, and the formal dismissal of the proceeding by the guardian, was no more than striking it from the docket, which the court should have done on becoming satisfied of the death of the father. Nor was it in the power of the guardian to confer upon the court authority to proceed with the sale, in that proceeding. The law has vested him with no such authority, and his consent to a sale would not have availed anything. By the express terms of the agreement of the parties in this case, the five hundred dollars did not become due and payable until the land should be sold under the proceeding then to be instituted for a partition, and the purchase money become due under such sale; and as that event has never occurred, the plaintiffs have no right to recover that sum.

Judgment affirmed.

Alexander J. Hawk, Plaintiff in Error, *v.* William McCullough, Defendant in Error.

ERROR TO SCOTT.

The words "grant, bargain and sell" in a deed, amount to an *express* covenant that the grantor was seized of an indefeasible estate in fee simple in the premises conveyed, and also, covenant for quiet enjoyment of the vendee.

And a covenant of warranty in the deed, that the heirs, executors and administrators of the grantor shall defend, etc., does not qualify or narrow the covenant as expressed by the words "grant, bargain and sell."

A declaration which declares under a covenant contained in the words "grant, bargain and sell," and spreads out at length the purport of those words, as the statute declares them, is good.

A bill of exceptions taken to the overruling of a demurrer, is improper; the point saves itself; the judgment is part of the record.

This was an action of covenant. The declaration alleges that defendant granted certain real estate to plaintiff, and by his deed of conveyance, "covenanted with the plaintiff, among other things, that the premises conveyed as aforesaid, were free of all incumbrances, done or suffered from him, the said defendant, except the rents and services that were reserved"—that at the time of executing said deed, the said premises were in the possession of certain tenants of the defendant, whose tenancies did not expire till long after the delivery of said deed, and that said tenancies had been created by the defendant, and did not expire before the 1st of August, 1857—that said deed of conveyance was executed and delivered on the 20th of February, 1857. The declaration alleges that the contract of tenancy rested in parol; that plaintiff was not advised of the exact terms of the tenancies, and therefore could not pretend to state them with certainty; that plaintiff states them according to the best information he can gain upon the subject, but that the defendant is fully cognizant of the exact terms; declaration, however, does state that defendant, in the fall of 1856, rented the premises, by parol, to certain persons therein named, whose tenancies did not expire before the 1st of August, 1857, and that thereby the plaintiff was unable to have and to hold the said premises according to the form and effect of said deed; whereby the defendant has not kept but broken his covenant in this, "the premises were at the time of the execution and delivery of said deed subject to the tenancies aforesaid."

The defendant appeared, craved oyer of said deed, set it out in *hæc verba*, and demurred *generally* to the declaration. The deed thus set out contains, among other things, the following words, to wit: "That the said party of the first part, in consideration, etc., have granted, bargained, sold, released and

conveyed, and do by these presents grant, bargain, sell, release and convey to the said party of the second part, his heirs and assigns forever," the said real estate. "To have and to hold, etc. And the said party of the first part, for their heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns, that they will and their heirs, administrators and assigns shall warrant and defend the same to the said party of the second part, his heirs and assigns, against the lawful demands of all persons."

The court, WOODSON, Judge, presiding, sustained the demurrer to the declaration, to which plaintiff excepted, and abided by his declaration; whereupon the court rendered judgment in favor of defendant, that he recover of the plaintiff his costs.

The errors assigned are: the court erred in sustaining said demurrer to the declaration; and in rendering judgment against the plaintiff.

KNAPP & CASE, for Plaintiff in Error.

D. A. AND T. W. SMITH, for Defendant in Error.

BREESE, J. The general principle is, where there is a conveyance, no covenant shall be added to it which is not expressed or which cannot be implied from the terms used. Our statute (Scates' Comp. 961,) provides that "all deeds, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, or other legal representatives, the words '*grant*,' '*bargain*,' '*sell*,' shall be adjudged an express covenant to the grantee, his heirs and other legal representatives, to wit: That the grantor was seized of an indefeasible estate in fee simple, free from incumbrances done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns, may, in any action, assign breaches as if such covenants were expressly inserted."

We have decided, (*Prettyman et al.* v. *Wilkey et al.*, 19 Ill. R. 242,) that the words grant, bargain, sell, amount only to a covenant that the grantor has done no act, nor created any incumbrance, whereby the estate granted by him could be defeated. In other words, to a covenant only against his own acts—a limited covenant simply, but, nevertheless, an express covenant; as much so, as any covenant can be, for it is so declared by the statute.

This being so, we do not well see, how the question made in the argument can arise, namely: Does an express covenant destroy an implied covenant? The deed is set out on oyer, and it does not seem to contain any implied covenant, but contains the words "grant, bargain, sell," which are an "*express*" covenant that the grantor was seized of an indefeasible estate in fee simple, as also for quiet enjoyment by the grantee. The breach assigned is, that the plaintiff was unable to have and to hold the premises according to the deed, by reason that they were subject to certain unexpired tenancies, created by the grantor before the execution of the deed.

The covenant of warranty in the deed, it will be observed, is not by the grantor that he will warrant and defend the title, but he covenants for his heirs, executors and administrators, that they will, and their heirs, executors and administrators and assigns, shall warrant and defend the title against the demands of all persons. *Ruffner* v. *Mc Connell*, 14 Ill. R. 168. So that this covenant cannot qualify or narrow the preceding covenant as expressed by the words "grant, bargain, sell."

We think the legal effect of this covenant expressed by these words is properly set forth in the declaration. That by force of these words, there was an express covenant by the grantor, that the premises conveyed were free from incumbrances done or suffered by him.

The unexpired tenancies alleged to have been created by the grantor before the execution of the deed, and admitted by the demurrer, were incumbrances, and being so, were a breach of this covenant.

But at any rate, the covenants preceding, if they are implied covenants, and the covenants subsequent to the covenant against incumbrances, are not of the same import. Covenants respecting the general title may well consist with a restrictive covenant against incumbrances, and, taken together, the several covenants stand unconnected in sense and expression, and uncontrolled, the one by the other. Rawle on Cov. of Title, 379, note 1; *Sumner* v. *Williams*, 8 Mass. R. 162.

There is, in fact, no express covenant by the grantor that he will warrant and defend the title, and of course, the preceding covenant cannot be abrogated by it.

We understand that the case rests upon the covenant contained in the words "grant, bargain, sell," which the plaintiff in his declaration has spread out at length, as the statute declares their purport and meaning to be. This is a proper mode of declaring, and we cannot see in what the declaration is vicious. A good cause of action is legally and technically set forth, and as there are no covenants contradictory of, or inconsistent with those

expressed in the deed by the words "grant, bargain, sell," and the incumbrances are averred to have been created by the grantor himself, we do not see why the court sustained the demurrer. We think it should have been overruled.

We have been specially referred by the defendant's counsel, to the case of *Frink* v. *Darst*, 14 Ill. R. 304, as having a powerful bearing on this case. That case overrules the case of *Frisby* v. *Balance*, 2 Gilm. R. 144, and establishes the doctrine, that under a quit claim deed, a subsequently acquired title will not vest in the grantee under such deed. The language imputed to Mr. Justice Trumbull in his opinion in that case, is a quotation from the opinion of the Supreme Court of Missouri, and so designated by him. It does not seem to touch or affect this case in any manner, in the view we have taken of it.

We take occasion to repeat here, that an exception taken to overruling a demurrer is improper, for the point saves itself—it is a part of the record by the demurrer, and needs no bill of exceptions to place it there.

The judgment is reversed and the cause remanded.

Judgment reversed.

William H. Young *et al.*, Appellants, *v.* Charity D. Ward, Appellee.

APPEAL FROM LOGAN.

Where an action is brought by the wife, upon a promissory note made payable to the wife or the husband, the proper mode of taking advantage of the fault, is by plea in abatement.

On such an obligation the suit should be brought either in the name of the husband, or by the husband and wife.

Upon an obligation made to a wife during coverture, the husband and wife may join in an action for a recovery upon it.

Husband and wife being but one person in law, the legal effect of a note made payable to the wife, or to the husband and wife in the alternative, is, that the husband is payee.

If a party signs a blank, and delivers it to another person, with authority to write over his name a negotiable obligation, if the person receiving the blank, makes the obligation for a larger amount than was intended by the signer, it will be good against him, in the hands of an innocent purchaser. So of negotiable paper, given for one purpose but used for another.

It is gross misconduct, for a circuit clerk, in making up the transcript of a case for this court, to append to the transcript the original appeal bond. Original papers should only be sent to the Supreme Court upon an express command from this court.

Young et al. *v.* Ward.

This was an action of assumpsit, brought upon a note made payable to Alfred Ward or Charity D. Ward, his wife, and given for two hundred and fifty dollars, made payable on or before the twenty-fifth day of December, one thousand eight hundred and fifty-five. The note was signed J. L. Reim, and the appellants. The declaration declared specially upon the note, and had also the common counts. The suit was brought in the name of Charity D. Ward. The defendants pleaded the general issue. Also a special plea that the said Charity D. Ward, who hath above thereof complained against the defendants, is not the wife of the said Alfred D. Ward. A third plea: That the note was obtained through fraud and circumvention, because Reim, who was the principal in said note, and who obtained the consideration therefor, and who induced the defendants to sign the note with him, said Reim, assured them at the time that several other persons whom he named would also sign the note; that upon the strength of this assurance defendants signed the note; that upon subsequent inquiry, Reim told defendants that the note had been destroyed, etc.; therefore defendants were not bound to pay, etc.

A demurrer was sustained to the special pleas. There was a trial by the court, without the intervention of a jury, and a judgment was entered for the plaintiff below. The defendants then took this appeal.

W. H. Young, for Appellants.

Lincoln & Herndon, and C. Parks, for Appellee.

Walker, J. The record in this case presents for consideration, the question of whether a judgment recovered by a *feme covert* on a note payable in the alternative, either to her husband or herself, is erroneous. There is no doubt that the suit should have been brought in the name of the husband alone, or in their joint names. But whether the defendant can now insist upon the objection, is what we are called upon to determine. The doctrine seems now well settled, whatever may have been the doubts formerly entertained, that on a contract entered into with the wife alone, during coverture, the husband and wife may join in an action for its recovery. *Philliskirk and Wife* v. *Pluckwell*, 2 Maule and Selw. 393; 1 Chit. Pl. 33. "The *consequences of a mistake*, in the proper parties in the case of baron and feme, are that when a married woman might be joined in the action with her husband, but sues alone, the objection can only be pleaded in abatement, and not in bar, though the husband might sustain a writ of error." 1 Chit. Pl. 36. In all cases where the wife is the meritorious cause of action, she may

be joined with her husband as plaintiff for its recovery. This contract is in the alternative, to pay the husband or wife, and it cannot be doubted she was a party to the instrument. It was payable to her husband or to herself, and the husband and wife might have joined as plaintiffs. But failing to do so, and the suit being in the name of the wife only, the defendant should have plead her coverture in abatement. By failing to do this, he waived the objection, and could not plead it in bar of the action; nor could he take advantage of it under the general issue on the trial, or on error. But even if he might have done so, the record fails to show that such objection was urged at any stage of the proceeding. This is not such an error as entitles plaintiff to a reversal of the judgment.

The note describes plaintiff as the wife of Alfred Ward, and the plaintiff in her declaration follows the description in the note. The husband and wife being in law regarded as one person, the legal effect of the note was that the husband was the payee, and the note was not payable in the alternative, to one of two persons, and the objection that there was uncertainty as to who was the payee, and therefore void, does not apply. The defendant by executing the note admitted the coverture of plaintiff, and was estopped to deny that fact, as effectually as the amount, or any other part of its contents. For these reasons there was no error in sustaining the demurrer to this plea.

The third plea discloses a state of facts which, if true, most clearly constituted a fraud perpetrated on defendant, by Reim. But it nowhere alleges that the plaintiff, or her husband, participated in the false representations which were made. There is no averment that she, or her husband, ever made or caused to be made, representations of any description to this defendant, or that she or her husband knew that any such were made. There is no principle of law that will hold a party to the consequences resulting from the perpetration of a fraud, who is innocent of all participation in it, unless it be where the statute has declared instruments to be absolutely void, as having been given in violation of some penal statute. And there is nothing averred in this plea to bring this instrument within any such enactment. If this plea had averred that these representations were made by the sanction, or procurement, of plaintiff or her husband, or with a full knowledge of their having been made, she or her husband had accepted this instrument, then the question would be different. It is the settled doctrine, that if a party signs his name to a blank paper, and delivers it with authority to fill the blank above his signature with a note or bill for a particular amount, or to a specified person, and the person

receiving it fills it for a larger amount, or to a different person, and it is passed in the course of business, without notice of the facts, the maker is bound by the instrument. And so of a note or bill already filled up, and entrusted by the maker or drawer to be delivered for a particular purpose, or to a particular individual, or on a contingency, and the instrument is negotiated contrary to the intention of the maker, to an innocent person. It is the duty of the maker to see that his negotiable paper does not improperly get into circulation, and failing to do so, he must suffer the consequences of his negligence. For these reasons, the demurrer was properly sustained to this plea.

In this case, the clerk of the Circuit Court of Logan county, has, for some unaccountable reason, and in violation of his official duty, returned with the transcript of the record in this case, the original appeal bond. That is one of the files of his court, deposited there for the benefit and protection of the parties. The law requires him to keep and preserve it in his office, and he has no right to entrust it to others, and much less to send it to another court, there to remain, unless it is in return to a writ, or order, for that purpose. If this practice is tolerated, those who are selected to preserve the records of our courts upon which our most important rights depend, may become the instruments by which these records may be destroyed, and those rights wholly lost. The law requires a transcript to be made and certified by the clerk, and for this he is entitled to compensation, and if parties wishing to remove their causes to the appellate court are unwilling to incur the expense of a transcript, it is no justification to the clerk in violating his duty. This practice cannot be tolerated, and it is earnestly hoped that this court will not in future have occasion to refer to its recurrence.

We are unable to perceive in this record any error for which this judgment should be reversed, and the same should therefore be affirmed.

Judgment affirmed.

David Chrisman, Appellant, v. Daniel Miller, Robert Schuyler *et al.*, Appellees.

APPEAL FROM McDONOUGH.

B. bargained for three quarter-sections of land, paying therefor a part of the purchase money, the residue to be paid at stated periods, time being of the essence of the contract; he sold to M., under a previous agreement with M., one of the quarter-sections, with similar times and terms of payment, M. having also paid to B. a part of the purchase money; each took possession, and continued therein and made improvements; the vendors to B. declared a forfeiture of the contract for non-payment of the purchase money; M., after the forfeiture declared, told the vendors, that B. could not pay, and M. then purchased the land: Held, that the assignee of B., under such circumstances, could not enforce a claim for the quarter-section originally bought by B.

After a declaration of forfeiture of a contract has been made, where time is of the essence of it, the vendor is at liberty to act as if the contract had ceased, and all parties formerly interested in the forfeited contract, may afterwards deal with the subject of it, as strangers.

No particular manner or form of declaration of forfeiture of such a contract is necessary.

This bill alleges that before 25th October, 1848, one Amos S. Burk was desirous of purchasing the north-east of 13, and west half, south-east 12, 4 north, 3 west, and at the same time Daniel Miller was desirous of purchasing the east half of last tract; that Burk and Miller agreed verbally that Burk should go to Quincy, where agent of owners of said lands resided, and purchase said lands in his own name; that Miller should place $30 in hands of Burk, as said Miller's probable proportion, or fourth of the first payment on said half section, and that when Burk should return from Quincy, he and Miller were to enter into a written contract for the payment of the purchase money by Miller to Burk, and conveyance of title by Burk to Miller for said east half, south-east 12, which contract was to correspond with the conditions of the contract that Burk should make in purchasing said half section. Miller paid to Burk $30 in pursuance of said agreement, and Burk went to Quincy, and on 25th October, 1848, made a written contract with Robert Schuyler and others, for the purchase of said half section, said contract being made on the part of Schuyler and others, by their agent, Charles A. Savage, in substance as follows;

Schuyler and others, in consideration of $100, paid by Amos S. Burk, and Burk's agreement to pay $100 on 1st January, 1850, $100 on 1st January in each and every year thereafter, with interest, until $500 should be paid,—(the whole consideration being $600,)—sell to said Burk the south-east 13, 4 north, 3 west, and agree to convey said land by quit-claim deed, upon full payment of said purchase money. Time being the essence of said contract. All payments to be made in Quincy. In case

of failure of said Burk to perform any of the covenants on his part, Schuyler and others "shall have the right to declare this contract void."

Burk paid said $100 recited in said contract, using toward such payment said $30 paid by said Miller. Soon afterwards, Burk and Miller, in pursuance of said verbal agreement, entered into a written contract of same date with Burk's contract with Schuyler and others, whereby Burk bound himself to convey to Miller by quit-claim deed the east half of south-east 12, aforesaid, and Miller agreed to pay Burk upon like terms, one-half the price which Burk had agreed to pay Schuyler and others for said quarter, being half of $350.

The contract between Burk and Miller is in form the same as the one between Schuyler and others and Burk—it acknowledges the receipt of $30 paid by Miller, and Miller agrees to pay the balance as follows: 29\frac{1}{6}$ on 1st January, 1850, and a like sum on 1st January, every year thereafter, with interest until $175 and interest is paid. Each payment to be made at Quincy. It makes time the essence of the contract, and provides that Burk, in case of failure to perform covenants on Miller's part, "shall have the right to declare this contract void." Burk and Miller paid off the first installments respectively due, as follows: Miller paid Burk $31, and Burk paid Schuyler and others $56, with extension of time to January 1st, 1851, for balance of that payment, which amounts are credited on said written contracts. In October, 1851, Miller paid Burk $25, and Burk paid Schuyler and others $75, which sums are credited on said contracts. That when said $75 was paid Savage, the agent of Schuyler and others told Burk, in Miller's presence, that he would be as indulgent as he could, would not rigidly enforce the contract, and if he had to urge the payment, would give Burk written notice, and not exact forfeiture.

Owing to the failure of crops, etc., Burk failed to make any more payments on his contract with Schuyler and others, Savage, their agent, still assuring him that he would not insist on a forfeiture of contract, and would give notice in writing in time for Burk to get the money. In April, 1853, Burk learned that Miller fraudulently had gone to Quincy, and had made a purchase in his own name of said half section from Schuyler and others, through their agent, Savage.

Miller had failed to pay Burk his proportion of the purchase money, according to his contract, yet in April, 1853, Miller went to Quincy, and there falsely and fraudulently represented to said agent, Savage, that Burk had abandoned all idea of complying with said contract, and that Burk was not able, and did not intend to comply with his contract, but that he, Burk,

intended to keep possession as long as he could, and cheat him, Miller, out of his labor and improvements on east half, south-east 12. Miller, by such false representations, induced Schuyler and others, by their agent, Savage, to sell him said half section, and to execute to said Miller a contract for a conveyance, in consideration of his agreeing to pay the *balance* that was due Schuyler and others on Burk's contract. Representing, also, that his object in making such purchase, was to save said east half, south-east 12, from being lost to him, Miller.

Burk, upon ascertaining that Miller had purchased, tendered and offered to pay Savage, as agent for Schuyler and others, the balance due on his contract with them. Savage refused to receive it, saying he had been deceived by Miller, but had sold him the land, and could not receive the money.

Burk, in two or three weeks after he learned that Miller had purchased said land, offered to pay Miller the balance that would be due on the contract that Burk had made with Schuyler and others, after deducting balance unpaid on Burk's contract with Miller, and that Miller should have the east half of south-east 12, which offer Miller refused. Burk then offered Miller the whole amount of balance due on Burk's contract with Schuyler and others, if Miller would convey the half section aforesaid, and also pay Miller all money that Miller had paid Burk on former contract. That Burk, immediately after he made said contract with Schuyler and others, took possession of and made valuable improvements on north-east 13, and west half south-east 12, aforesaid, worth about $300, and Burk has ever since resided thereon. Miller took possession of and improved the east half of south-east 12, aforesaid.

That Miller, when be bought of Schuyler and others, knew of Burk's possession, and that he did not intend to abandon his purchase, nor to deprive Miller of said east half south east 12.

That on 27th May, 1853, Burk, for a valuable consideration, assigned his interest in said half section by endorsement on said written contract with Schuyler and others, to Chrisman, the present appellant, of which Miller had notice. That Burk has since held possession as tenant of Chrisman, and after his purchase of Schuyler and others, until assignment, Burk held possession in his own right.

Offers to bring into court the money unpaid on contract with Schuyler and others, deducting amount due on contract between Miller and Burk, to allow Miller to retain east half south-east 12, aforesaid, if Miller will convey to him, appellant, the north-east 13, and west half south-east 12, aforesaid. That since the filing of original bill, said Schuyler and others have conveyed all said premises to Miller, and Miller refuses to convey, although

requested, the said north-east 13, and west half south-east 12. Prays process, etc., waives answers being under oath—that court ascertain amount due on the two contracts, and the amount that appellant ought to pay Miller, etc., and that Miller convey north-east 13, and west half south-east 12, aforesaid, to appellant; and for general relief.

Miller filed his answer to the foregoing bill, and admits that on 25th October, 1848, when Burk informed him he had bought the land, and wished to sell part of it, he bought of Burk said east half south-east 12, for $175, on terms as stated in the bill, and entered into the contract stated in bill, and paid $30, and afterwards, on 2nd January, 1850, at Quincy, paid $31 more to Burk, and afterwards on 10th October, 1851, at Quincy, paid Burk $25 more.

Denies execution of contract between Burk and Schuyler and others. Denies Savage's authority to execute it. Insists that Burk, long before assignment to appellant, had forfeited all rights under said contract. That he had abandoned all claims under it, and appellant knew it. That believing that Burk had abandoned all claim, he had purchased said land of one Edward A. Savage, agent for said Schuyler and others, about March, 1853, for $533.26, and received a deed from them for said half section. Denies that he made any misrepresentations, etc. Denies that the contract between Burk and Schuyler and others, or any money paid thereon, formed any part of the consideration which he paid for said land. Denies that any money has ever been tendered to him, or to Schuyler and others.

Burk filed an answer, admitting allegations of bill.

At the April term, 1858, of said court, the bill was dismissed at appellant's cost, by WALKER, Judge.

On the hearing, complainant offered the deposition of *Amos Burk*, who testified that the said Miller wanted to purchase the said east half south-east 12, that witness was to go to Quincy, and buy the whole of south-east 12, of Charles A. Savage, then agent for it, was to give Miller a bond for a deed for said east half, according to bond that he got, and Miller was to pay half purchase money that he was to pay for whole quarter section. Miller paid him thirty dollars on the contract before he went to purchase the land. He was to buy in his own name. He bought the lands in his own name, of Charles A. Savage, as agent for Schuyler and others.

Paid the thirty dollars over to agent of Schuyler and others, as part of first payment. Miller approved of purchase after it was made. Miller and witness then executed contract. Miller and witness, in January following, went to Quincy together. Miller paid witness thirty-one dollars, which is endorsed on

contract with Burk, and witness paid fifty-six dollars, using the thirty-one dollars to make that amount, which was endorsed on contract with Savage. Also, at the same time an extension of the time was given upon balance of money then due, until 1st January, 1851.

On 10th October, 1851, witness paid at Quincy, on his bond, $75, using $20 that Miller had paid him on Miller's bond. Savage, the agent, then told witness that he would not force payments any faster than he was compelled by his principals; that he would give witness timely notice, so that he could raise the money, before he declared contract void. Went to Quincy in 1852, and learned of sale to Miller, and had a conversation with Savage about the matter; he informed witness that Miller had got a contract for both quarters, by agreeing to pay *balance* due on witness's contract. Witness then tendered Savage all the money due on witness's contract with Schuyler and others. On returning from Quincy, went to see Miller. "He said he had got me by the heels and meant to keep me there." A short time afterwards tendered Miller all the money due on contract except what would be due on east half. Then tendered him all the money that would be due on witness's contract with Schuyler and others; he would not receive it. On May 27th, 1853, assigned the original bond over to Daniel Chrisman, complainant. Miller occupied east half of south-east 12. Witness occupied the rest of the land now in dispute, being west half south-east 12, and north-east 13. We commenced improving about twelve months after we purchased. Miller has occupied said east half ever since, and witness the other pieces; and also for more than a year after his sale to Chrisman. Chrisman has since occupied it. I improved said west half south-east 12, and north-east 13. Improvements worth $500. Miller's improvements on east half worth $150. Schuyler and others, neither by themselves nor agent, ever declared contract void. Witness never, after the time on said contract was extended, received any letter from Schuyler and others, or their agent, until after Miller bought. The land was worth more when Miller bought than when witness bought.

On cross-examination witness stated that there was a written extension of time on his contract with Schuyler and others, dated January 2nd, 1850, and a verbal extension made on Oct. 10th, 1851, to continue until Savage, the agent of Schuyler and others, should notify witness. Chrisman was to pay witness $200 for his claim to land, and has paid all but $50.

Deposition of *A. E. Savage*, taken 16th January, 1857. Charles A. Savage, on the 25th October, 1848, was agent for Robert Schuyler and others, named, and is still their agent.

Charles A. Savage, as agent for Schuyler, sold land in dispute to A. S. Burk; there was a forfeit bond executed in usual form. $100 was paid on execution of contract; $56 on January 2nd, 1850; $75 on October 10th, 1851. There was an extension of time given on balance of what was due January, 1850, to Jan. 1st, 1851. Schuyler and others, afterwards, by their agents, sold said land to Daniel Miller, for $533.26, on 16th March, 1853,—$360 cash, $179.60 on 26th October, 1853. The balance due on Burk's contract, at time of sale, was $533.26. Miller had informed witness of his being interested in land, but not of extent of interest. Witness named the price above. Schuyler and others generally approved of the actions of C. A. Savage, as agent, and they received the consideration of sale, so far as paid by said Burk, for land in dispute.

Witness mailed letter at Quincy, directed to Burk, at Macomb, declaring a forfeiture; don't know whether Burk ever received it. Never gave Burk any other written notice; told him, in Macomb, in spring of 1852, that "I should declare it forfeit if he did not comply with the terms of said contract." Witness offered land for sale after 1st March, 1853, and sold it to Miller on the 16th of March, 1853.

The last installment on Burk's contract was not due on 16th March, 1853. The mailing of the letter to Burk, and the sale of land to Miller, were the only acts Savage did to declare contract forfeited.

J. R. W. Hinchman testified, that he remembers Miller being in the office of C. A. & A. E. Savage; wanted to purchase some land; Burk's name was mentioned in connection with it; he said that Burk never would pay for it, and unless he obtained title from Messrs. Savage, he feared he would never get any title. Said he had agreed to pay Burk some money on the land. He offered to pay what was due from Burk on land, anxious to secure it because it lay in front of his door.

Some time after this, Burk was in Savage's office, and stated that he was prepared to pay the balance due from him on the land.

Charles A. Savage testified, that at the time of the sale by my brother and myself, as agents of Schuyler and others, to Miller, spoken of in my former deposition, Miller stated that Burk would not be able to comply with the contract he had made with Schuyler and others.

The non-fulfillment, on Burk's part, of the performance of his contract, and secondly, from the fact that Miller created in our minds the impression that he was in possession of land under purchase from Burk, was what induced us to give the new contract to Miller, spoken of in my former deposition. We were

not in the habit of enforcing a forfeiture of such contracts, unless we were well satisfied that they would not be fulfilled; that is, unless they had not been, and there was a prospect that they would not be fulfilled. It was our practice to allow third parties to come in and fulfill these contracts by paying the balance due, when we would execute deeds to such third parties. We confined ourselves in this matter, to those whom we supposed, or were satisfied had become interested as subsequent purchasers from those to whom we had originally sold.

Miller did not, when he purchased, inform us that Chrisman, or any one else, was in possession of any part of land claiming through Burk. My impression is that after the sale to Miller, Burk offered to pay up the balance due on the contract, and that we declined receiving it, in consequence of having sold to Miller. This was not long after the sale to Miller. If we had been informed by Miller at the time of the sale to him, that David Chrisman, or any other person claiming by purchase from Burk under Burk's contract, was in possession of, or interested in a portion of said land, we would not have contracted to sell the whole of it to Miller, without affording Chrisman or such other person, so holding or claiming under said Burk's contract, an opportunity of protecting his or their purchase from Burk, by paying up the balance due on said contract.

Two or three times after October 10th, 1851, and before March 15th, 1853, C. A. Savage notified Burk, personally, that unless he paid up immediately, "*I should be obliged to declare it forfeited.*" A letter was written which is herewith attached, marked "B."

On 16th March, 1853, A. E. Savage and myself sold the land, as agents for Schuyler and others, to Daniel Miller.

Miller, in 1853, offered to pay me the balance due on Burk's contract, which was $533.26. I replied he could have the two quarters for balance due on Burk's contract.

Letter referred to as exhibit "B," dated February 1, 1853, states to Burk, "If you do not pay up on or before March 1st, next, we shall declare same forfeited, and the land shall be for sale." Signed, C. A. & A. E. Savage.

On 1st February, 1853, we notified Burk by letter, that if he did not pay on or before 1st March, we should declare contract forfeited, and hold the land subject to sale.

J. P. M. Buchanan testified, that some time before this suit, Chrisman told witness he did not believe Burk would be able to pay for land; that Miller should never have it. I told him that Miller had a contract for it.

Chrisman, on another occasion, told witness he knew that Burk's contract had expired.

Errors assigned: court erred in dismissing bill at complainant's costs; and not entering a decree in favor of appellant, for relief prayed for in bill.

Cyrus Walker, and J. Grimshaw, for Appellant.

C. L. Higbee, for Appellees.

Caton, C. J. The case presented by this record is briefly this: On the 25th October, 1848, Burk entered into a written contract of purchase with Schuyler and others, of the half section of land in question, for $600.00; one hundred of which he paid down, and agreed to pay one hundred with interest on the first day of January, 1850, and one hundred dollars with interest on the first of each succeeding January, until the balance should be paid. The covenant to convey is made upon the express condition that the payments shall be promptly made, and time is in terms declared to be of the essence of the contract; and a subsequent clause of the contract declares that the parties of the first part, in case of failure by Burk to perform any of his covenants, "shall have the right to declare this contract void." In pursuance of a verbal understanding between Burk and Miller, existing before this purchase, Burk agreed to sell to Miller one eighty of the half section, with payments and conditions corresponding with those of the contract of purchase above stated; of which payments, thirty dollars were paid down by Miller. Miller took possession of his eighty, and Burk took possession of the balance of the half section. On the second of January, 1850, the day after the second payment of one hundred dollars and interest fell due, Burk paid to the agents of the parties of the first part fifty-six dollars, and the agents at that time, agreed to extend the balance of that payment till the first of January, 1851. No further payment was made by Burk till the 10th of October, 1851, when he paid seventy-five dollars on the contract. This was the last payment he ever made on that contract, and no extension of time was ever stipulated, except that which was stipulated on the second of January, 1850. Several times between the time of the last payment on the 10th of October, 1851, and the 15th of March, 1853, Burk was personally notified by the agents of the party of the first part, that unless he paid up immediately, they would be obliged to declare the contract forfeited, and on the first of February, 1853, the agents wrote to Burk: "if you do not pay up on or before March 1st, next, we shall declare same forfeited, and the land shall be for sale."

Miller was nearly as delinquent in his payments to Burk, as Burk was to Schuyler and others.

On the 27th of February, 1853, Burk assigned his interest in the contract to the complainant, Chrisman, who never made any payments on the contract; and on the 16th of March, 1853, the agents of Schuyler sold the land to Miller for $533.26; of which he paid down $360, and the balance on the 26th of October, following. In the mean time, Burk continued in the possession, use and occupation of the three eighties which he claimed, and made valuable improvements on the land; and after he heard of the purchase by Miller, he tendered the amount due on the contract to the agents of Schuyler and others, and also to Miller, and demanded a conveyance of the two hundred and forty acres to Chrisman, which was refused. At the time Miller purchased, he represented to the agents of whom he made the purchase, that Burk was unable to complete the payments, and that he had purchased of Burk a part of the land. This is in brief, the substance of the case, as we gather it from a very voluminous record, upon which the court below dismissed the bill; which is now assigned for error.

When once understood, this whole case is reduced to a very small compass.

Two principal questions present themselves in the consideration of this case, upon which the decision must principally depend:

First. Had the contract for the purchase of the land by Burk ceased to exist, so that he no longer had any legal or equitable rights under it, on the 16th of March, 1853, at the time of the purchase by Miller? And—

Second. Was the conduct or position of Miller such at the time of his purchase, as to make him the trustee of the assignee of Burk, and make Miller's purchase enure to the benefit of Chrisman?

It seems to us, that but one answer can be given to the first proposition.

It is conceded on all hands, that parties have a right to make their contracts as stringent as they please, and to make time of the very essence of their contracts; and if one party, without the consent of the other, allows the specified time to pass, no matter from what cause, without performing the condition, the stipulated consequences must follow. Here, by the express contract of the parties, time was made of the essence of the contract. The contract is, that if the payments should not be made at the stipulated time, then the purchaser's interest under the contract should cease. In all such cases, the mere

lapse of time, with non-performance, does not of itself obliterate the contract; so that neither party has any rights, and is subject to no liability under it as if it never had been. After the expiration of the time, and non-performance, the vendors had a right still to treat the contract as subsisting, and sue Burk on his covenants. The clause of forfeiture was put in for their benefit and their security, and did not release the purchaser from his covenants to pay, till the covenantees chose to avail themselves of that clause. Till then, the rights and liabilities remained the same as if no such clause was in the contract. *Mason* v. *Caldwell*, 5 Gilm. R. 196. So long as Schuyler and others reserved the right to sue Burk upon his covenants to pay, so long did the right subsist in Burk to tender the balance due, and demand a deed. After default by Burk, they had the right at any moment to declare the forfeiture; and thus deprive themselves of the right to sue on the covenants; and to deprive Burk of the right to claim a performance by them, nor was it incumbent on them to give notice to Burk of such determination. After his default he was entirely at their mercy. The mere act of offering the land for sale, or entering it in their sale-book, or any other act showing that they considered the contract as terminated, or treated it as terminated, was sufficient to put an end to it, and deprive Burk of the right to claim its performance; and them of the right to sue him upon his covenants contained in it. If we treat Miller as a stranger, then the mere act of selling to him was of itself a sufficient election by the vendors to seek their remedy by taking advantage of the forfeiture, and released their remedy on the covenants. Indeed such was the undoubted effect of the sale to Miller, no matter what his relations to Burk might be in reference to the land.

We will now consider for a moment what those relations were, and what influence they should exert upon the respective rights of Miller and Burk, or on the assignee of Burk in reference to the title acquired by Miller.

During the subsistence of that contract, both Miller and the assignee of Burk had a joint interest in it, the former to the extent of the eighty acres which he had purchased of Burk, and the latter to the extent of the remainder of the half section. We are inclined to the opinion that while this relation continued, while the contract subsisted in life, and each had an interest in it, neither could deal for the subject-matter of that contract, except for the joint benefit of both, in proportion to their respective interest in that subject-matter.

However this may be, we are of opinion that the agents of the vendors had terminated the contract by taking advantage of the clause of forfeiture before the purchase by Miller, so that

the contract at that time was a dead letter, and that neither had any rights under it, and that the relation of confidence between those who had the joint interests under the contract had become dissolved, and they had become as strangers, as to the subject-matter of the contract.

The Savages, the agents of Schuyler and others, on the first of February, 1853, addressed a letter to Burk on the subject, in which they said, "If you do not pay up on or before March 1st, next, we shall declare same forfeited, and the land shall be for sale." This letter, upon the expiration of the time specified, without the required payment, is evidence of the termination of the contract at the appointed time. Had they after that time, sued Burk on his covenant to pay the money, this letter of itself would have been sufficient to establish the defense that they had availed themselves of the right of forfeiture, and had thereby destroyed the contract. Indeed, the letter is something more than a mere threat. Its manifest object was to fix a time by the expiration of which, upon the non-performance by Burk, should of itself terminate the contract. Such, we say, was the manifest meaning of this letter, although in the form of a threat. But as it required no public act to determine the contract by the forfeiture, if we are to understand that letter as but a declaration of intention to terminate it at that time, in the event of non-payment, the fact that the payment was not made, in connection with the letter, would, in an action against Burk, be proof that they did terminate it at that time, unless notified before the first of March that they would not do as they said they would in the letter of the first of February. After the first day of March, Burk had a right to assume and to act as if the contract was terminated on that day, and that he was no longer liable upon his covenants to pay, and to make arrangements and contract other obligations upon that hypothesis. Burk swears that he never received that letter, nor was it important that he should. The other parties were under no obligation to notify him that they would forfeit, or that they had forfeited, at any time. The election to claim the forfeiture, instead of relying longer on the covenants, required no public parade to make it valid and binding on both parties. It might be made never so secret, and if but susceptible of proof, it would be obligatory. The facts stated in that letter might as well have been posted on their office door or entered in their journal, and when once established to have been thus stated, the same results would have followed, as follow the writing of that letter. It is true that the agents swear they would have taken the money of Burk at any time before they sold to Miller, but that would have been an

act of grace on their part. Their object was to realize the money which Burk had refused to pay, and for this purpose they again put the land into market, asking for it no more than the balance due from Burk. Of course then, they would take the same money from Burk which they were asking for the land from others. This circumstance, therefore, by no means shows that they had not put the land into market before Miller purchased. We think the fair conclusion, from all the evidence, is that the contract was determined on the first of March, 1853, and that after that time, neither party had any rights under it. When the rights of the parties under the contract ceased, the relations resulting from those rights ceased also. Thenceforth all of the parties, Miller, Burk, and Chrisman his assignee, ceased to have any interest in the land, either legal or equitable, and Miller had as much right to purchase as any third person,—as a total stranger to the transaction.

We are of opinion that the decree of the Circuit Court should be affirmed.

Decree affirmed.

Enos M. Henkle *et al.*, Plaintiffs in Error, *v.* Benjamin Smith *et al.*, Defendants in Error.

ERROR TO MACON.

Where property is sold without any time being specified for the delivery or payment, the law implies that the delivery is to be within a reasonable time, and that the delivery and payment are to be concurrent acts. What is a reasonable time, is a question for the jury.

If the place of delivery is different from that of the residence or place of business of the vendee, he must be notified of such delivery.

Where it was proved that the defendant had corrected the price current in a newspaper, files of the paper were properly admitted in evidence against him, to prove the market value of grain.

Benjamin M. Smith and others, as partners, commenced an action of assumpsit against Henkle and others, as partners, in the Macon Circuit Court, Emerson, Judge; filed their declaration, alleging in first count, that on the 25th of August, 1857, plaintiffs below had sold to defendants below their whole crop of wheat for a price therein named, the same to be of fair quality for the season, and to be delivered at Macon Station, on the Illinois Central Railroad, in a reasonable time thereafter, and to be paid for on the 1st day of December thereafter; and they

aver that they offered and tendered the said wheat at the said Macon Station within a reasonable time, and that defendants below refused to accept the same.

In the second count the same allegations are made, except the averment is made that the wheat was to be paid for on delivery.

Third count for goods bargained, sold and delivered.

Fourth count for goods bargained and sold.

Fifth count for money due on account stated.

At July term, 1858, on a plea of non-assumpsit, the cause was tried by a jury, and a verdict was rendered for plaintiffs below for $452.81.

The bill of exceptions shows that *John S. Williams*, for plaintiffs below, testified that in August or September, 1857, he heard a conversation between Smith and Condell, parties to suit. The point in controversy was in relation to the payment of freight upon wheat from Macon Station to Decatur, and as to when the wheat was to be delivered; it was finally conceded, by Condell, that the wheat was to be delivered at Macon Station, and that defendants below would pay the freight.

J. G. White testified, that he heard Smith ask Condell, one of defendants below, if it was not the contract that they, defendants below, should take from them, plaintiffs below, good fair wheat for the season, that they should take their whole crop of wheat, and that the same was to be delivered at Macon Station, and pay $1.15 per bushel for white fall wheat, and $1.05 for red fall wheat, and 85 cts. for the spring wheat. Condell said that was the contract.

John Rickets testified, that he conversed with Condell relative to the wheat of Smith and Stoner; that Condell remarked that plaintiffs below had cleaned the wheat and made it all right, and they would take it.

Levering testified, that the defendants below had received from Macon Station, wheat shipped by plaintiffs, amounting to 54,314 lbs. of wheat; that on 6th November, 1857, plaintiffs had shipped from Macon Station to defendants, to Decatur, Illinois, wheat to the amount of 41,126 lbs., all of spring wheat, and that the defendants had refused to accept the same, and that the wheat was then taken by plaintiffs.

Freese testified, that the plaintiffs brought the wheat to his warehouse to clean for them; that it was about 663 bushels after it was cleaned.

Mr. Eads testified, that he hauled some of the wheat from the farm of plaintiffs to Macon Station, and the wheat last hauled was of the same quality as first wheat hauled. The last

wheat I hauled made one car load and another full of wheat which I did not see loaded; the spring wheat was sent to Decatur, and as I understood, the defendants refused to receive it; there was then over 400 bushels of wheat at Macon Station, and some wheat left on the farm of plaintiffs, which was not hauled to Macon Station.

Mr. Oldham testified, that he hauled 400 bushels or over to Macon Station before 1st December; that there was still left on the farm some wheat; the last wheat delivered at the station was of same quality as first wheat delivered.

Priest testified, that he bought from Smith and Stoner 663 bushels of spring wheat, for which he gave 45 cts. per bushel; that spring wheat was worth, about 1st December, 1857, from 50 cts. to 60 cts. per bushel, and winter wheat on 1st December, from 40 cts. to $1.20 per bushel.

Mr. Can testified, that 3rd December he delivered to Mr. Condell a copy of the following notice:

Macon Station, Nov. 30th, 1857.

Received of Smith & Stoner, to be shipped to Henkle & Condell, the following lots and kinds of wheat, viz:

Of red fall, 3,358 lbs.; of white fall, 12,224 lbs.; of spring, 10,518 lbs.

J. S. RUBY, *Agent.*

MESSRS. HENKLE & CONDELL.—Sirs: You will see by the above, that the above amounts of wheat are ready for your reception at Macon Station.

SMITH & STONER.

The defendants objected to above notice being read to the jury, but the objection was overruled, and the defendants excepted.

A. J. Davis testified, that he was one of the proprietors of the Decatur Weekly Gazette, and that defendants below corrected the weekly reports of market prices of grain, etc., for said newspaper.

S. Taylor testified, that he carried the paper to defendants below every week for correction of market reports; sometimes the reports were changed by one of the defendants, and sometimes they were permitted to stand as they were, and sometimes did not see either of the defendants, but submitted to the clerks.

Plaintiffs below introduced several numbers of said paper from November 4th to December 2nd, to show the price of grain during the same period in Decatur; to the introduction of which, defendants below objected.

The defendants below introduced, as a witness, *J. D. Henkle*, who testified that the wheat received by defendants from plain-

tiffs weighed light; that defendants received from plaintiffs 616 $\frac{14}{60}$ bushels of red fall wheat, 250 $\frac{53}{60}$ bushels of white fall wheat, and 12 bushels of spring wheat.

J. S. Ruby testified, that the wheat that was shipped by him on 6th November, for plaintiffs below, to Decatur, was in bags; that the wheat afterwards brought to the station was wet; it was sticky and clammy; that he only examined a few of the bags and found the wheat to be in them as stated.

Errors assigned are: 1st, The court erred in admitting improper evidence; 2nd, The court erred in overruling motion for new trial; 3rd, The court erred in rendering final judgment for plaintiffs below.

GALLAGHER, WAIT & OGLESBY, for Plaintiffs in Error.

A. B. BUNN, and J. W. POST, for Defendants in Error.

WALKER, J. It was urged that the court below erred in admitting the notice given by plaintiffs below, to the defendants, that a portion of the wheat had been delivered at Macon station, and was ready for their acceptance. The evidence fails to show that this wheat was to be delivered by a specified time, and the law implies under such circumstances, an obligation to deliver in a reasonable time. Whether it was delivered in a reasonable time, was a question of fact for the jury, to be determined by all the circumstances in evidence. This notice to defendants could not have been properly rejected, as it tended to fix the time of its delivery and notice of that fact to defendants. The contract required plaintiffs to deliver this wheat at that station, and we can see no objection to giving this notice to defendants, that it had been so delivered, or to their proving that fact. The notice and the proof of its service could, in no way, prejudice the defendants, and as there was no time fixed for the delivery or for the payment of the price, the delivery and payment were concurrent acts, and plaintiffs would have no right to recover the money until it was delivered at the place agreed upon, and the defendants had notice. And as the place of delivery was not that of the residence or business of defendants, such notice could not be inferred from a mere delivery. The proof of this notice was properly admitted in evidence.

It was also urged that the court erred in admitting the price current contained in the several numbers of the Decatur Weekly Gazette. Before they were introduced, there was evidence before the jury, that the defendants or their clerk, were in the habit of correcting these prices current every week. This connected defendants with this weekly report of the market at

Decatur, and they were equivalent to admissions of defendants. Again, witnesses testified to the same fact, which was clearly legitimate, and the evidence of the Gazette was only cumulative, and could not, even if inadmissible, have misled the jury. We see no force in this objection.

The other questions, as to whether the wheat was delivered in a reasonable time, and whether the entire crop of wheat was delivered, were questions of fact for the determination of the jury. They have found both questions in favor of the plaintiffs below; and from all the evidence before them, we are not prepared to hold that their finding is so manifestly against the weight of evidence as to require the verdict to be set aside.

There is no objection perceived to the instructions given, nor do we perceive any error in this record, for which the judgment of the court below should be reversed, and it is therefore affirmed.

Judgment affirmed.

James Thompson, and John L. Thompson, Appellants, *v.* Thomas Lee, Appellee.

APPEAL FROM CASS.

The law does not regard the middle initial letter as a part of a person's name.

This was an action of assumpsit commenced by Lee against appellants, in the Cass Circuit Court, Harriott, Judge, on the following note:

"$2,025. *Virginia, Dec.* 15, 1856.

On the 1st day of April, A. D. eighteen hundred and fifty-eight, we jointly and severally promise to pay Thomas Lee, or order, the sum of two thousand and twenty-five dollars, with six per cent interest from date, for value received. Attest R. S. Thomas.

JOHN L. THOMPSON.
JAMES B. THOMPSON."

The summons and declaration were against James Thompson and John L. Thompson. The declaration contained two counts. The first alleges the note to have been made by the defendants. The second count professes to set out the note in *hæc verba*, with the signatures as follows: "John L. Thompson.
James R. Thompson."

The middle initial in James Thompson's signature to the note was a character in hand-writing unlike the writing of the words "James Thompson," and a character resembling a "B" or an "R."

Plea, general issue.

On the trial the note was objected to as being variant from either count in the declaration. A witness was sworn, who stated he was acquainted with James Thompson; that he never saw said Thompson write a word; that he did not think he could write; that the character in the note, between the first and last names of said Thompson, in his opinion, was his mark; he has seen said Thompson make such a mark several times. The court (a jury having been waived) allowed the note to be read in evidence. The court thereupon rendered judgment for plaintiff. The defendants entered their motion for a new trial, which motion was overruled, to which the defendants excepted.

Errors assigned: 1st, The court erred in allowing the note to be read in evidence; 2nd, The court erred in overruling the defendants' motion for a new trial; 3rd, The judgment should have been rendered in favor of the defendants.

J. S. Bailey, for Appellants.

H. E. Dummer, and J. Grimshaw, for Appellee.

Walker, J. It is urged that there was a variance between the note declared upon, and that which was read in evidence on the trial. The summons and declaration were each against James Thompson and John L. Thompson, and the note read in evidence is signed by John L. Thompson and James Thompson. But in the latter signature, a letter or character resembling the letter B or R, appears between the christian and surnames. Whether it was intended to be a letter, or a character used as the maker's mark, we conceive can make no difference, as such initial letter is not regarded as a part of the name, and the law only recognizes one christian name of a party. 1 Ld. Raym. 562; *Franklin* v. *Talmadge*, 5 J. R. 84. And if it was used as the maker's mark by which he executed the note, it was equally no part of the written signature, and consequently there was no misdescription, and there could have been no variance.

Whether the note was admissible in evidence under the second count, may have depended upon inspection, as that count professed to set it out in *hæc verba*, and when offered, it was for the court to determine whether or not it was correctly described. The court, if it admitted the note under this count, must have determined that the description was correct. We have nothing

in this record from which we can say that the court decided incorrectly. But whether there was a variance between the note described in the second count or not, can in no wise change the result, as it was properly admitted under the first count.

The plea of non-assumpsit was not verified by affidavit, and there was therefore no necessity to adduce evidence on the trial, to prove the execution of the note. And we regard it unnecessary to determine whether it proved its execution, or explained the object of using the character either as a letter or the maker's mark.

We perceive no error in the record, and the judgment of the Circuit Court is affirmed.

Judgment affirmed.

Isaac Smith, Plaintiff in Error, *v.* John H. Smith, Defendant in Error.

ERROR TO BOND.

A wager as to the result of a presidential election, in another State, made after the vote has been cast, is not against public policy.

A stakeholder, unless some other mode has been provided, is the proper person to decide who has won a wager.

On the 14th day of November, 1856, John H. Smith filed in the clerk's office of the Circuit Court of Bond county, Illinois, an affidavit in replevin, setting forth that he was lawfully entitled to the possession of a certain one-horse buggy, nearly new, etc., worth about ninety-five dollars; that the same was unlawfully detained from his possession by Isaac Smith. On the same day a writ of replevin was issued out of the clerk's office upon said affidavit, and on the same day was served by taking said buggy and delivering same to said plaintiff.

Afterwards, said John H. Smith filed his declaration in replevin for said buggy. To which declaration, Isaac Smith filed three pleas: The plea of *non cepit;* plea of property in defendant; and plea of property in stranger. To which said pleas, said John H. Smith filed replications.

Afterwards, at the June term of said Bond Circuit Court, 1857, the said cause coming on for trial, by consent, was tried by the court, Snyder, Judge, presiding.

Whereupon plaintiff introduced one *Joel Smith*, who testified that he was in Greenville about three weeks before Christmas,

and that George Moffitt tried to sell a buggy to him; that afterwards, John H. Smith, the plaintiff in this suit, traded for the buggy; that Smith was to pay for the buggy, by note for one hundred and fifty dollars, which he held on A. H. Douglass, and Moffitt was to give Smith a smaller note he held on him, and the buggy for the note on Douglass; that Smith said he could not take the buggy away that day, but would come back and get it in a few days.

Plaintiff then introduced one *Franklin Berry*, who testified, that he saw Isaac Smith bring the buggy to his stable, about one week after the last presidential election; it was an open buggy, brown or black.

Plaintiff next introduced one *Chamberlain*, who testified, that he knew Moffitt's buggy; that he saw Isaac Smith and his son taking it from Elam's shop towards the stable spoken of by Berry; that Elam keeps buggies to sell; and that the buggy had been at Elam's for a considerable length of time; that Moffitt had been working at Elam's shop before that time, but was not working anywhere at that time.

Plaintiff here closed his case.

Whereupon defendant introduced one *J. H. Alexander*, who testified, that about two days after the late presidential election, the said Moffitt offered to bet his buggy against one hundred and ten dollars, that Mr. Fillmore, as a candidate for president of the United States, was not behind the other candidates for that office, in the State of New York; and that Isaac Smith, the defendant, took him up and bet one hundred and ten dollars against the said buggy that Mr. Fillmore, as such candidate, was behind the other candidates for that office in the State of New York; that witness was selected as stakeholder for said parties, and Isaac Smith placed the hundred and ten dollars in his hands, and Moffitt told witness that the buggy was at Elam's shop; that he could leave it there or take it when he pleased; and that the stakes were to be given by witness to the winner whenever it was ascertained how the State of New York had gone in the election; that witness did not remove the buggy from Elam's, but let it remain there; that about a week or two afterwards he became satisfied that Isaac Smith had won the said bet, and that he, witness, delivered up the money staked, to said Isaac Smith, and went with him to Elam's shop and gave up the buggy to him; that it was in the same place where Moffitt said it was when the bet was made; that there was nothing expressly said at the time of the bet, as to who was to determine who had won or lost, but witness considered it the same as bets commonly made; and that he had the right to decide, or that it was his duty to decide.

Defendant next introduced one *Seymour*, who was sworn and testified, that he heard a conversation between plaintiff and defendant which had reference to a former conversation which took place between the said Isaac H. Smith and Moffitt previous to the purchase by plaintiff of the buggy. In which the defendant asked the plaintiff, "did you not hear me tell Moffitt that he ought to wait and see whether he owned a buggy before he sold one?" To which plaintiff replied that he did recollect such a conversation.

Whereupon the court decided for the plaintiff.

Defendant moved for a new trial, which was overruled.

The errors assigned are—

That judgment should have been rendered in favor of defendant.

That judgment should not have been rendered in favor of plaintiff.

That the judgment was against the law and the evidence.

That the court should have granted a new trial.

J. AND D. GILLESPIE, for Plaintiff in Error.

LINCOLN & HERNDON, for Defendant in Error.

CATON, C. J. In the case of *Morgan* v. *Pettit*, 3 Scam. R. 529, it was decided that a bet made between citizens of this State upon the result in another State of a presidential election, then pending, was not forbidden by our statute, and was not void by the common law, as being against public policy. In this case, there is much less objection as controvening public policy, for the bet was not made till several days after the election in New York, and after the vote must have been canvassed, although before the result was known here. Nor did the event which was to determine the wager depend upon any chance, accident, effort or skill. It was a fact irrevocably fixed as is the number of the grains of wheat in a measure standing on the table, or the date of a coin held in the hand. Such a contract the parties had an undoubted right to make, by the common law, and it is not forbidden by our statute.

Independent of the right of the stakeholder to determine who had won the wager here, the party proved, by an official certificate of the canvass of the votes of the State of New York, that the result was in his favor; but in the absence of such proof, we are inclined to concur with the court in the case of *Elthorn* v. *Kingsman*, 4 Eng. Com. Law, 626; at least so far as to hold that the stakeholder is the person selected by the parties themselves, to decide in the first instance the event upon which the

wager depends, unless they have fixed upon some other tribunal to determime that question. By the terms of the contract he was required to deliver the stakes to the party who should win the bet, and surely it was never contemplated that he should be compelled to file a bill of interpleader, to determine that matter, in order to protect himself from a lawsuit, by one party or the other. As between themselves, they might perhaps litigate the matter, without being concluded by the decision of the stakeholder. We are prepared to hold that his decision *prima facie* settles the rights of the parties.

If the verbal declarations by Moffitt to John H. Smith, were sufficient to transfer the possession of the property to him, while it was remaining at Elam's shop, by the same rule the possession was transferred by Moffitt to the stakeholder at the time the bet was made, and in the same mode was the possession transferred to Isaac Smith by the stakeholder, at the time he decided who had won the wager, and the buggy was thereupon taken away by him; so that both constructively and actually, the defendant first acquired possession of the buggy. But even were it otherwise, the plaintiff could not maintain this action, for as between Moffitt and Isaac Smith, the title of the latter was complete the moment the wager was decided in his favor; and the proof satisfactorily shows that John H. Smith purchased with full knowledge of the defendant's right to the property.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Russell Hinckley, Plaintiff in Error, *v.* Albert Kersting, Defendant in Error.

ERROR TO ST. CLAIR.

To a banker or broker who deals in depreciated bills, as an article of commerce, the rule of *caveat emptor* applies; and if a bank bill purchased by a broker proves to be of less value than the price given for it, the vendor is not bound to make it good; especially where the transaction is in good faith.

When persons are engaged in any particular traffic, the presumption is, that they are better acquainted with the value of the commodities in which they deal, than the community generally.

This was an action originally commenced before a justice of the peace, to recover the money paid for a certain worthless bill.

The plaintiff is a banker, the defendant is a German, who understands the English language imperfectly, and is a butcher

by trade. The cause was appealed to the Circuit Court of St. Clair county, and tried at the September term, 1858, of said court, before the court and jury, SNYDER, Judge, presiding. Judgment was rendered in favor of defendant below. By agreement of counsel, said cause was heard in the second Grand Division.

On behalf of plaintiff below, one *Gruber* testified, that in the fore part of December, 1857, at the request of defendant, he took to plaintiff's bank, $112 in paper, among which was the ten dollar bill in controversy—that he inquired of the clerk of plaintiff what he paid for paper money, who replied that they discounted at four and a half or five per cent. The clerk looked at the money, and stated a five dollar bill to be a bad one; witness took the bills back to defendant, who took out the five dollar bill, and told witness to get specie for the balance, at the discount proposed. Witness then took the bills back to plaintiff's bank, including the one in controversy, and the clerk gave him gold for the bills, less discount. That the next day, or the day after, Affleck, a clerk of plaintiff, called upon witness and told him the bill was a bad one, and wanted him to take it back. That the next morning he again called upon witness, and told him Mr. Hinckley wanted to see him; he then went to plaintiff's bank; plaintiff told him he must give him back the money he got for the bill, or take back the bill. Witness then took the bill to defendant, who said he would not take it back—that plaintiff was a banker and must keep it. Witness returned the bill to plaintiff, at the same time telling him what defendant said.

Affleck, a clerk for plaintiff, testified, that he was posting books at the time Gruber came in—that in reply to an inquiry of Gruber, he said they took currency at five per cent. discount; that he passed his fingers over one end of the bills, and at the time supposed all were Illinois bills—that Gruber went out, came back again, and handed the bills to another clerk of plaintiff, who gave Gruber gold for them, less discount; don't recollect the amount paid; thinks the paper was discounted at about four and a half per cent. That after Gruber left, the other clerk in looking over the bills, handed the ten dollar bill to witness, who examined it and found it to be worthless; that soon afterwards he went out in town to find Gruber, and told him he must take back the bill; witness had not the bill with him at the time. The next morning witness saw Gruber again, and got him to go to the bank; he went, and Mr. Hinckley told him, Gruber, that he must take back the bill. Gruber replied that he would take it to Kersting. He then went out and returned, saying that Kersting would not take it back.

The plaintiff asked the court to give the following instructions, viz:

"That if the jury believe, from the evidence, that the defendant sent the bill in controversy to the plaintiff, with other bills, to have exchanged for specie, and the defendant's agent gave said bill to plaintiff's agent, and received money therefor; and if they further believe that said bill was at the time worthless, and that the plaintiff offered to return the same to defendant within a reasonable time, then the jury should find for the plaintiff the amount of money paid for said worthless bill."

"If they believe, from the evidence, plaintiff's agent gave to defendant's agent money for the bill in controversy, believing at the time that it possessed value, when in fact it possessed no value, and was worthless, and that plaintiff returned, or offered to return the same to defendant within a reasonable time, then they should find for the plaintiff the amount of money so paid for said worthless bill."

Which instructions the court refused as asked, but gave them with the following modification: "These instructions are given with the proviso that the jury believe the transfer of each bill to have been a separate contract in itself, and that said bills are not parts of one whole contract."

In the refusal of them as asked, and giving them as modified, the plaintiff excepted.

The court gave the following instruction on the part of the defendant, viz.: "If the jury believe that Hinckley bought of Kersting a ten dollar worthless bill among other good bills at a discount, and had a good opportunity, at the time of the purchase, of determining the value of all the bills, then Hinckley cannot recover back the amount estimated to be paid for the worthless bill, unless Kersting either expressly warranted the value of the bill, or practiced fraud upon Hinckley, or knew that the bill was worthless at the time."

To the giving of which instruction the plaintiff excepted.

The jury found the issue for the defendant. Plaintiff moved for a new trial, for the reasons following:

The court refused to give the instructions as asked by the plaintiff, but modified the same.

The court gave improper instruction on the part of defendant.

The jury found contrary to the law and evidence.

Which motion was overruled by the court.

The plaintiff now assigns for error, the refusal of the court to give the instructions as asked for by the plaintiff, giving the instruction on part of defendant, and the overruling of the motion for a new trial.

G. TRUMBULL, for Plaintiff in Error.

W. H. AND J. B. UNDERWOOD, for Defendant in Error.

WALKER, J. Conceding, that when depreciated or worthless bills are paid on a precedent debt, or as money loaned, or paid on the purchase of property, that the person who passes them, upon a proper notice, is liable for the value at which they were received; it does not follow, that such would be the case when they are purchased at a discount, as an article of commerce. When they are paid on a debt, loaned as money, or paid on the purchase of property, they are both paid and received as so much money, and are not taken on speculation. When legal coin might be required, anything less than its value will not be a satisfaction, unless the value of such bills was known when received, as in a case where the parties act in ignorance of the fact of their want of value, and suppose them to have the value at which they were passed. But when they are purchased as a commodity of commerce, they are treated then as articles of sale, and the buyer purchases on the best terms he can fairly obtain, and the seller procures the best price he honestly can. Bankers and money brokers follow the buying and selling of such bills, and other money, as a matter of profit, in the same manner as those dealing in merchandize, produce or other chattels. With them such paper is fluctuating in price, at different times and in different places, as are other articles of trade; and their profits are greater or less, owing to the demand or supply of the article in the market. No reason is perceived why the rule of *caveat emptor* should not apply to the sale of bank bills with those trading in them, precisely as it does to persons purchasing other articles of property. It can make no difference that they are choses in action, because the rule is uniform, that the purchaser of a bill of exchange, promissory note, or other negotiable instrument, without fraud, inducement or guaranty, takes it at his own risk. On the sale of such instruments by mere delivery, the law implies no agreement that the maker or drawer are solvent, or that the money shall be paid. And it is not true, that if the instrument thus purchased proves to be of less value than the price given, that the seller is liable to make it good. That liability accrues by the endorsement, guaranty, or by fraud practiced on the buyer. Bank bills are negotiable promissory notes of incorporated companies, and the title passes to the purchaser by delivery, as it does with articles of personal property.

When persons are engaged in any particular trade, the presumption is, that they are acquainted with the value and intrin-

sic worth of the articles which they are engaged in buying and selling. And so it is to be presumed, that bankers and money brokers are better acquainted with the genuineness and value of the circulation of banks, the paper of which they buy, than is the community generally. Their opportunities are better, and the interest of their business necessarily leads them to inform themselves in this respect, beyond other persons.

In this case it appears that plaintiff purchased the bills of defendant at a discount, in the course of his business as a money broker. He paid for them the agreed price, after the bills were inspected by his clerk; and upon that examination one of the bills of the lot was rejected as worthless, and the remainder were taken, including the one in dispute. The plaintiff had ample opportunity to examine and satisfy himself of the genuineness and value of these bills, and the examination was sufficiently thorough to enable him to reject one of them. There is no evidence that defendant had any knowledge that this bill was worthless, or in any way defective. And when the clerks of plaintiff, in twice running the bills over, did not discover the fact, it may well be, that the defendant had no such knowledge. The defendant in no way warranted or guarantied the genuineness of these bills, and there is no liability by contract, and as no fraud was shown, we cannot infer liability on that ground. The testimony simply amounts to this, that defendant's agent presented the bills at plaintiff's bank, and asked what would be given for them, and the agent of plaintiff, after examining them, informed him, and the price was received, and the bills delivered. It does not appear, that defendant by his agent, made any statement or representation in regard to the bills, or was asked any question requiring any such statement. The plaintiff took the property on inspection and at his own price, and if it is not of the value he supposed, it is his own want of information or want of attention, which has produced this loss. And as the loss must fall on one of two innocent persons, so far as we can see from the evidence, we think that it must be on the purchaser, and not the seller, as he has failed to require a warranty or guaranty of the value of this money, and has not shown that defendant knew it to be worthless. The instructions given by the court were consistent with this view of the law, and were proper, and the verdict of the jury is supported by the evidence, and we are not disposed to disturb their finding.

Upon the whole of this record no error is perceived, for which the judgment of the Circuit Court should be reversed, and the same is therefore affirmed.

Judgment affirmed.

James De La Hay, Plaintiff in Error, *v.* Mary Jane De La Hay, Defendant in Error.

ERROR TO MORGAN.

A husband who seeks a divorce, upon the allegation of cruelty on the part of the wife, must bring himself within the requirements of the statute.

The opinion of the court in the case of *Birkley* v. *Birkley*, 15th Ill. 120, examined and approved.

This was a petition by plaintiff in error against defendant in error for divorce, filed in the Morgan Circuit Court.

At the March term, 1858, of said court, there was a decree *pro confesso*, and cause was referred to the Master, to report testimony.

Gertrude De La Hay testified, that the parties married in Memphis, Tennessee. Have four children, two of whom are living. Parties lived together from date of marriage till separated by the causes mentioned in the petition. In 1853, parties then residing at Taylorville, Illinois, defendant, with consent of complainant, went to New York, and attended a medical school a term of three months, leaving husband and children at home. Returned home, and remained some months with family, and again went to New York, with like consent of complainant, to attend the same school, taking with her the two children, and leaving the husband at home. Remained in school about six months, and graduated. About this time, complainant went to New York to assist defendant home. Shortly before being ready to start home she attempted suicide, by taking arsenic, or some other deadly poison, from the effects of which she was relieved with some difficulty. During this period the husband had removed to Mowequa, in Shelby county, and returned from New York to that place. Parties lived together at this place some months, when defendant left her home and family; went off with a young man named Mathewson, to Vermont, in Fulton county, where she had no relations or friends; remained away from home three or four weeks, when she returned to her family. She remained at home but a short time, when she again left, and went into the State of Indiana, and there engaged teaching school. Absent at this time about four months.

In the summer of 1855, defendant again attempted suicide, with a razor, but was prevented. She then made a violent assault upon her husband with a hammer, but failed to do any material injury. Winter of 1856, complainant removed to Jacksonville. Defendant came in May following. Parties have

resided in the same house since, till in February, 1858, when she left, and has remained absent since that time, and declares she will not live with him as his wife any longer, and does not love her husband.

In the summer or fall of 1857, defendant made an assault upon her daughter with a large knife, in such a manner as to justify the belief that she intended to kill or maim. That ever since defendant returned from New York, in 1855, there has been continued intervening difficulties between the parties, so as to make the life of each extremely disagreeable, and to unfit them for living together as man and wife. That "defendant is subject to fits of passion and desperation, which disqualify her for the duties of a wife and mother."

Opinion of the Master in favor of granting prayer of the petition.

The court dismissed the petition, WOODSON, Judge, presiding.

Errors assigned: The court erred in dismissing the complainant's petition; and in refusing a decree in favor of complainant, granting him a divorce in this case.

J. W. STRONG, for Plaintiff in Error.

D. A. AND T. W. SMITH, and I. J. KETCHUM, for Defendant in Error.

WALKER, J. A divorce is asked by the complainant in this case, upon the ground of cruelty on the part of the defendant. Though the complaint in these cases usually proceeds from the wife, as the weaker party, yet the statute authorizes a divorce in favor of the husband, for her cruelty. When the husband is the complainant, it is not sufficient to show slight acts of violence, on her part, towards him, so long as there is no reason to suppose he will not be able to protect himself by a proper exercise of his marital powers. But he may establish such a course of bad conduct on the part of the wife towards him, as to satisfy the court that it is unsafe for him to cohabit with her. While the general principles of the law are the same, whether the suit be instituted by the husband or the wife, in the application of these principles, it is necessary to consider the relative rights which the marriage has created, and perhaps the physical constitutions and temperament of the parties. And it must, therefore, be a clear case which will induce the court to grant a divorce on the application of the husband, for the cruelty of the wife.

In the case of *Birkley* v. *Birkley*, 15 Ill. R. 120, the allegations were, that the wife had become jealous of the husband, and accused him of improper intimacies with other women, which involved him in difficulties in the neighborhood. That she refused to attend to her household duties, and absented herself from his house, sometimes for days and weeks together; that she threatened to take his life, and to burn his buildings, and destroy his property. This court, in that case, say, "The causes of complaint are of the same character as some of those specified by the statute, but less in degree than the legislature has seen fit to prescribe. Here is desertion charged, but not of sufficient length of time to authorize a divorce for that cause. And here is misconduct charged, partaking at least of the character of cruelty; but the bill does not state facts showing that she has been guilty of extreme and repeated cruelty," etc., "which the statute requires, to authorize a divorce for that kind of misconduct." So in this case, the evidence shows a desertion for weeks, and even months at a time, but not for the space of two years. It likewise shows that she, on one occasion, attempted to commit an assault upon him with a hammer, but did no injury; but there was no evidence showing a repetition of the act. And the evidence is entirely silent as to the circumstances attending it. Whether it was under extreme provocation, or without any justification, does not appear. That she has acted without a due regard for his feelings, and in contempt of his wishes and authority, there can be little, if any, doubt; but whether he is wholly blameless, does not appear, as he introduced no evidence to show that he was free from fault. We do not see, from the evidence, that it was then, or now is, unsafe for him to cohabit with her, and we are satisfied that the case does not come within any of the specified causes enumerated in the statute. The case certainly is no stronger, if even as strong, as the case of *Birkley* v. *Birkley*, and we have no inclination to relax the rule there adopted. The contract of marriage should be dissolved only for grave and weighty causes; and parties should not be encouraged to seek divorces unless the causes exist which have been prescribed by the statute. The well being of society, the interest of the children of the marriage, good morals and the precepts of religion, all forbid, that the marriage contract should be dissolved, unless the objects of the relation have been defeated, and the cohabitation of the parties has become productive of wrong, or the safety of one of the parties is endangered. And this was doubtless the object of the legislature in adopting the enactments upon the subject of divorce.

It was also urged that, if the case did not come within any of the specified causes, that it is within the 8th section of the statute.

In the case of *Birkley* v. *Birkley*, this court say, in giving a construction to this section, "We have no hesitation in saying that the law does not confer upon the courts, an unlimited discretion to grant divorces in all cases, when they may deem it expedient or advisable. Where the offense is of a character which is provided for in the statute, as a specific cause of divorce, the degree of the offense must be measured by the statute, and when it does not come up to the standard, the courts have no right to say that an offense of the same character, but less in degree, shall be sufficient to dissolve the marriage contract. When the legislature has prescribed one measure of guilt as necessary, the courts cannot say that a less will be sufficient." When the legislature have required two years of desertion, the courts are prohibited from saying four months will suffice. And when the legislature has said that cruelty must be extreme and repeated, to constitute a ground, the courts cannot say that a single act will suffice. Such a construction of this section would be virtually a repeal of the first section. Neither the desertion or the cruelty in this case, came up to the statutory provisions, and therefore do not entitle the complainant to a divorce. Nor, when taken together with the other circumstances in the case, does the complainant bring it within the provisions of this section.

We, after a careful examination of the record, are unable to perceive any error, and the decree of the Circuit Court should therefore be affirmed.

Decree affirmed.

George Camp, Appellant, *v.* Thomas Morgan, Appellee.

APPEAL FROM SCOTT.

Where a judgment has been reversed, the amount of which was recovered from the defendant below on execution, as also his costs upon fee bills issued, before reversal; and after reversal the defendant in the court below seeks to recover from the plaintiff in that suit, the money recovered on the reversed judgment; he must proceed for the whole amount paid, costs as well as debt; if he dismiss as to the costs, his remedy *pro tanto* will be gone.

In order for the defendant below to recover the costs made by him in defending the original suit, which has been reversed, he should obtain a judgment for such costs against the plaintiff.

Camp *v.* Morgan.

The costs made by a defendant are presumed to be paid as the case proceeds; if they are not, a fee bill issues, by the clerk; there is not any judgment for these costs, for which the plaintiff in the original suit is bound to respond; after a judgment for such costs, he will be liable.

A plaintiff cannot divide an entire demand, or cause of action, so as to maintain several actions upon it.

APPELLEE sued appellant before a justice of the peace, on an account; the suit was appealed to the Circuit Court of Scott, where there was a judgment for appellee for $54.96.

The bill of exceptions shows, that appellant obtained a judgment against appellee and one A. J. Morgan, in the Circuit Court of Pike county, for the sum of $100.65, damages and costs of suit, on which judgment, an execution and fee bills were issued against appellee and A. J. Morgan; that appellee satisfied said execution and fee bills, by paying to the sheriff the said sum of $100.65, damages, and the sums of $26.97 and $12.89—said items of $26.97 and $12.89 being the costs of said suit as appears by said fee bills, and being the items for which judgment was rendered in this present case, with interest; that said judgment of the Pike court was subsequently reversed by this court; that afterward appellee brought a suit against appellant to the May term of the Circuit Court of Scott county, 1858, for the purpose of recovering back the said sums of $100.65, and $26.97 and $12.89, paid by him as aforesaid in satisfaction of said execution and fee bills; on the trial of which cause, the plaintiff having proved the payment of the said sum of $100.65, and having failed to prove the payment of the said sums of $26.97 and $12.89, withdrew the last two items, and took judgment for the said $100.65, with interest, at said May term. Since the rendition of said last judgment, this suit has been instituted for the purpose of recovering the said items of $26.97 and $12.89, withdrawn as aforesaid, and which had been paid as aforesaid on said execution and fee bills. This present cause was tried by the court, a jury being waived by the parties. On the trial appellant interposed, in bar, the record and judgment rendered as aforesaid, for the said $100.65, with interest, at said May term of the Circuit Court of Scott. The bill of exceptions further shows that the said items of $26.97 and $12.89, if due to the appellee, were due to him at the time of the institution of the suit as aforesaid, to the May term of the Scott Circuit Court, wherein judgment was rendered for the said $100.65. The court allowed said items of $26.97 and $12.89, and gave judgment therefor, with interest in the sum of $54.96, and costs of suits, to which allowance and judgment, appellant at the time excepted.

The errors assigned are: that the court erred in rendering judgment for appellee, and in not rendering judgment for appellant; and in not non-suiting the appellee.

KNAPP & CASE, for Appellant.

BERRY & HALDEMAN, for Appellee.

WALKER, J. It appears from this record, that Camp sued Thomas and A. J. Morgan, in the Pike Circuit Court, and recovered a judgment against them for $100.65 and his costs, taxed at $26.97, all of which was collected of appellee, under execution. A fee bill was likewise issued against the Morgans for their costs in the suit, taxed at $12.89, which Thomas Morgan also paid. Subsequently the case was taken to the Supreme Court, and that judgment was reversed. Thomas Morgan then sued Camp, to recover back the money paid in satisfaction of the judgment and those cost bills; and on the trial of that suit, failing in his evidence to prove payment of the cost bills, he withdrew them from the consideration of the court, and took a judgment against Camp for the $100.65 paid on the execution, with accruing interest. He afterwards instituted a suit before a justice of the peace for the recovery of the money of Camp, paid in satisfaction of the two fee bills. On a trial before the justice, he rendered a judgment in favor of Camp, from which Morgan appealed to the Circuit Court, and the cause was tried by the court without the intervention of a jury, by consent, when the court rendered a judgment in favor of Morgan for $54.96, and from it Camp appeals to this court.

It is insisted that the court erred in receiving evidence of the payment of these fee bills, and rendering a judgment for the amount so paid. The parties to a suit in contemplation of law, pay their own costs, as they are incurred in the progress of the cause. Neither has any claim on the other for costs made by himself, until the court awards their payment by a judgment of recovery, in the proceeding in which they are made. If the party making costs does not pay them when made, he is liable for their payment, on a fee bill issued against him for their collection. This fee bill for $12.89, was all costs incurred by the Morgans in defending the suit, and the evidence does not show that they ever recovered a judgment against Camp for them in that suit. When the judgment was reversed by the Supreme Court, Camp became liable to repay to Morgan the money which he had collected of him under that judgment; but beyond this it imposed no liability. This cost bill was not collected by Camp, but by the officers to whom the costs were

due. No evidence was given that Camp ever had any interest in or control over it, or ever received any portion of the money collected in its satisfaction. This item of $12.89, until recovered by a judgment against him, was not chargeable to Camp, and the court should not have rendered judgment for it against him. Upon a reversal of the original judgment and dismissal of the suit by the Circuit Court, the Morgans would recover a judgment against Camp for that amount, and then he would be liable for its payment.

The appellant also insists that when Morgan paid the money in satisfaction of the judgment and costs, the demand created against him was entire and indivisible, and could not be separated, so as to maintain several actions for its recovery. And that when Morgan withdrew those items on the former trial, and took judgment for the remainder of the demand, that judgment became a bar to this action.

The doctrine is well settled, and is uniform in both the courts of Great Britain and of this country, that a plaintiff cannot so divide an entire demand, or cause of action, as to maintain several actions for its recovery. And if he sue and recover a judgment for a part only of such a claim, the remaining portion is barred by that recovery. A judgment of a court is certainly an entirety, and cannot be divided into several causes of action, any more than might a bond or note for the payment of a sum of money at one time. In the case under consideration, Camp recovered a judgment for a sum of money and his costs, which is one of the items in controversy. These costs were, unquestionably, a part of this judgment upon which execution was issued, and they were so collected. The costs were as much a part of the judgment as are the damages in a recovery in debt; and the payment was as entire as the judgment itself. When this demand was before the court for adjudication in the other case, Morgan, to have pursued his right of recovery on this portion of his claim, should have submitted to a non-suit, and having failed to do so, that judgment became a bar to a recovery of these costs in this case; and the judgment of the Circuit Court must be reversed and the cause remanded.

Judgment reversed.

William A. Howard, Plaintiff in Error, *v.* Henry Babcock, Defendant in Error.

ERROR TO FULTON.

If a person borrows a horse, to be used without making compensation therefor, he is bound to a greater degree of care and diligence in its care, than if it were hired. His liability in the different cases stated.

An award which declares that A. shall pay to B. the sum of money which B. paid to A., for the purchase of one of two horses, which were sold together to A. for three hundred dollars, is void for uncertainty; and an averment in a declaration that the horse was, in fact, received at one hundred and fifty dollars, will not cure the defect.

An award must be so certain that it can be easily comprehended, and be carried into execution without the aid of extraneous circumstances.

This was an action of debt, commenced by Howard against Babcock, in the Fulton Circuit Court.

The declaration contained seven counts, the three first upon an award in writing, by arbitrators; the fourth, for a mare sold and delivered; the fifth, for chattels, mares, horses and lands bargained and sold; the sixth, for money paid, etc.; and the seventh, on account stated.

The award counted upon was made by virtue of a parol submission of a difference as to Babcock's liability to Howard, for the value of a mare that died in the possession of the former, and it provides and determines that Babcock pay to Howard "the sum of money for which the said Howard received the said mare from the said Babcock, on the purchase of the same from him." Each count upon the award, after setting out the same, avers that the mare was, in fact, received by Howard, on such purchase, at $150.

To these counts the defendant interposed a general demurrer, which was sustained by the court.

The plaintiff abided by the counts to which the demurrer was sustained; and the defendant pleaded *nil debet* to those remaining.

The cause was tried at the February term, 1858, before Walker, Judge, presiding, and a jury.

On the trial the plaintiff showed that he sold defendant his farm for $1,500, about 8th May, 1857, and that defendant proposed to let the plaintiff have two mares and a wagon and harness, in part payment; that for the purpose of completing the trade, defendant drove his mares, in the harness and attached to the wagon, to plaintiff's house, on the farm traded for, and hitched them to the fence in front of the house. The plaintiff came out, walked around the team, and inspected the mares, wagon and harness, but did not touch them, and they remained

where the defendant had tied them. The plaintiff then said the wagon did not suit him, but he would take the mares at $300, and the harness at $27, to which the defendant agreed. The plaintiff then said to defendant, (both standing by the team,) that he, the plaintiff, wanted the team to go to Texas, the next September; that he would like to have the team for three or four weeks before he started, to fit for the journey, and if defendant had any use for the mares, he could keep them until he would want them, some time in August following. Defendant replied he had some work to do, and he would keep the mares. Plaintiff also remarked that he would be at work part of the time, on the farm sold, and the mares would be under his eye, and he could see if they were well treated, and if they were not, he could take them.

The plaintiff and defendant then went to the house, where defendant paid him the balance of the $1,500, in money, counting the horses and harness at $327, and plaintiff conveyed, or gave a bond to convey the land to defendant. Defendant then drove away the team, with the harness and wagon, as he came.

The plaintiff had no other possession, nor was there any other delivery than as here stated at that time.

Defendant kept and used the mares for about a month, at different kinds of work; and plaintiff proved that one of the mares, while so in defendant's use and possession, died, and introduced proof tending to show that defendant had mistreated the mare, and neglected to take proper care of both of them, and that the death of the one mare was in consequence of the mal-treatment and neglect of defendant.

Plaintiff then proved that on the day of the death of the one mare, the other was sent by defendant to plaintiff, who received her; and that the worth of the mare that died was from $130 to $150.

The defendant then offered proof tending to show that the mare died of some disease or accident, and that he took reasonable and proper care of her while she was in his possession, after the trade, and gave notice of her sickness to plaintiff, who stated that he could do no good if he went to see her, and did not go.

Defendant then proved, by one of the arbitrators, to whom was referred the question as to which of the parties should lose the price of the mare that died, that each of the parties made a statement of the facts before the arbitrators, for their action, and that in his statement, the plaintiff said that the mare was never in his possession, but he considered her as delivered, but claimed that she died from want of proper care by the defendant.

This was all the evidence.

The plaintiff then prayed the following instructions to the jury:

1. Although the jury believe, from the evidence, that the plaintiff considered the mare as his, and was of the opinion that the mare had been delivered to him, yet if they further believe, from the evidence, that there was in fact, no delivery, and that the opinion of the plaintiff was unfounded upon the law, then the jury will find that there was no delivery.

2. Although the jury believe, from the evidence, that the plaintiff, for the purpose of submitting the matter in controversy to referees, stated that he considered the mare as delivered, and that he made such statement to the referees, and thereby, for the purpose of obtaining the decision of the referees he waived a legal right, such admission and waiver does not bind him in this suit.

4. If the jury believe, from the evidence, that the defendant sold the mare in controversy to the plaintiff and received payment by a credit upon what was due from the defendant on the land purchased, and further, that the defendant never delivered the mare to the plaintiff, they will find for the plaintiff the value of the mare.

7. If the jury believe, from the evidence, that the defendant sold and received pay for the mare in controversy, and that at the time of the sale the mare was hitched to the wagon of the defendant, and that the defendant, after the sale and payment, without unhitching the mare, drove the mare away by the consent of the plaintiff, to keep her for a time, and with an agreement to deliver the mare afterwards, and that the mare was never otherwise in the possession of the plaintiff, such facts do not constitute a delivery.

8. If the jury believe, from the evidence, that the plaintiff sold a tract of land to the defendant, that the plaintiff executed a written contract to convey the land and delivered the possession of the land to the defendant, and that at the time the contract for the land was made, the defendant drove two mares to the residence of the plaintiff in a wagon, and hitched them to the fence; that the mares were left standing there for a short time, and driven away by the defendant; that while the mares were standing at the plaintiff's and when the contract was made, the plaintiff agreed to take the mares, at the price of three hundred dollars, in part payment for the land, and that the mares were credited at that sum, on the contract for the land; and that at the time the mares were at the plaintiff's, as above stated, the defendant drove away the mares in the wagon, as they came, with the consent of the plaintiff, to keep them for

two or three months, and that the plaintiff never had any other control or possession of the mares, then the jury will find that the mares were not delivered.

9. In determining the question as to whether the defendant held the property at the time the mare died as a gratuitous bailee, the jury will consider the conversation of the parties by which the agreement was made, and in which the defendant obtained the mare, and they cannot determine that any other consideration existed than such as was disclosed in the conversation at the time.

And the court gave those numbered three, five and six, and refused to give those numbered one, two, four, seven and eight, and refused to give instruction number nine, as asked, but modified the same by adding thereto the words, "or by express or implied evidence," and gave such instruction as modified. To which refusal, and to the giving said ninth instruction as modified, the plaintiff then and there excepted.

After retirement, the jury returned a verdict for the defendant, and the plaintiff thereupon moved for a new trial, and assigned as reasons the following:

1st. Because the verdict of the jury is against the law and the evidence.

2nd. Because the court erroneously refused to give the instructions to the jury asked by the plaintiff.

3rd. Because the court erroneously refused other instructions to the jury, as asked by plaintiff, but modified the same before giving.

4th. Because the court erroneously gave the instructions to the jury as asked by the defendant.

The court overruled the motion, and rendered judgment for defendant for costs; to the overruling of which motion and the rendition of which judgment the plaintiff excepted.

The plaintiff now makes the following assignment of errors:

1st. The Circuit Court erred in overruling the motion of the plaintiff below for a new trial.

2nd. The verdict of the jury was against the law and the evidence.

3rd. The Circuit Court erred in refusing to give proper instructions to the jury asked by the plaintiff.

4th. The Circuit Court erred in giving improper instructions to the jury as asked by the defendant.

5th. The Circuit Court erred in modifying one of the instructions asked by the plaintiff, and in giving the same so modified.

6th. The Circuit Court erred in rendering judgment for the defendant below.

7th. The proceedings are otherwise informal and erroneous.

GOUDY & JUDD, for Plaintiff in Error.

ROSS & SHOPE, and LOGAN & HAY, for Defendant in Error.

BREESE, J. The principal question presented by this record is, were the mares sold and delivered to the plaintiff in error, Howard?

We do not consider it important to inquire whether there was an actual delivery or not, it being sufficient, as between the immediate parties, Howard and Babcock, that a bargain was struck, and the title to the mares became vested in Howard.

We have gone over this whole ground in the case of *Wade* v. *Moffatts*, *post*, and reaffirm the doctrine there sought to be established. The inaccuracy of the ninth instruction, made so by the qualification of the court, by the insertion of the phrase, "or by express or implied evidence," cannot be material. The court evidently meant to be understood "or manifested by the circumstances of the case." We say it is not material, because a delivery was a non-essential. The sale was perfect without it.

The third instruction which the court gave for the plaintiff, was in these words—it is on a legal proposition: The delivery of an article of personal property or a chattel, is the transfer of the possession of the same by some person to another, so as to place the property in the power and control of such person. The fifth as given is, "If the jury believe, from the evidence, that the mare was hired to the defendant, then he would be bound to use such care as persons would usually exercise concerning their own property in like circumstances; but if the jury believe, from the evidence, that the mare was loaned, without compensation, to the defendant, then he would be bound to use a greater degree of care, and to exercise extraordinary diligence, and such as the most prudent would use toward their own property." And the sixth: "If the jury should believe, from the evidence, that the mare was delivered, and that after such delivery she was loaned without compensation to the defendant, and while she was in the possession, by such loan, of the defendant, the mare died, and was not returned to the plaintiff, then the jury will find for the plaintiff the value of the mare, unless they further believe, from the evidence, that the death was without the fault of the defendant, and that the defendant took extraordinary care of the mare, and that a slight degree of neglect in the care of such animal would render the defendant liable for any injury, or for the death of the mare in controversy, if produced by such neglect."

Thus it will be seen, the plaintiff had the full benefit of all the questions he could properly raise before the jury in his favor.

Let us see if the instructions given on behalf of the defendant misstated the law on the facts supposed.

The first is, "If the jury believe, from the evidence, that the mares in controversy were hired by Howard, the plaintiff, to Babcock, the defendant, to be used by him, and that they were mutually benefited by the arrangement, then Babcock is only required to use such care as ordinary prudent men with their property in taking care of the mares; and if the jury further believe, from the evidence, one of the mares died, and that the defendant used such care and diligence in taking care of the mare, they will find for the defendant.

"That after the mare in controversy had been sold and delivered by the defendant to the plaintiff, that she was hired by the plaintiff to the defendant, and that the hiring was for the mutual benefit of the parties, then and in such case, the defendant is only required to use such care as ordinary prudent men take of their property, in taking care of the mare; and if the mare, while thus in the care and possession of the defendant, died, and that the defendant took such care of the mare, they will find for the defendant.

"That the mare in controversy was borrowed by the defendant of the plaintiff, and that during the time she was so borrowed she died from some unavoidable accident, and the defendant used such care as the most prudent take of theirs, without any carelessness on the part of the defendant, they will find for the defendant.

"If they believe, from the evidence, that the mare in question in this case, died from inevitable casuality, or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of negligence or carelessness.

"That although they believe, from the evidence, that the defendant borrowed from the plaintiff the mare in question, yet if they further believe that the defendant used the same care and diligence, and prudence, in taking care of the mare the most prudent, careful man would take of his own property, placed under similar circumstances, then the jury will find for the defendant.

"That any admissions that may have been proved to have been made by plaintiff, are proper for the jury to consider in forming their verdict, and the jury will give any admissions, if any thus proved, such weight as they may think them entitled to."

These were excepted to by the plaintiff, and exception disallowed.

We think they clearly state the law, and the distinction so far as care and diligence are concerned, between a hiring and a borrowing, and do not differ essentially from those given by the court on behalf of the plaintiff.

There was proof that the plaintiff did not want to use the mares until the August following the purchase, and he stated it would be an accommodation to him for the defendant to keep them. It was an advantage, as he saved their keep and care by the arrangement, and was benefited to that extent. The benefit was mutual, under which state of case, no extraordinary diligence and care are requisite.

In the printed abstract of the plaintiff, the ruling of the court on the demurrer to the first, second and third counts on the award, is assigned for error, though it is not assigned on the record.

The plaintiff, however, considering that it is there assigned, commences his argument with that ruling.

The award is in these words, that Babcock pay to Howard, "the sum of money for which the said Howard received the said mare from the said Babcock, on the purchase of the same from him."

In each of these counts is an averment that the mare was in fact received by Howard on such purchase at one hundred and fifty dollars, and it is insisted that this averment makes the award certain.

It will be seen by the evidence, that no price was agreed on of any one mare. A pair was purchased at three hundred dollars. One of them, the surviving one, may have been worth two hundred dollars of that amount, for aught that appears. There is nothing to show they were of equal value, each one worth precisely one hundred and fifty dollars. The one that died may have been worth but seventy dollars. It is entirely uncertain at what sum Howard received her from Babcock, and the averment in the declaration don't help it. The award must be certain of itself, so that it can be easily comprehended, and capable of being carried into execution without the aid of extraneous circumstances. *McDonald* v. *Bacon*, 3 Scam. R. 431. How is the sum paid by Howard for the mare ever to be ascertained? It can't, from the very nature of the transaction, be ascertained. It does not follow, because he allowed $300 for the pair, he estimated the one that died at $150. No man can say what he allowed, although her value might be proved at that. One witness might swear to one sum, and another witness to a greater or less sum as her value, but neither could establish the sum of money in the language of the award, "for which Howard received the said mare from Babcock, on the purchase of the

same from him." No extraneous circumstances that should be resorted to, could possibly establish this fact, and therefore the award is void for this uncertainty, or impossibility, rather. If the award had said, in proportion to what he allowed for the pair—it would have been certain. Even the maxim, "*id certum est, quod certum reddi potest*," will not avail the plaintiff, for no human power can make it certain. The plaintiff himself could not swear at what sum he received either of the mares from the defendant.

The cases referred to by the plaintiff's counsel from Vermont, *Wright* v. *Smith*, 19 Ver. R. 110, and *Cooley* v. *Dill*, 1 Swan, (Tenn.) 318, do not sustain his position.

In the Vermont case the award enjoined upon the defendant the payment of the *taxable* costs. What those were, is prescribed and fixed by the law; and in every given cause, the facts being given, the sum total of the taxable costs can be certainly ascertained. But if the sum was made certain by the averment in the declaration, there is still a fatal defect in each of the three counts. It is a rule in pleading, that when matter is more peculiarly within the knowledge of one of the parties than the other, notice is necessary to the other party, although the terms of the contract may not require it. The sum at which he received the mare, was certainly more in the knowledge of the plaintiff than of the defendant—in fact, in his knowledge alone. To have entitled him to recover, then, he should have averred in his declaration, that the sum was $150 at which he received the mare, of which the defendant had *notice* before suit brought. There is an averment that the defendant had notice of the award, but not of the sum the plaintiff claimed to have allowed for the mare.

But we question very much, if this would have helped an award so void as this is. No averment could help it, for no averment of the sum could be proved.

The case in 1 Swan R. 313, does not seem to have any application to the question made here. It merely decides that a certain award was final under the terms of the submission of the parties. This point we are considering was not before the court.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

William H. Smucker, Plaintiff in Error, *v.* Thomas J. Larimore, Defendant in Error.

ERROR TO MORGAN.

If a plea of release of errors, in this court, is sustained by the proof, the judgment of the court below will stand affirmed.

Smucker sued out this writ of error to the Morgan Circuit Court. On the filing of the record in this court, Larimore filed his plea, averring that before the commencement of any proceedings in error in this case, to wit: At the county, etc., on, etc., the said Larimore was about to have sold at public auction, for cash in hand, pursuant to the award referred to in the record in this case, certain goods and chattels, to wit: one mule, etc., for satisfaction and payment to him, of certain moneys awarded to be due him in the premises, and the said plaintiff (Smucker) and the Lewis Hatfield named in the record in this case, requested the said defendant to allow said Lewis Hatfield to bid in said goods and chattels, at said auction sale, for his note to said defendant at sixty days' date, in lieu of cash, and undertook and promised, then and there, that if he, said defendant, would accede to said request, that that should be an end of all trouble and litigation in the premises. And the said defendant avers that he then and there acceded to said request, and had said goods and chattels sold at auction, and the said Lewis Hatfield, then and there, pursuant to the premises, became the purchaser of said goods and chattels, and took possession of the same, and made and delivered his note to the said defendant at sixty days' date, for nine hundred and seventy-five dollars. And the said William H. Smucker and Lewis Hatfield, then and there contracted and agreed with the said defendant, to waive all errors in this case. All of which the said defendant is ready to verify. Wherefore, etc.

To a plea of the above character there was a demurrer, which was sustained. The foregoing plea was substituted, and was also demurred to; but the demurrer was overruled, and the plaintiff in error then filed the general issue. By agreement of parties, the evidence was taken before a Notary Public of Morgan county, and was reported to the court.

Upon the issue raised by these pleadings, and the proofs thereon, the following opinion was pronounced by the court.

The pleadings were submitted to the court, without the intervention of a jury.

J. L. McConnell, and I. J. Ketchum, for Plaintiff in Error.

D. A. and T. W. Smith, for Defendant in Error.

Walker, J. The plea of release of errors in this case, avers, that before the writ of error was sued out, Laramore was about to have sold at public auction a quantity of personal property, in pursuance of an award set forth in this record. And the object of the sale was to satisfy a sum of money awarded to be paid by Smucker to Laramore. That Smucker and Lewis Hatfield, named in the record, requested Laramore to allow Hatfield to purchase the goods at the sale, and give his note to defendant at sixty days, in lieu of cash. And that they undertook and agreed that if defendant would accede to the proposition, that it should end all trouble and litigation in the premises, and that defendant did then accede to the proposition, and that the said Hatfield, in pursuance of said agreement, became the purchaser of the chattels and took possession of the same, and made and delivered his note to defendant in accordance with the agreement, and that the said Smucker and Hatfield, then and there contracted and agreed with Laramore to waive all errors in this case.

It was objected that this plea does not show such a consideration received by Smucker as is necessary to support the agreement to release the errors assigned on this record. This objection, raised under the demurrer, is not well taken. The change in the terms of sale, from cash to sixty days' time, without interest, was clearly an inconvenience and loss to the defendant. The note on sixty days' time, was not worth as much as the same amount of money paid at the time of sale would have been. And the inconvenience and loss to the defendant is averred to have been at the request of the plaintiff and Hatfield, and was no doubt of benefit to one or both of them. And any inconvenience or loss to one party to a contract, or a benefit to the other, is a sufficient consideration to support the agreement. This plea, as we think, avers facts showing both, and was sufficient. And the demurrer is therefore overruled.

It then remains to determine whether the evidence adduced on the trial, establishes the truth of the plea. Mathews testifies that Smucker and Hatfield saw witness, as the agent of defendant, to learn from him whether some arrangement could not be made in regard to the sale of the property. And that when they were all present, Hatfield proposed to give to Laramore his note at sixty days for Laramore's claim, if he would permit Hatfield to bid in the property; and that Laramore, through witness as his agent, "acceded to the proposition, but

with the express understanding and stipulation, that said Smucker and Hatfield should abide by the arbitration, and that it must be an end of all trouble and litigation in the matter; to which the said parties assented or agreed, and in pursuance to this understanding or agreement, said Hatfield purchased said property and executed his note to Thomas J. Laramore for $975, payable sixty days from date." And Samples testifies that he sold the property, and that the sale was to have been for cash, but was bid in by Hatfield, who gave his note at sixty days for the purchase money. And this witness further states, that it was his "understanding from all the parties, that the acceptance of the note instead of cash, by Laramore, would be the end of the contest."

This evidence very satisfactorily shows that it was the design of the parties to end the contest in regard to the matters litigated in this record, by the arrangement then made and consummated. And that the agreement to give the time for payment, was the consideration supporting it. And if such an agreement was fairly made and executed, the parties who have received the benefit resulting from the arrangement, cannot now be heard, to controvert or disregard the contract. But an effort was made to destroy the effect of the testimony of Mathews, by showing that he had an interest in the collection of this money for Laramore. It appears that he was a trustee, and employed by the Illinois Conference Female College to solicit subscriptions for that institution; and that Laramore agreed to give the institution one-third of this claim of Mathews, should he be able to collect it. And that he as trustee or individually, had borrowed money for the college, and was liable for its payment. And also by an effort to show that the arrangement testified to by him, did not occur at the place he named, by the testimony of clerks who were in the store on that day. It does not appear from any part of the evidence, that Mathews was to get any portion of the money in controversy, and he swears that he was not. The mere fact that the college, of which he was a trustee and agent, had Laramore's promise to give a portion of this claim when collected, could not disqualify him as a witness, nor could the fact that he was liable for indebtedness of the college make any difference, as it nowhere appears that the money when received was to be applied in discharge of his liability. Nor do we think it tends to weaken the force of his evidence. But if it did, he was fully corroborated by the evidence of Samples, who testifies that he understood from all the parties that the arrangement was to end all litigation between them. Nor does the fact that the two clerks in the store did not hear the arrangement entered into, weaken its force. They say they have no recollection of

the transaction, and one of them that he has no recollection that Mathews was in the store on that day. It might be true that they had no recollection of this transaction, and yet it be true that it did occur. One of the clerks testifies, that Mathews was twice in the store on that day, which shows the want of memory or inattention of the other. Negative evidence of this character, is not sufficient to overcome the positive evidence of a witness who testifies to the existence of the fact.

We are, for these reasons, of the opinion that the plea of release of errors was sufficient, and that the evidence sustains its truth, and that the judgment of the court below must be affirmed.

Judgment affirmed.

William Flowers, Plaintiff in Error, *v.* John Brown, Administrator of the estate of James Brown, deceased, Defendant in Error.

ERROR TO FULTON.

A court of chancery will not ordinarily issue a writ of possession in order to enforce its decrees; and never where a party in possession may make a successful defense of his possession, either at law or equity.

This cause was commenced in the Circuit Court of Fulton county, on the chancery side, by John Brown, administrator of James Brown, deceased, to foreclose a mortgage given to his intestate, by William Flowers. The bill was filed on the 3rd day of March, A. D. 1851, and sets forth that on or about the 10th day of March, 1840, James Flowers and John Hall, both of Fulton county, etc., became indebted to his intestate in the sum of one hundred and thirty-seven dollars and sixty cents, upon a promissory note, bearing that date, and due six months thereafter, with twelve per cent. interest from date; and that on or about the 10th March, A. D. 1844, one William Flowers became indebted to the intestate in the further sum of forty-two dollars and thirty-two cents, bearing that date, and payable one day after the date thereof.

And that thereupon William Flowers, to secure the whole of said money, amounting to the sum of one hundred and seventy-nine dollars and eighty-five cents, as appears by the notes, executed his deed of mortgage to the intestate, to certain pieces and parcels of land; which instrument is set forth to have been dated on the 7th day of August, A. D. 1847, conditioned that

the same should be void on the payment of the sum of one hundred and seventy-nine dollars and eighty-five cents to the intestate, on or before the 23rd day of August, A. D. 1847. The bill then refers to copy of notes and mortgage filed therewith, and made part of the bill. The bill then sets forth a demand by the intestate in his lifetime, and a refusal to pay, and, also, appointment of administrator, and demand and refusal to administrator. The bill concludes with usual prayer, etc. A copy of the notes and mortgages is then set forth, one of the notes signed by William Flowers and John Hall, and the other by William Flowers.

Summons issued 3rd March, A. D. 1857, properly tested, but without seal, returnable to March term of Fulton Circuit Court, which was returned not served.

At the March term of said court, A. D. 1851, the cause was continued, with alias which was issued, returnable to the next term of said court, and duly served upon the defendant, William Flowers.

At the August term of said court, A. D. 1857, a decree in this cause was entered of record, which recites that the cause came on for hearing upon the bill, answer and exhibits, and it appearing to the court that the defendant had been duly served with process; and further, that the defendant, William Flowers, failed to appear, plead, answer or demur to the complainant's bill of complaint, it is therefore ordered by the court that the same be taken as confessed as to him; and it further appearing from the exhibits, that there is still due and owing to the said complainant the sum of four hundred and six dollars and eight cents, secured by mortgage on certain lands, describing them.

The court therefore orders and decrees that the defendant pay to the complainant, the sum of four hundred and six dollars and eight cents, and all of the costs of this suit, by a certain day, and that in default thereof, that the lands described be sold at public auction, for cash, to the highest bidder, etc., and that William Elliott be appointed commissioner to make such sale, and requiring him to give three weeks' notice of such sale, etc., and that he first pay the costs, and then the complainant, and bring the residue, if any, into court at its next term, and that he execute to the purchaser a certificate of purchase, entitling him to a deed in fifteen months, etc., and that he report. And, then, among other things, the court orders that the defendant surrender possession of the premises and the title papers, etc. to the purchaser, at the expiration of the time of redemption.

At the November term of said court, A. D. 1851, the commissioner reported to the court, that the defendant having failed to pay the money at the time limited in the decree, that

he did, after giving notice as required, on the 30th day of September, A. D. 1851, offer the premises for sale to the highest bidder, and that John Brown, the complainant, having bid the sum of $445.25, which being the highest and best bid offered, the same was struck off and sold to him, and that certificate was made as directed.

And at the same term of court a decree was entered approving the report of the master, and the sale affirmed, and that upon the expiration of fifteen months, that the master in chancery make and execute a deed to the purchaser.

The cause was then continued from term to term, until the 23rd day of January, A. D. 1853. The master in chancery filed his report in this cause, setting forth that in pursuance of decree rendered in this cause at the November term, A. D. 1852, of said court, he had made and executed a deed for the premises sold to said John Brown, as directed, etc., and had delivered the same to the clerk of said court.

Here the cause rested, and was continued from term to term, until the May term, A. D. 1857, of said court, when complainant, by his solicitors, made motion for final decree of confirmation of the deed and reports, and for writ of possession, etc.

The defendant then came and filed his reasons for setting aside the sale, and showing cause why the deed, and report and sale should not be approved.

It next appears that a copy of decree had been served upon the defendant, and those holding under him, together with a written notice to deliver up the possession and the title papers, and return of the officers that there had been a refusal to surrender. The affidavit of Brown was then filed, setting forth that he had purchased of complainant all his rights in the premises, etc.; that he had made demand for the possession of the premises, and refusal to deliver up, etc., in contempt of the authority of the court.

At the same term the defendant, Flowers, filed his affidavit, setting forth, that since the sale of said land under said mortgage, that affiant and said complainant had contracted and agreed with each other, that said Brown would give defendant further time to pay the money due under said mortgage, and that complainant promised to convey the land to defendant, upon the payment of the balance due upon the decree, and that in pursuance of this agreement, the defendant had paid to said complainant the sum of $144; and that it was then and there further agreed, that the balance of said money should be paid as soon as he could conveniently pay it, or that the same might be paid in stock, at cash values; that some time in the month of February or March last, affiant received a letter from complain-

ant, requesting defendant to come and settle the balance; that the roads were bad, and defendant answered that as soon as the roads got better, he would come up and settle the balance; that some time in the month of April, defendant went to see complainant for the purpose of paying the balance, when he was informed by complainant that he had sold and conveyed the land to Beers, and would receive nothing further on the contract. Affiant further charges notice to Beers of the contract existing between defendant and complainant about the land. Affiant sets forth that this tract of land is worth $2,500 to $3,000, and that the other tract is worth about $400.

Upon this affidavit the defendant moved the court for a continuance of the cause, to enable him to file a bill of review. The court overruled the motion, as also the motion of defendant to set aside the sale; and ordered a writ of possession to issue.

C. L. Higbee, M. Hay, and L. Ross, for Plaintiff in Error.

Goudy & Judd, for Defendant in Error.

Caton, C. J. That portion of the final decree which awards a writ of possession, we think erroneous. The affidavit which was filed in resistance of that portion of the decree, sets up new matter, which occurred after the former decree in the cause, ordering the property to be sold, and hence, this was the first time when it could be presented to the consideration of the court. It is not necessary now to determine definitely, whether the affidavit makes out such a case as would certainly enable the defendant to maintain his possession in an action of ejectment, or such a case as would demand of a court of equity to decree a specific performance of the agreement therein stated. It is sufficient that he has shown facts, which should convince the court that his claim to such a case is not a mere frivolous pretense, to delay the assignee of the purchaser, in the possession of an undoubted right. While the court of chancery has an undoubted jurisdiction to award the writ of possession in execution of its decrees, this it will not ordinarily do, and never, where there is any reasonable prospect that the party in possession may make a successful defense of his possession, either at law or by the aid of a court of equity. That portion of the decree which awards the writ of possession, must be reversed, and the balance affirmed—each party to pay half the costs here.

Walker, J., having tried the cause in the court below, took no part in the decision of this case.

Edward S. Henrickson, impleaded, etc., Plaintiff in Error, *v.* Ransom Van Winkle, Defendant in Error.

ERROR TO MORGAN.

A release of errors, by one of several defendants to a record, where the error only relates to the party who executes the release, is good.

A party to a record cannot release an error which is personal to another party, nor can one party urge an error which is personal to another.

Where one of several defendants was not served with process, but judgment was nevertheless entered against him with the others, he may release the error.

Henrickson, who had been sued in the same action with Harry Reinback and Hiram Van Winkle, sued out this writ of error to reform a judgment which had been rendered in the Circuit Court of Morgan county. The state of the record in the Circuit Court, is stated in the opinion of this court.

In the Supreme Court, on the return of the process, the defendant in error pleaded, "that as to any errors assigned in the record and proceedings in this case, touching the rights or responsibilities of Harry Reinback and Hiram Van Winkle, impleaded with the said Edward S. Henrickson, in the court below, the said Ransom Van Winkle says, plaintiff *actio non*, because said defendant says, that before the institution of any proceedings in error in this case, to wit: at the county of Morgan, and State of Illinois, on the twenty-second day of December, in the year of our Lord one thousand eight hundred and fifty-seven, the said Harry Reinback and Hiram Van Winkle, in the name and by the style of 'H. Reinback,' and 'H. J. Van Winkle,' executed and delivered a release, here in court ready to be produced, jointly and severally releasing to the said defendant and assigns, any and all errors in the record and proceedings aforesaid, so far as they might affect the said Harry Reinback and Hiram Van Winkle, or either of them; all of which the said defendant is ready to verify, etc."

The plaintiff in error moved the court to strike the above plea from the files; because there was not anything contained in said plea, to warrant in law a release of errors touching the right of the plaintiff in error.

W. D. Wyatt, for Plaintiff in Error.

D. A. and T. W. Smith, for Defendant in Error.

Walker, J. This was an action of assumpsit commenced by Ransom Van Winkle against Edward S. Henrickson, H.

Reinback and Hiram Van Winkle, in the Morgan Circuit Court, to the October term, 1857, on a promissory note. A summons was issued and served on Reinback and Henrickson, and no return as to Van Winkle. At the return term the defendant Henrickson, filed the general issue, on which issue was joined, and by consent the court tried the cause without the intervention of a jury, and found the issue for the plaintiff, and assessed the damages at $251.17. Defendants Reinback and Van Winkle were called and a default entered against them, and a judgment was rendered against all the defendants for the amount of the damages so assessed. And Henrickson brings this writ of error to reverse this judgment. To this writ of error the defendant in error pleads a release of all errors, executed by Reinback and defendant Van Winkle before the writ was issued. To this plea, plaintiff in error filed a demurrer, on which there was a joinder.

This demurrer presents the question, whether a release of error executed by a portion of the defendants to the record, is sufficient without the concurrence of the others. This we have no doubt may be done in all cases where the error complained of relates alone to the party executing the release. If the error is personal to him alone, no one else has a right to object if he chooses to waive his privilege of insisting upon it. And if by his releasing such error the record becomes regular, there is then nothing of which his co-defendant can complain. But one party has no right to release an error which is personal to another party to the record, nor can one party urge an error personal to another party.

If in this case there was an error in not empanneling a jury to assess the damages after default was entered, which is by no means conceded, no person was injured or had a right to complain but Reinback and Hiram Van Winkle. If that proceeding had been erroneous, Henrickson was not injured by it, as he had expressly waived a jury to pass upon his rights. The other defendants would alone have a right to complain, and had the undoubted right to release the supposed error, and when they did so, they only waived, as he had already done, a trial by jury. By their doing so, Henrickson sustained no wrong, and was deprived of no legal right.

It was, however, clearly erroneous to enter a default, and to render a judgment against Hiram Van Winkle, who had not been served with process, and who had not entered any appearance to the action. But it was an error which could injure no one but himself, and he had, if he chose, an unquestioned right to have insisted upon it, or to release it, as he might choose. The plea alleges that he adopted the latter course, which is

admitted by the demurrer, and the other defendants have no right to complain of his exercising this legal right.

This plea professes to be a bar to the entire cause of action, and would not be good if there are any errors in the record which could not be released by the defendants executing the release. But on a careful examination of the record, we perceive none but such as affected the defendants who executed the release, and when they executed it, the record and judgment became regular and binding on all the defendants. The plea, we therefore think, presents a complete bar to the writ of error, and plaintiff not showing that he has anything to reply to the plea, judgment of affirmance is rendered on the demurrer in favor of the defendant in error, and the judgment of the court below is affirmed.

Judgment affirmed.

Jacob Spangler, Plaintiff in Error, *v.* The Indiana and Illinois Central Railway Company, Defendant in Error.

ERROR TO MACON.

An averment that the plaintiff was, and still is a body corporate and politic, etc., is sufficient in an action to recover subscriptions of stock to a railway company, especially where the declaration is demurred to.

In order to recover subscriptions to stock in a railway company, which is to be called for in proportions, it must appear that the installments were called for periodically; and not that the assessments therefor were all made at one time, without notice of previous assessments.

Assessments, as understood in such contracts, mean a rating by the board of directors, by installments, of which notice is to be given. After notice has been given, and the period for payment has passed, an action will lie for the aggregate amount.

On an overruled demurrer to a declaration filed to recover stock subscriptions, if the party does not ask permission to plead over, it is proper for the clerk to assess damages.

This judgment was pronounced upon a subscription to stock, reciting that, "We, the undersigned, promise to pay to the Indiana and Illinois Central Railway Company, fifty dollars for each share of capital stock set opposite to our names, in such manner and proportion, and at such times as the directors of said company may order and direct, without any relief whatever from valuation or appraisement laws." The pleadings in the case are stated in the opinion of Mr. Justice Breese.

On the overruling of the demurrer to the first and second counts of the declaration, the plaintiff below entered a *nolle prosequi* on the common counts, and the court gave him judgment for twelve hundred and fifty dollars—amount of subscription for twenty-five shares of stock.

The defendant below sued out this writ of error, and assigned for errors, the overruling of the demurrer to the first and second counts of the declaration, and the rendering of final judgment for the plaintiff.

A. B. Bunn, for Plaintiff in Error.

A. J. Gallagher, for Defendant in Error.

Breese, J. The first objection is, that the declaration is insufficient. It is urged that the declaration should have averred by what law, or laws, the plaintiff existed as a corporation — that the mere statement that the plaintiff was a corporation, is not sufficient.

There is no ground for this objection. There is an averment that the plaintiff at the time, etc., was, and still is, a body corporate and politic, "created under the name and style aforesaid."

By demurring, the defendant admits the fact as averred. If he would deny the existence of such a corporation, he should have put in a plea for that purpose, either in abatement or in bar. *The Society for the propagation of the Gospel* v. *The Town of Pawlet and Ozias Clark*, 4 Peters R. 480; *McIntire* v. *Preston*, 5 Gilm. R. 58, and cases there cited.

Another objection is, that the declaration does not aver that the board of directors had ordered ten installments of ten per cent. each, on every share subscribed, amounting to the defendant's full subscription, and had given the defendant notice of it, nor does it aver the time and place when and where the order of assessment was made, and the particular amount of each assessment.

We have decided, (*Barret* v. *The Alton and Sangamon R. R. Co.*, 13 Ill. R. 504,) that where the power to require payment from subscribers to stock, is vested in a board of directors, an action will not lie to recover installments until the board has directed the call to be made, and due notice of the amount, and the time and place of payment have been given, the subscribers being in no default until these requirements of the charter have been performed.

The undertaking of the defendant is, to pay to the company fifty dollars for each share of capital stock subscribed, in such

manner and *proportion*, and at such times as the directors of the company may order and direct. The averment is, that "before bringing the suit, the defendant, by the directors of said body corporate and politic, was duly required and notified to pay the company, as installments on his subscription of stock, ten assessments of ten per cent. each, amounting in the whole to the sum of twelve hundred and fifty dollars, and being the *amount* in *full* of stock subscribed by the defendant, and the same was personally demanded of him."

In the second count it is averred, that ten installments of ten per cent. each, amounting to $1,250, due on the stock by defendant, had been called for by the board of directors of the corporation, of which the defendant then and there had, and at all times had, due notice.

The third and last count avers, that the defendant was indebted to the plaintiff in the sum of $1,250, for and in respect of twenty-five shares of stock duly subscribed by him, and which he held in the company, by virtue of divers calls on him, duly made before then by the directors for the time being of the company, and being so indebted, he undertook and promised.

To say nothing of the very loose and inartificial manner in which this declaration is drawn, we think it does not contain the substance of a good declaration in such a case on the contract set forth. The contract must have been understood by both parties to be, that the board of directors would make, periodically, certain assessments on the stock subscribed, of which the subscribers would be duly notified. It could not have been in the contemplation of the defendant, or any subscriber, that he could be called upon to pay the whole amount of his subscription at one time, without notice of previous assessments. This contract, like all others, must be construed according to the intention of the parties as manifested by the language used, and the object contemplated. By this contract, the defendant was to pay his subscription in certain proportions. A call upon him for the whole at once, is not justified by the contract. A demand for the whole might be justified if there had been regular periodical assessments, and the defendant duly notified of them. On failing to pay them, an action would lie for the whole amount. It is indispensable that assessments should have been made by an order of the board of directors, and the subscribers duly notified. *Barret* v. *Alton and Sangamon R. R. Co.*, *ante*. Assessments, as understood in such contracts, mean a rating or fixing of the proportion, by the board of directors, which every subscriber is to pay of his subscription, when notified of it, and when called on. There is no averment in any

one count of this declaration, that any assessment was made, such as was contemplated, of which the defendant had any notice. He cannot be required to pay the whole amount of his subscription until its several proportions have been called for and refused. For this reason the demurrer should have been sustained. It is proper, in such cases, the subscription being the equivalent of an instrument of writing for the payment of money only, that the court, by the clerk, should assess the damages the same as in case of a default, unless leave is asked and given to withdraw the demurrer and plead to issue.

The judgment of the Circuit Court overruling the demurrer is reversed, and the cause remanded, with leave to the plaintiff to amend the declaration.

Judgment reversed.

JUSTUS ROCKWELL *et al.*, Appellants, *v.* CUTHBERT T. JONES *et ux.*, Appellees.

APPEAL FROM RANDOLPH.

In an action of trespass *quare clausum fregit*, where the plaintiff deduced title to the premises trespassed upon by virtue of a sale under a *scire facias* to foreclose a mortgage: Held, That the fact that the sheriff's return to the *scire facias* was, that he made known to the mortgagor, by honest and lawful men, etc., as he was within commanded, was sufficient to authorize the court to render judgment on the *scire facias*. Held, also, that if the *scire facias* was sued out before the mortgage debt became due, that fact would have been ground for abating the suit or for reversal of the judgment, but cannot be inquired into collaterally. And so of other defects in the regularity of the proceeding.

The heirs of a deceased mortgagor need not be made parties to a *scire facias* to foreclose a mortgage; the statute authorizes the proceeding by making either the heirs, executors or administrators parties.

Although a judgment under a *scire facias* to foreclose a mortgage, does not direct a special execution for the sale of the mortgaged premises, that defect cannot be inquired into collaterally.

Where a party suing in trespass for damages to real estate fails to show paramount title, or possession at the time of the commission of the injuries complained of, he cannot recover.

THIS was an action of trespass *quare clausum fregit*, brought in the Circuit Court by the appellees, who were plaintiffs, against the appellants, defendants.

The declaration alleged that the defendants "on the 1st day of October, A. D. 1857, and on divers other days and times," etc., "with force and arms, broke and entered the close of said

plaintiff, Eliza R. Jones," etc. Defendants denied the trespass, pleading the general issue. By consent of the parties, the case was tried by the court, O'MELVENY, Judge, presiding, without a jury, at the September term, A. D. 1858, and a verdict and judgment rendered for the plaintiffs for $17 and costs of suit.

In support of their case, the plaintiffs first offered in evidence a mortgage of a tract of land in Randolph county, Illinois, being " the south half of the east half of the north-west quarter of section No. thirteen, township No. seven south, of range No. seven west, containing forty acres," which mortgage was executed the 1st day of December, 1843, by Justus T. Rockwell, in consideration of $98.30, and to secure the repayment thereof to Elisha Seymour, the mortgagee, on the 10th day of September, 1845. No objection being made, the mortgage was admitted and read.

Plaintiffs next offered in evidence a writ of *scire facias*, sued out of the Randolph Circuit Court, by Elisha Seymour, the beginning of which writ is in the usual form, addressed to the sheriff, reciting the foregoing mortgage, and concludes as follows: " And the said Justus T. Rockwell is since dead, intestate, and letters of administration of all and singular the goods, chattels, rights and credits, which were of the said Justus T. Rockwell, have been granted in due form of law to Seth Allen, of the county aforesaid; nevertheless, the said Justus T. Rockwell, in his lifetime, did not pay, nor hath the said Seth Allen, administrator as aforesaid, since the death of the said Justus T. Rockwell, as yet paid the said sum of ninety-eight dollars and thirty cents, mentioned in the said indenture, or any part thereof, to the said Elisha Seymour; he, the said Justus T. Rockwell, in his lifetime, and the said Seth Allen, administrator as aforesaid, since his death, have wholly neglected, failed and made default therein, as we have received information from the said Elisha Seymour; and we, willing that those things which are just and right should be done, do therefore command you, that by honest and lawful men of your county you make known to the said Seth Allen, administrator as aforesaid, that he be before the judge of our Circuit Court in and for said county, at the Court House, in the town of Kaskaskia, in said county, on the fourth Monday of September, instant, to show, if he has or knows of any thing or cause why judgment should not be rendered for such sum of money as may be due from the said Justus T. Rockwell, in his lifetime, to the said Elisha Seymour, on and by virtue of said indenture, according to the form, force and effect thereof, if he shall think it expedient for him so to do; and have you then and there the

names of those by whom you shall so make known to him, and this writ.

Witness, James H. Quinn, Clerk of our Circuit Court, at office in the town of Kaskaskia, this 10th day of [SEAL.] September, in the year of our Lord one thousand eight hundred and forty-five, and the seal of said court. J. H. QUINN, *Clerk.*"

To the reception of this writ as evidence, the defendants objected. The court overruled the objection and admitted the writ to be read, to which the defendants at the time excepted.

Plaintiffs then offered in evidence the following return to said writ:

"I have this day made known by honest and lawful men, to wit: John Doe and Richard Roe, unto Seth Allen, administrator of Justus T. Rockwell, as I am within commanded.

JOHN CAMPBELL, *Sheriff R. C.*

Sept. the 10*th*, 1845.

Defendants objected to the above service and return as insufficient. The court overruled the objection, and permitted the return to be read in evidence, to which defendants at the time excepted.

Plaintiffs next offered in evidence a judgment of the Circuit Court of Randolph county, of September term, A. D. 1845, of which the following is a copy:

"ELISHA SEYMOUR, *vs.* SETH ALLEN, Administrator of JUSTUS ROCKWELL. } DEBT. SCIRE FACIAS.

And now comes the said plaintiff, by Baker his attorney, and the said defendant being duly called, comes not, but makes default, and the clerk is ordered to assess the damages consequent on the detention of said debt in said declaration mentioned, and report the same, with the said debt, to the court; and the said clerk reports the sum of twenty dollars and two cents as said damages, and the said debt at the sum of ninety-eight dollars and thirty cents; and on motion of said plaintiff, the said report is approved and ordered to be filed. It is therefore considered by the court, that the said plaintiff do have and recover of and from the said defendant the sums aforesaid of said debt and damages, making together the sum of one hundred and eighteen dollars and thirty-two cents, and also the costs of suit, and that execution issue herein."

To this judgment the defendants objected. The objection was overruled and the judgment admitted as evidence, to which the defendants excepted at the time.

Plaintiffs next offered in evidence a special writ of *fieri facias*, of which the following is a copy:

"STATE OF ILLINOIS, } Scr.
RANDOLPH COUNTY, }

The People of the State of Illinois to the Sheriff of Randolph county, Greeting:

We command you that of the south half of the east half of the north-west quarter of section number thirteen, (No. 13,) township (No. 7,) number seven south, of range (No. 7,) number seven west, containing forty acres, in your county, you cause to be made the sum of one hundred and eighteen dollars and thirty-seven cents, with interest, to be computed thereon from the 23rd day of September, A. D. 1845, until paid, which Elisha Seymour recovered for his debt and damages; and also the further sum of five dollars and ninety-seven cents, which were adjudged to him for his costs and charges expended in an action of debt on mortgage against Seth Allen, administrator of Justus T. Rockwell, at the September term of the Randolph county Circuit Court, A. D. 1845, as appears of record; and have that money at the clerk's office of our said court in ninety days after the date hereof, to render to the said Elisha Seymour his debt and damages and costs aforesaid; and have you then and there this writ, with due return thereon.

Witness, James H. Quinn, Clerk of the Circuit Court within and for the county of Randolph, and the seal of [SEAL.] said court hereto affixed at Kaskaskia, this 23rd day of November, A. D. 1845.

JAMES H. QUINN, *Clerk.*

On which writ there was endorsed the following returns:

"I have this day levied this execution on the South half of the East half of the North-West quarter of section numbered thirteen (13), in township seven (7) South, of Range seven (7) West, containing forty acres. Nov. 26, 1845.

JNO. CAMPBELL, S. R. C."

"I have this day sold the Land above described to Elisha Seymour, for one hundred and thirty-three dollars, 38 cents, which satisfies this writ. December 19, 1845. JNO. CAMPBELL, S. R. C."

Defendants objected to the admission of the writ, and also to the returns endorsed thereon. Objection overruled, and the writ and returns admitted, to which defendants at the time excepted.

Plaintiffs next offered in evidence the record of a sheriff's deed, dated August 5th, 1847, to Elisha Seymour, for the lands described in the foregoing writ of *fieri facias*, said deed containing a recital of the foregoing judgment and execution. No objection was made to the reading of the *record* of the deed, but the deed itself was objected to as evidence, on the ground that

no legal foundation had been laid for its introduction. The court overruled the objection and admitted the deed, to which the defendants at the time excepted.

The plaintiffs next introduced in evidence the record of an order of the County Court of Randolph county, State of Illinois, for the sale of the land included in the foregoing deed, (together with other lands,) at the April term of said court, A. D. 1854.

The defendants admitted the order to be the record of the County Court, but objected to its introduction as evidence. Objection overruled by the court, and the order admitted to be read, to which the defendants excepted.

Plaintiffs next offered in evidence the record of a deed from the office of the recorder of Randolph county, from Edward Seymour, administrator of the estate of Elisha Seymour, deceased, to John O'Neil; said deed bearing date, June 7th, A. D. 1854, and embracing within it (amongst other lands) the tract described in the foregoing execution and sheriff's deed.

To the admission of this deed the defendants objected. The objection was overruled and the deed read from the record, (showing the land in question to have been purchased by John O'Neil,) to which ruling of the court defendants excepted.

Plaintiffs next offered in evidence the record of a deed of the same lands mentioned in the execution and foregoing deed, from John O'Neil and wife to Ann E. Servant, dated Nov. 19th, 1855. To which deed defendants objected. The court overruled the objection and permitted the deed to be read, to which the defendants excepted.

Plaintiffs next offered in evidence the record of a deed from R. B. Servant and Ann E. Servant, of the lands embraced in the foregoing deed, to Eliza R. Jones, one of the plaintiffs, which deed is dated the 18th day of August, A. D. 1857. To this deed defendants objected. Their objection was overruled and the deed admitted, to which the defendants excepted.

Plaintiffs then introduced *Amzi Andrews* as a witness, who testified that he knew of a piece of land upon which defendants had been cutting timber, but did not know it by the numbers. Should think defendants had cut off of the land about two hundred trees or saplings. (Here it was admitted by defendants' counsel that defendants were in possession of the land and had cut timber, but no admission was made as to the quantity.) Witness supposed there were about twenty cords cut, worth about $20.

John Reno, another witness, said he thought there were about twenty-five or thirty cords cut and taken away, worth about fifty cents per cord. No other evidence was offered or given, on

either side, in this case. The court found the defendants guilty, and assessed the damages at $17.

Defendants moved for a new trial. Motion overruled, and judgment entered as before stated for plaintiffs, for $17 and costs, to which defendants excepted. Defendants prayed an appeal to the Supreme Court, which was granted, and a bill of exceptions containing all of the evidence in the case was signed and sealed, and made a part of the record, and by consent of parties, the appeal is brought to this Grand Division.

The appellants assign the following errors:

1. In the admission of the writ of *scire facias* as evidence for plaintiffs.
2. In overruling the objection to the service of and return to the writ.
3. In allowing the judgment against Seth Allen, administrator of Justus T. Rockwell, to be admitted as evidence for plaintiffs.
4. In permitting the writ of *fieri facias*, and the returns thereon, to be read in evidence.
5. In admitting as evidence, the sheriff's deed to Elisha Seymour.
6. In admitting the record of the order of the County Court as evidence.
7. In permitting to be read in evidence, the record of the deed from Edward Seymour, administrator of Elisha Seymour, to John O'Neil.
8. In permitting to be read as evidence, the record of a deed from John O'Neil and wife to Ann E. Servant.
9. In the admission of the record of a deed from Richard B. Servant and Ann E. Servant to Eliza R. Jones.
10. In finding the defendants guilty, and in overruling the motion for a new trial, and entering judgment for the plaintiffs.

Thomas G. Allen, for Appellants.

G. Koerner, for Appellees.

Walker, J. It was objected that the *scire facias* read in evidence, was insufficient to give the court jurisdiction, to render a judgment for the foreclosure of the mortgage. It is true that it did not, in terms, require the sheriff to summon the defendant, but it required him to make known to defendant that he should show cause why a judgment should not be rendered. It in that respect adopted the language of the statute, giving and regulating foreclosures in this mode, and when the statutory requirements have been literally adopted, it must be held

sufficient. That the command was, that he make known by honest and lawful men, could in no way affect the validity of the writ, and it was in form strictly in compliance with the ancient English practice. We are of the opinion that the writ was good and sufficient to confer, and did confer, jurisdiction upon the court.

It was likewise objected, that the sheriff's return was insufficient to give the court jurisdiction of the person of the defendant. The sheriff made return to the writ, "That I have made known by honest and lawful men, to wit: John Doe and Richard Roe, unto Seth Allen, administrator of Justus T. Rockwell, as I am within commanded." While by the modern practice, it is usual to return, that process has been served by reading it to the defendant, and this is no doubt the better practice, still this return is strictly in conformity with the former practice in England. 2 Lilly's Entries, 399. By that practice it is required, where the defendant to a *scire facias* resides in the county, that he should have some notice of the proceeding, the sufficiency of which, if disputed, should be determined by the court. 2 Tidd's Prac. 1037. And there appears to have been notice in this case, and it must be presumed that the court passed upon and determined that it was sufficient, and it is not open to be inquired into collaterally. We are therefore of the opinion that the return of service was sufficient to authorize the court to proceed to judgment in the case.

It was also urged, that the writ of *scire facias* was sued before the mortgage debt fell due, and that the judgment was for that reason void. If it be true that the debt was not due when process was issued, it was clearly ground for abating the suit, or it would have been available for the reversal of the judgment, on appeal or writ of error. But it cannot be held that it rendered the judgment a mere nullity. It is true that the statute only gives the right to foreclose by this mode when the entire debt is due, but courts have the jurisdiction to try and determine such causes, when they have the parties properly before them, and an error committed by the court in determining whether the demand is due or not, cannot render the judgment void. By the law, the plaintiff has no right to maintain an action, nor has the court the right to render judgment, for any demand before it is due and payable, and yet, it has never been held, that a judgment rendered on a demand not due, was a nullity. And no difference is perceived when jurisdiction is exercised under a statute, or under the common law. The common law powers of our Circuit Courts are conferred by statutory enactment, as well as in this proceeding. While it was ground for abating the suit, or reversing the judgment on error,

it cannot render it void, or authorize it to be inquired into collaterally.

The reversal of this judgment is also urged, because the heirs of the mortgagor were not made parties to the *scire facias* to foreclose the mortgage, and that the judgment and other proceedings are inadmissible in evidence in this cause. By the death of the mortgagor, his right of redemption descended to, and was vested in his heirs, who were necessary parties to this or any other proceeding, intended to divest them of their right, unless it has been rendered unnecessary by legislative enactment. The statute giving this remedy, and regulating proceedings under it, to foreclose the equity of redemption, provides that a writ of *scire facias* may issue for the purpose, directed to the sheriff or other proper officer of the county, where the mortgaged premises may be situated, requiring him "to make known to the mortgagor, or if he be dead, to his heirs, executors or administrators, to show cause, if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage." This language is clear and explicit, that the plaintiff may, when the mortgagor is dead, at his election, make either the heirs, executors or administrators defendants, as he may choose. The language is in the disjunctive, and we can, by no known rule of construction, say that it requires the heirs to be parties, if the plaintiff shall choose to proceed against the executors or administrators. The writ was manifestly in compliance with the statute, and was therefore against the proper party.

It was also urged that the judgment in that case was insufficient to authorize or support a sale of the mortgaged premises, because it was rendered against the defendant who was the administrator, and failed to order a sale of the land, and to award a special execution for that purpose. That the judgment was erroneous, and that it might have been reversed on error, there can be no doubt. It should have ordered the sale of the mortgaged premises to satisfy the debt; and it should likewise have awarded a special execution against the premises. *Maury* v. *Marshall*, 1 Scam. R. 232; *Swigart* v. *Harbor*, 4 Scam. R. 371. That the execution also might have been quashed and the levy and sale set aside, for the want of such order and award of execution, there can be as little doubt; but still it does not necessarily follow that these proceedings are void and may be inquired into, in a collateral proceeding.

The court rendering the judgment, we have seen, had jurisdiction of both the subject-matter and the proper parties, and whether the judgment it rendered was correct or incorrect, it is, until reversed, binding in every other court. If, on the other

hand, the court had acted without jurisdiction, and had therefore acted without authority, the proceedings would have been null and void, and could have conferred no right or protection to those claiming under them, and they might have been disregarded by the court below, although unreversed. Ibid. 371. The court having had jurisdiction, the judgment was therefore admissible in evidence, however erroneous it may have been. That it purported to be rendered against the administrator could make no difference, as he was a proper defendant, and this was so held in the case of *Swigart* v. *Harbor*. The statute authorized the proceeding to be instituted against him, and it necessarily follows that the judgment must, when he is made a defendant, be rendered against him. There is in such case, no other defendant against whom it can be entered. To do justice, the court in such case, must for the purposes of the foreclosure, render the judgment against the defendant. And the judgment when rendered, must have precisely the same effect as if it were against the mortgagor himself, if he were living. To hold otherwise, would be to prevent the mortgagee from making any but the heirs defendants, which would be in violation of the statute. This is a proceeding *in rem*, and the judgment in that case could in no event have been for anything more than a sale of the mortgaged premises. The proceeding is against the mortgaged property and not against the administrator personally, nor against him *de bonis testatoris*, and whatever were its irregularities it was a judgment against the mortgaged premises. The court had no power or authority to render any other judgment, and its legal effect was, that it became a judgment against the lands, though informal in not ordering its sale, and in not awarding a special execution.

This judgment awarded an execution, and no other could legally have been awarded or issued in that case than one for the sale of the mortgaged property, and although informal, it was equally explicit and formal as was that in the case determined in *Swigart* v. *Harbor*, where the execution and sale under it were held binding. In that case, as in this, the judgment was against an administrator; there was no order for the sale of the land, and it only awarded execution in pursuance of the statute, and we think that case is conclusive of this question. This court in that case held, that if the execution was irregular and unwarranted, it was the duty of the defendant to have applied to the court issuing it to have it quashed, and failing to do so, he could not question it in a collateral proceeding. And these proceedings, until reversed or avoided by a direct proceeding, are equally binding on parties and privies, as on strangers to the record. We perceive no error in receiving the

writ, return, judgment, execution and sheriff's deed, in evidence on the trial below. And as the objections urged against the other portion of the chain in plaintiffs' title, which succeeded the sheriff's deed, were only based upon the insufficiency of this proceeding, it is not deemed necessary further to discuss this branch of the evidence.

It then only remains to determine, whether the proceedings in the action by *scire facias* and subsequent deeds, in connection with the other evidence in the case, gave plaintiffs a right to recover. In an action to recover for damages to real estate, the plaintiff must show paramount title in himself, or an actual possession of the premises at the time of the commission of the injuries, for which suit is brought. The evidence in this case fails to show any title in Justus T. Rockwell. Whether he had any title does not appear, nor is it shown that the defendants were his heirs and claiming under the same title with the plaintiffs. The evidence also fails to show that plaintiffs were in possession, but rather that the defendants were. The plaintiffs therefore failed to make such a case as entitled them to recover; and the verdict is not supported by the evidence, and a new trial should have been granted.

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

Judgment reversed.

The County of Crawford, Appellant, *v.* Morrison Spenney, Appellee.

APPEAL FROM CRAWFORD.

Counties are not liable for the expenses attending the execution of criminal process.

The Governor may offer a reward on the part of the State for the apprehension of criminals. Sheriffs cannot do so, and make the counties liable, except for the apprehension of horse thieves.

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

The cause was tried before Harlan, Judge, at October term, 1858, of the Crawford Circuit Court.

G. Koerner, and J. H. Steel, for Appellant.

C. H. Constable, for Appellee.

BREESE, J. This was an action of *indebitatus assumpsit* brought by Spenney against the county of Crawford. The declaration contains two counts. The first count alleges an indebtedness of two hundred dollars, for work, labor, care and diligence done, etc., by the plaintiff for the defendant, and at its special instance and request, "in and about the pursuit and re-arrest of William Reamer, an escaped prisoner, originally arrested and detained for crime alleged to have been committed within the jurisdiction of the county of Crawford, and in pursuance of the process of the legal authorities thereof."

The other count is for money paid, laid out and expended by the plaintiff, to and for the use of Crawford county, and at its like special instance and request, "in reward paid and expended defrayed in and about the recapture of one William Reamer, an escaped prisoner, who was in custody and detained upon charge of crime by virtue of charge preferred and proceedings had by and under the legal authority of said county of Crawford, within the jurisdiction of which, the crime for which said prisoner had been arrested and detained, was charged to have been committed, and being so indebted, the defendant promised to pay, etc."

The defendant pleaded *non assumpsit*,—an adjudication by the County Court of Crawford county, before which this claim was presented and disallowed,—payment by the county, by issuing an order on the county treasury for $44.40, which was received by the plaintiff in full satisfaction and discharge of all the sums claimed in the declaration.

To the second plea a demurrer was filed and sustained, and as we think properly, and although there was no replication to the third plea, the record shows the parties went to trial on that and the general issue, before the court, without a jury, who found for the plaintiff one hundred and twenty-three dollars. A motion for a new trial was refused, and a bill of exceptions taken, in which is incorporated the evidence in the cause, and the case brought here by appeal, where the errors assigned are, That the court admitted improper evidence; overruled the motion for a new trial; gave judgment for the plaintiff, and awarded execution, and sustained the demurrer to the second plea. The venue was changed, by consent, to the second grand division.

It is unnecessary to go into a particular examination of the errors, or of all the facts of the case; it is sufficient to say, it is nowhere proved that the recapture of the prisoner was made by the plaintiff, at the request of the county of Crawford.

The facts are briefly these: One Reamer was committed to the custody of the sheriff of Crawford county on a charge of

larceny; that the jail of that county being insufficient, he carried him to Clark county and delivered him to the plaintiff, who was then sheriff of that county, who committed him to the jail of Clark county; that the prisoner broke the jail and escaped, and was recaptured by the plaintiff at a cost of sixty dollars; that soon after, the prisoner again escaped in the same way as he effected his first escape, in open day-light, by passing through the family room of the plaintiff, acting as jailor. There are strong grounds to believe that the jailor was not free from the charge, under all the circumstances, of culpable negligence in not preventing, by the extremest caution and care, at least, the second escape, being admonished as he was by the first escape, of the necessity for extra vigilance.

We hold that the counties are not liable for the expenses attending the execution of criminal process. They are a burden upon the office of sheriff, coroner and constable. They are under no legal or moral obligation to pay them, nor are sheriffs allowed by any law of which we are cognizant, to offer rewards for the apprehension of criminals who may have escaped from their custody, and make the counties liable. The Governor can do so on behalf of the State, by sect. 8, chap. 45, R. S. 1845. (Scates' Comp. 1113.)

If the sheriff offer a reward, it will be presumed to be in atonement for his carelessness in permitting the escape.

Should this claim be allowed, it would amount to a premium for negligence, and expose the treasuries of the counties to be plundered by collusive escapes and recaptures. The law can justify no such claim, no matter whether the suit is brought by the sheriff of the county against the county where the jail may be, or the county using the jail for insufficiency of its own jail.

The counties, as such, have no concern or interest in these commitments and escapes. They are for offenses against the laws of the State, and the State has properly authorized its highest executive officer to offer rewards, and that functionary only, except in the case of horse-thieves, and for their apprehension, in which cases the County Courts can offer a reward not exceeding fifty dollars. R. S. 1845, p. 574.

Some objections were made to the time of signing the bill of exceptions. The record shows a trial by the court, and on the rendition of the judgment, the bill was tendered and signed. This is all correct.

There being a total want of legal liability shown in this case, on the part of the county of Crawford, to the plaintiff, the judgment is reversed.

Judgment reversed.

The Terre Haute and Alton Railroad Company, Plaintiff in Error, *v.* Daniel Earp, Defendant in Error.

ERROR TO SHELBY.

A subscriber to stock in a railroad company cannot avoid payment, because the charter of the road has been so changed, as to authorize the company to which the subscription was made, to purchase stock in other railroad companies, even though the terminus of the road, in which the stock was first subscribed, is thereby changed.

This was a suit in assumpsit, instituted in the Circuit Court of Shelby county, by the Terre Haute and Alton Railroad Company, against Daniel Earp, the defendant in error, to recover the sum of five hundred dollars, subscribed by him for ten shares of the capital stock of said company.

The defendant, in the court below, filed various pleas, upon several of which issue was taken, and others were demurred to; but the only question presented to the court upon the record in this cause, arises upon the fourth plea of the defendant, which is as follows, viz.: "And for further plea in this behalf, the defendant says *actio non*, because, he says, that at the time when he signed the said articles of association, and subscribed for ten shares of the capital stock of the Terre Haute and Alton Railroad Company, he so signed and subscribed for the purpose of constructing, completing and operating a railroad from Terre Haute, in the State of Indiana, to the city of Alton, on the Mississippi river, in the State of Illinois, the same to be run and kept in operation from and to the points aforesaid, as required by the articles of association, signed and subscribed by said defendant and others, and as also required and specified in an act entitled 'An Act to incorporate the Terre Haute and Alton Railroad Company,' approved January 28th, 1851, and other acts amendatory thereof, and for no other purpose; and the said defendant avers that said plaintiff having first constructed their road from Terre Haute to Alton, and having purchased an interest of two-thirds in, and acquired control of the charter of the Belleville and Illinoistown Railroad Company, by and under color thereof, built and constructed a railroad from a point about four miles eastward of Alton, on their original railroad from Terre Haute to Alton, to Illinoistown, at a point on the Mississippi river, at a great distance, to wit: twenty-five miles from Alton, aforesaid, and opposite to the city of St. Louis, in the State of Missouri, which new and deflected road, together with all that part of the original Terre Haute and Alton road, lying eastward of said point of deflection, said plaintiff has constituted into one continuous line of travel and

trade, thereby making the real terminus of the road, to which defendant's money, by this suit, is sought to be applied, to be at said Illinoistown, and not at Alton aforesaid, and that the same was done without the consent of defendant, and this the defendant is ready to verify; wherefore, etc."

To this plea the plaintiff demurred, and the court below overruled said demurrer, and the plaintiff abiding by said demurrer, judgment was rendered in favor of said defendant upon said demurrer.

The only error assigned in this cause, and presented by the record, is the decision of the court below in overruling the demurrer to said plea.

J. Gillespie, S. W. Moulton, and Levi Davis, for Plaintiff in Error.

Lincoln & Herndon, for Defendant in Error.

Caton, C. J. The principles by which this case must be determined, have already been settled by repeated decisions of this court, and we do not feel called upon to discuss them again at length. By the second section of the act amending the charter of the plaintiff, passed on the 28th of February, 1854, it was authorized to take stock in other roads, and in pursuance of that authority, it purchased a majority of the stock of the road from Alton to Illinoistown, and this is the act set up as releasing the defendant from his subscription. That it was for the interest of the plaintiff to obtain the control of that road, and thus secure a continuous route to Illinoistown, may be easily appreciated, and is to be presumed from the fact that it was authorized by the legislature to do so, and that in pursuance of that authority it purchased the stock and obtained such control. If what we have said in the cases of *Alton and Sangamon Railroad Company* v. *Barrett*, 13 Ill. R. 504, *Sprague* v. *Illinois River Railroad Co.*, 19 Ill. 174, *Illinois River Railroad Company* v. *Zimmer*, 20 Ill. 654, and *Price* v. *Rock Island and Alton Railroad Company*, *post*, has not shown satisfactory reasons for the rule of law which we hold on this subject, we despair of doing so now.

In our opinion, the facts set up in the plea constituted no defense to the action, and the demurrer to it should have been overruled.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Walker, J., dissenting. I cannot concur in the opinion of the majority of the court, in this cause. The plea alleges that

defendant subscribed ten shares to plaintiff's road, under a charter for its construction from Terre Haute in Indiana to Alton in Illinois, and that after the road was constructed, the plaintiff purchased a controlling interest in the Belleville and Illinoistown Railroad Company, and by virtue of the charter of that company, constructed a railroad from a point four miles east of Alton, to Illinoistown, a distance of twenty-five miles from Alton, and that by this suit the money subscribed by defendant is sought to be applied to this last named road, without his consent. This plea, the truth of which is admitted by the demurrer, raises the question of whether the change of the charter of the company, was such, when acted upon by it, as to absolve the defendant from paying his subscription.

Any fundamental change in the charter of such a company, releases subscribers for shares from payment of the subscription. This rule is too familiar and firmly established to require a review of, or reference to adjudged cases. But the alteration, either in the charter of the company, or the line of the road, to exonerate the subscriber for stock, must be one that removes the prevailing motive for the subscription, or else materially and fundamentally alters the responsibilities and duties of the company, in a manner not provided for or contemplated by either the charter itself or the general laws of the State. These are principles which it is believed none will controvert, and if this case falls within their application, the defendant is legally discharged from payment of his subscription. The original charter of this company was for the construction of a road from Terre Haute in the State of Indiana, to Alton in this State, and in none of its provisions do we find any authority to purchase the Belleville and Illinoistown road, or to construct this branch to Illinoistown. No such authority is either expressly or impliedly given, and its existence depends upon subsequent enactment. And when this subscription was made, no such powers could have been exercised; and they were objects not in the contemplation of the legislature, the directors or subscribers, when the charter was granted, and the company organized. The appropriation of the money to be raised on this subscription, at the time it was made, was not intended to be appropriated to any other purpose than the construction of a road between the points designated in the charter, and that was the prevailing motive which entered into and formed the design of the subscriptions. And this entered into and formed a part of the contract between the company and the subscribers for its stock. And having entered into the contract and become a part of it, neither the legislature or the directors had any power to change the terms or obligations of this contract, by authorizing the money

to be perverted to the purchase or construction of other roads. By his subscription this party agreed to pay the money, and the company agreed to apply it, in the construction of a road between the points named in the charter, and there is no power to apply it to other purposes or on other roads, without his consent; and that is denied by this plea. If the legislature could authorize a change in this contract, so as to authorize the application of this money to the purchase of the Belleville and Illinoistown road, no reason is perceived why they might not authorize its application to the purchase of any other road, however remote. Or if they may authorize the construction of a branch to Illinoistown, that they may not authorize the construction of a branch to Galena or to Cairo, and apply this money for the purpose. It is no answer to say that this stock is more valuable, since it is not what defendant agreed to receive for his money, and he alone has a right to determine whether it best promotes his interest. Neither the legislature or directors have a right to determine this for him. This change is not a mere change of location, still maintaining its points of terminus according to the original design, but is superadding other roads leading to other points of termination, and I think the alteration of the charter removes the prevailing motive that induced the subscription, and changes essentially and materially the terminus of the road. And that the defendant should be discharged from the payment of this subscription, and that the judgment of the Circuit Court should be affirmed.

Susannah Forquer *et al.*, Plaintiffs in Error, *v.* George Forquer *et al.*, Defendants in Error.

ERROR TO ST. CLAIR.

Upon a proceeding in equity for a partition of real estate, if the decree exceeds the prayer of the bill, which was taken *pro confesso*, the decree may be reversed.

This was a suit for partition in chancery, and for the correction of an error in a deed made by Susannah Forquer to her children, conveying certain land devised to her by her husband, William Forquer. The suit was brought by defendants in error against the plaintiffs in error, at the March term, A. D. 1856, of the St. Clair Circuit Court. The bill of complaint shows that William Forquer, the husband of Susannah Forquer, plaintiff in error, (defendant below,) died on the 8th of October,

1855, seized of certain land described therein, and leaving twelve children, of whom were all the complainants, except Casselbury and the Shooks; and also by his last will and testament, devised to his said widow all his estate, real and personal, for her lifetime, charged with certain legacies to his children, as set forth in the record. The widow of said testator, by her deed of October 31st, 1855, conveyed to all the said children of said testator, in joint tenancy, 92⅔ acres, two tracts of the land devised to her, being all the real estate received by her under said will, except 46⅓ acres, which she retained. There is in said deed the following clause: "I reserve to myself the rent due, and to become due, from C. Casselbury, out of the real estate of my said husband," which clause next precedes the signature, and follows the testatum clause of said deed of Susannah Forquer. The said bill prays that certain mistakes in description in said deed may be corrected, and shows that "said Casselbury has a lease on a field in the east part of said tract, and of part of the orchard, from said testator, for three years from March 1st, 1855;" and after setting out the interest of all the parties in the said land devised to the widow, and by her conveyed to her children, (certain of whom had conveyed to said Casselbury and Shooks, defendants in error,) the bill prays for partition of said land, "or that the same may [might] be sold subject to said lease, under the authority and direction of the Circuit Court, for the benefit of the proprietors." The decree orders a sale of the premises absolutely and without reference to said lease, which the said plaintiff in error, Susannah Forquer, assigns for error.

The record further shows that a motion, based on affidavits, was made in the court below, to amend the record of the decree of sale, so as to make the same subject to said lease, and reserve the rent thereon to the said widow. From the affidavits of Joseph Vollinger in support, and of C. Casselbury and A. W. Shook in opposition to said motion, it appears that they became the purchasers of the land sold; Casselbury, through Vollinger, who says that he sold his purchase to Casselbury, and claims no interest in the lease. From these affidavits, and from the report of the sale, it appears that Casselbury and the Shooks, defendants in error, are the sole purchasers of the land leased to Casselbury by the testator, William Forquer, the rent of which is claimed by his devisee and widow, the plaintiff in error.

N. Niles, for Plaintiffs in Error.

W. H. and J. B. Underwood, for Defendants in Error.

CATON, C. J. Admitting, for the present, that the statements of the bill were sufficiently broad to justify the decree, yet the prayer expressly limited the relief asked, to a sale of the premises, reserving thereon the rent to the defendant, Mrs. Forquer. With such a prayer it was error, when the bill was taken *pro confesso*, for the want of an answer, to decree the sale of the premises absolutely, without the reservation of the rent as specified in the prayer of the bill. Mrs. Forquer having no objection to the relief asked for, was not called upon to appear and controvert any of the statements of the bill, no matter what they might be. She might well rest assured, that the court would grant no greater relief to the complainants than they had asked for, and in doing so, the court erred; and the decree must be reversed and the suit remanded.

Decree reversed.

CHARLES W. SMYTH, Plaintiff in Error, *v.* JAMES TAYLOR, Defendant in Error.

ERROR TO GREEN.

Where the executor is authorized by a will, to sell both the real and personal property of the testator, "*at any time*," that expression will be construed with reference to, and in connection with, the objects and purposes expressed in, and in subordination to, the trusts and powers created by the will.

The intention of the testator is not to be ascertained from any particular word used, but from all the provisions of a will; all its parts are to be construed in relation to each other.

The same rule applies in the construction of powers; and in ascertaining the intention of a party, the circumstances of the case may be used as auxiliaries.

Whenever it appears that the object for which a power has been created, has been accomplished, or has become impossible, or is unattainable, the power itself ceases.

THIS was an action of ejectment, to recover the undivided one-third of the east forty acres of the north-west quarter of section 23, in township 12 north, range 12 west 3rd P. M., in Green county.

Plaintiff claims the premises as one of the heirs of Francis G. Smyth, who died testate about the 19th day of April, 1839. Said Smyth, deceased, died, leaving a wife and three sons. By his will, the testator bequeathed to his wife certain personal property, consisting of stock and household furniture, and also all the crops maturing on the farm at the time of his death, and one hundred bushels of corn, to be hers so long as she should

remain his widow, but to pass to the executor on her marriage, who is directed to sell the same, and loan the proceeds out at the highest and best interest for the benefit of his children. Then follows the following provision, to wit:

"Third. I do order and direct, that all the residue of my property, both real and personal, shall be sold at any time, either on a credit or for cash in hand, or a part of the amount which the same may sell for, may be required by the executor to be paid in hand at the time of sale, and time given for the payment of the balance, as the executor may deem most advisable and proper. The real estate may be either sold at private or public sale, as the executor may see proper, and the money arising therefrom, one-fourth of the same shall be retained in the hands of my executor, and by him loaned at the highest and best interest possible, and the interest accruing thereon shall be by him *annually paid to the said Sinai*," (his wife) "so long as she shall remain my widow, and no longer, so that if she should ever marry, she shall thereafter be deprived of any portion of my estate, except the interest she may have previously received according to the provisions of this will. The other three-fourths of the money shall be loaned at the highest and best interest, either by my executor, or by the person or persons who may be appointed guardians to my minor heirs, *until they shall arrive at full and lawful age*, and then one equal part of it, *together with the interest*, shall be paid to my eldest son, James O. Smyth, *when he arrives at the age of twenty-one years*, and one other equal part of the same, *with the interest* which may have accrued thereon, to my son, John W. Smyth, and one other and last equal part, *together with the interest which may have accrued thereon*, to my third son, Charles W. Smyth, *as they shall severally arrive at full and lawful age*."

Will then provides that if the said Sinai should marry, the executor should pay over her share to his three children; and appoints John Holliday, executor.

The bill of exceptions further shows, that at the time of the death of the testator, the oldest child was about nine years old, the second about seven years old, and the youngest two and a half years old; also that the widow renounced the provisions of the will, took her dower, and married in the year 1843; also that the premises now in controversy were sold by the executor on the 6th day of June, 1853, and that at the time of sale, the two oldest sons had already become of age.

It is admitted, as the bill of exceptions shows, that if the executor did not have power to sell the premises on the 6th day of June, 1853, according to the provisions of the will, then the

plaintiff ought to recover in manner and form as set forth in the declaration.

The evidence also shows, that from the death of Francis G. Smyth, to the time of sale, the executor had possession and control of the premises.

The evidence also shows, that the plaintiff was supported and educated by his mother, and her present husband, up to the time of his majority, wholly at their expense.

The cause was tried by the court by consent, and judgment rendered for defendant, to which the plaintiff at the time excepted, etc.

The errors assigned, are: The court erred in rendering judgment for defendant; in overruling motion for new trial; and in not rendering judgment for the plaintiff.

KNAPP & CASE, for Plaintiff in Error.

J. M. PALMER, for Defendant in Error.

BREESE, J. The question presented by the record in this case, arises out of the power of the executor, under the will of Francis Smyth, to sell his real estate. The plaintiff claims one-third of such estate, as one of the three children of the testator, and as one of his heirs at law. The defendant claims as purchaser, under a sale made by the executor on the sixth of June, 1853. The testator died in April, 1839.

The appellant admits that the executor was, at one time, vested with the power to sell, but insists that the power had expired before he attempted to exercise it. The first question that presents itself is, was there any time expressly limited by the will, within which the power to sell should be exercised?

By the terms of the will, the executor was authorized to sell both the real and personal property "at any time, either on a credit, or for cash in hand, or a part of the amount which the same may sell for, may be required by the executor to be paid in hand at the time of sale, and time given for the payment of the balance, as the executor may deem most advisable and proper." What construction shall be put upon the words "at any time," and by what rule is the court to be governed in giving them a meaning?

It is an universal rule in construing wills, that the intention of the testator must be the governing principle, and that must be collected upon grounds of a judicial nature, as distinguished from arbitrary, occasional conjecture. 2 Jarman on Wills, 523.

This intention is not to be ascertained from any particular word used, but is to be collected from all the words, and all the

provisions of the instrument. All its parts are to be construed in relation to each other, so as, if possible, to form one consistent whole. And the rule is the same in the construction of powers—the intention of the parties is to govern. *Goodtitle* v. *Funucan*, Doug. R. 565; *Wilson* v. *Troup*, 7 Johns. Ch. 33; *Pomeroy* v. *Partington*, 3 T. R. 362. As powers are to be carried into effect according to the intention of the party creating the power, in ascertaining what that intention is, the circumstances of the case may be used as an auxiliary. 7 Com. Dig., title "Poiar," 8.

Construing the expression "at any time," with reference to, and in connection with the objects and purposes expressed in the will, for the creation of the power to sell, we have no difficulty in arriving at the conclusion, that it operates as a limitation of time within which the power shall be exercised.

The purposes for which the power was created, are so clearly specified, as to forbid the idea that it was to endure for an indefinite period, and to be exercised for any purpose the executor might deem proper. The testator certainly never meant to give him a power which should enable him to defeat all the provisions in his will in favor of his wife and children. The general terms used—"at any time"—must be restricted, by construing them in subordination to the trusts and provisions in the will. Now, what are those trusts and provisions? After bequeathing to his wife certain personal property, enumerated specifically in the will, to be hers so long as she should remain his widow, but to pass to his executor on her marriage, he then orders and directs that all the residue of his property, both real and personal, shall be sold at any time, either on a credit or for cash in hand, etc. The real estate to be sold, either at private or public sale, as the executor might see proper, and the money arising therefrom, one-fourth of the same is to be retained in the hands of the executor, and by him loaned at the highest and best interest possible, and the interest accruing thereon to be annually paid to his wife, so long as she remains his widow and no longer, so that if she should ever marry, she is to be deprived of any part of the estate, except the previous provision of the will.

This is the only permanent provision for his wife to be found in the will. He designs to provide for her annual support out of the interest accruing on one-fourth of the money arising from the sale of the land. To carry this intent and design of the testator into effect,—to carry out the object in view in creating the power, it would seem, the executor should exercise it soon after the death of the testator. How, otherwise, could this his intention be carried into effect?

The case shows, however, that the widow renounced the provision made for her under the will, taking the share of the estate allowed her by law—at what time is not stated—and that she married again in 1843. The executor not having sold, prior to her renunciation and marriage, could not sell to provide for her after those acts, as she herself defeated one of the objects the testator had in view by creating the power. But how stands the case with regard to the children?

The provision in the will for their benefit, is found in the same clause in which the widow is included. It declares, "the other three-fourths of the money shall be loaned at the highest and best interest, either by my executor, or by the person or persons who may be appointed guardians to my minor heirs, until they shall arrive at full and lawful age, and then one equal part of it, together with the interest, shall be paid to my eldest son, James O. Smyth, when he arrives at the age of twenty-one years, and one other equal part of the same, with the interest which may have accrued thereon, to my son, John W. Smyth, and one other and last equal part, together with the interest which may have accrued thereon, to my third son Charles W. Smyth, as they shall severally arrive at full and lawful age," with a further provision, that should his wife marry, the executor should pay over her share to his three children.

At the time of making this will, James was about nine years of age, John about seven, and Charles, the plaintiff in this suit, two years and six months old.

The objects and purposes of the testator, as we gather from the will itself, were, that his real estate should be converted into money to constitute a fund, to be increased by a high rate of interest, which each of his children should enjoy on their severally arriving at the age of twenty-one.

At the time this provision was made, contracts for interest were authorized, at a rate not exceeding twelve and one-half per centum per annum, on the loan of money. Act of 18th February 1833, Laws of 1833, page 348. This act was not repealed until 3rd of March, 1845. R. S. 1845, p. 459. In practice, throughout the whole State, it is well known, double the above rate of interest was usually received. The testator, doubtless, regarding the tender years of his children, the improvidence of guardians, so general as to be a common remark, the waste and annual dilapidation of improved and rented lands, the taxes, and charges for repairs and other expenses, might well have supposed on their arrival at full age, they would have nothing but barren acres with which to begin their active lives, and but a small pittance for their support, and if wild land, nothing. Money, at a high rate of interest, such as was then paid for its use, and even now,

would be more beneficial. In looking into the intention of a testator, courts will regard the circumstances under which he acts,—as the state of his property, of his family, and the like, and the motives which can be reasonably supposed to influence men in their action, in such cases. Here, a strong desire is manifested by the testator, to provide, in the most beneficial manner, for his infant children, when they should reach their manhood, and ample power given to the executor to effectuate that desire.

The will expressly provides, that the money arising from the sale of the land, shall be loaned out at the highest rate of interest, "during the minority" of the children; so that each child, on coming of age shall receive his equal share, with the accumulated interest; and this is to be done, not by the executor only, but by such person or persons as may be appointed guardians for the children; clearly showing the strong desire the testator had, to convert his land at the earliest possible moment into money for the benefit of his children.

Though there be no express limitation of time within which this power to sell is to be exercised, yet it is strongly implied from the whole language, style and tenor of the will, that it should be exercised during the minority of the children, and at such time as would, by loaning the money arising from the sale at the highest rate of interest, produce the largest fund for each child as it arrived at full age. This was the only purpose of the testator, and the phrase, "at any time," is to be so construed and understood.

Again, the language of the will is, that "the residue of my property, both real and personal, be sold, etc." The power over the personal property is given in the same words, and found in the same sentence which creates the power to sell the real estate. It will not be pretended, the executor could retain the personal property for an indefinite period and then sell it, or for fourteen years after the death of the testator, and then sell it as he did the land. The plain purpose and object of the testator was the speedy creation of a fund, during the minority of his children, the benefits of which they should receive as they severally arrived at full age. This has been defeated by the conduct of the executor. He has not executed the power in accordance with the intention of the testator, so clearly manifested by him, nor within the time clearly limited by the will, as implied from its expressed purposes and objects.

It is a maxim, when the reason of a law ceases, the law also ceases; so with powers, they necessarily expire when the objects of their creation fail, have become impossible or unattainable.

Now, in this case, before the exercise of the power by the executor in selling the land, the two oldest sons had reached their majority; of course, the object of the testator, as to them, could not be reached by a sale. The time, when the intention of the testator could have been accomplished had passed, and with it, the power to sell, the one being dependent on the other.

The case of *Jackson ex dem. Ellsworth* v. *Jansen*, 6 Johns. 73, is a case very much like the one we are considering. William Ellsworth, the father of the plaintiff, was seized in fee of the premises, and died seized, leaving the lessor his only child and heir at law. He made a will, which was duly executed and unrevoked at the time of his death. The will contained these clauses: "I do hereby authorize and empower my executors hereinafter named, to sell and dispose of all and singular my house and lot of ground on which I now live, and the barn and lot opposite to my said dwelling-house, to the best advantage, and to make deeds, etc. I also hereby authorize and empower my said executors to sell and dispose of all my personal estate, etc. It is my will, after my said executors shall have so disposed of my said estate, and converted the same into money, that they let out the whole thereof on use or interest, on good security; and that the interest moneys be annually paid by my said executors to my said wife, during her natural lifetime. And it is my will, and at and after my wife's decease, I give and bequeath unto my son, Theophilus Ellsworth, his heirs and assigns, all the principal money in bonds and other securities, which shall be remaining in the hands of my executors. And, lastly, I do nominate my wife Elizabeth, executrix, and my friends, Abraham Low and Christopher Tappen, executors, etc." The widow and Tappen acted as executors, the other having renounced. In January, 1804, Elizabeth, the executrix, died, and Tappen, as surviving executor, sold the premises in August, 1804, to the defendant, his son-in-law.

Several points were made on the trial, and the court say: It is unnecessary at present to take notice of the first point which was raised and argued in this case, because, if it were to be admitted that a power to sell, unaccompanied with a devise of an interest in the land, will survive, the intent of the testator is here apparent, that the sale by his executors should be made in the lifetime of his wife. The intent is much regarded in the construction of these powers; and from several of the cases it would seem that the power was construed with greater or less latitude as would best meet this intent. After giving the power to sell, the testator directs, that when his executors shall have so disposed of his estate, they shall put the moneys at interest, on good security, and pay the interest annually to his wife,

who is also appointed one of the executors. The great object of the power was to make provision for the wife, and if it was not executed in her lifetime, the intention is plain, it was not to be executed at all. It was granted upon the condition necessarily implied, that it should be exercised for her benefit. On this ground, even if the other was not tenable, the plaintiff is entitled to recover.

A similar and stronger case is found in 3 Cowen R. 651, *Sharpsteen* v. *Tillon.* Moses Hallock made his will, by which he devised his house, etc., to his wife, and a comfortable maintenance, to be out of the income of his real estate, so long as she remained his widow; to his two sons, Edward and Isaac, the use and improvement of all his real estate, except their mother's maintenance, during her natural life; and directed that after her decease, all his real estate should be sold, and gave to his two sons, E. and I., £150 apiece, and to his five sons, all the rest of his estate, of all kinds, to be equally divided between them; and appointed L. and D., and his son I., executors for the purposes in the will mentioned. L. and D. alone proved the will, and took upon themselves its execution. The testator died, leaving a widow and his five sons, and the children of a deceased daughter. The widow having died, I. having also died without issue, and E. and another son having died, leaving issue, the two executors, L. and D., sold the real estate.

The court held that the objects of the testator having been in a great measure defeated, and his intentions in giving the power frustrated, the power itself failed; and the sale was consequently void, so far as it depended on the powers. And the court say, that the purposes of a testator, in giving a power by his will to sell real estate, must be ascertained from all the provisions of the will; and the objects of the power must be considered in connection with the power itself; and that a power in a will, to sell real estate, fails when its objects are unattainable.

We think it is both reasonable and right, that wherever it appears that the object for which a power has been created, has been accomplished, or has become impossible, or unattainable, that the power itself should cease to exist.

As we have seen what were the objects and purposes of this testator, by creating this power in his will, and that they were unattainable in 1853, when the executor sold, the sale was void. Two of the sons had reached full age. No fund was created for them, or for the plaintiff, rapidly reaching his majority, as the testator had provided, and his purposes, so clearly manifested in his will, could not be accomplished by a sale. The time had passed, and the power expired by its own limitation, as implied in the will.

This being a question of power, it will not satisfy the claim of the plaintiff, by remitting him to a recovery of his portion of the money for which the land was sold. He is entitled to his share of the land, and such being the stipulation of the parties, if the sale by the executor is declared void, we will not remand the cause, but direct that judgment be entered here, for the equal undivided one-third part of the land, as set forth and described in the declaration, as the estate in fee of the plaintiff, and that a writ of possession issue therefor.

The judgment below is reversed.

Judgment reversed.

The Morgan County Bank, Appellant, *v.* The People of the State of Illinois, Appellees.

APPEAL FROM MORGAN.

A letter of the State Auditor, in reference to matters of banking, etc., is not of itself evidence; that officer is required to keep a seal, and his official writings, etc., can only be properly authenticated by the use of it.

On the 24th day of August, 1858, the People of the State of Illinois filed in the Morgan Circuit Court, their declaration against the Morgan County Bank, in debt; averring that on the 11th day of April, 1858, at Jacksonville, Morgan county, Illinois, said bank was a body politic and corporate, doing a banking business pursuant to the laws of said State, and subject as such to have taxes levied on and paid by it: and that on the 22nd day of July, 1857, at said county, the value of its property and effects subject to taxation for that year, was ascertained according to law, at the sum of sixty-five thousand dollars, and was duly listed and assessed by the assessor of said county, to pay the sum of four hundred and thirty-five dollars and fifty cents, State tax, the debt sued for in this case; and that the collector of taxes of said county demanded of the defendant to pay said taxes, which it refused to do.

Plea, general issue—and joinder.

At the October term, 1858, by agreement, the issue was tried by the court. On the trial, it was admitted by the defendant below, that it was incorporated under the general banking law, and was doing a banking business in Jacksonville, in said county, in the year 1857. And it appeared from the evidence of Wm. G. Johnson, assessor of said county, that in the spring of 1857,

he called at the house of said bank, for the purpose of assessing their taxable property, for State and county purposes, and informed Mr. H. R. Reed, one of the officers of the bank, of his business, and left with him a blank schedule, according to the law; and afterwards called at the bank, and requested H. R. Reed and W. W. Wright, president and cashier of said bank, to furnish him their assessment list, and he then showed them the auditor's circular. They remarked that they preferred he would get it from the auditor. The assessor then requested M. Stacy, clerk of the County Court of said county, to write to the auditor respecting the matter. The clerk so wrote, and afterwards placed in the hands of the assessor what purported to be a letter from the auditor, which was proven to be in the hand-writing of Jesse K. Dubois, the State auditor, which letter was in the words and figures following, to wit:

AUDITOR'S OFFICE, *Springfield*, 22*nd July*, 1857.

MATHEW STACY, ESQ.—*Sir:*

Your favor of the 18th has just come to hand. The 6th section of the banking law approved 14th Feb., 1857, says the capital stock of every bank or banking association, paid in or secured to be paid in, except so much thereof as is invested in real estate, together with the surplus profits or reserved funds, viz: sd. 6th section. In the April report of the Morgan County Bank, the president and cashier of said bank sd. that they had $65,648.55 capital stock paid in and invested according to law. Now that is the amount, unless they can show the assessor that it is incorrect; what the surplus profits and reserved funds of the bank is, I have no means of ascertaining. Yours truly,

JESSE K. DUBOIS, *Auditor.*

The plaintiffs below introduced this letter in evidence to prove the amount of property owned by the bank subject to taxation. To this letter, as competent evidence, the defendants below objected, and objected to the reading of the letter as evidence; which objection was overruled by the court, WOODSON, Judge, presiding, and the letter was read in evidence. And to the overruling of which the defendant below, at the time excepted. And it further appears from the evidence of said assessor, that he, according to and upon the strength of said letter alone, assessed the bank at $65,000.

It further appears from the testimony of M. Stacy, clerk of the County Court of said county, that he made out the tax book of said county for the year 1857; that the amount of property assessed to the Morgan County Bank was $65,000, and the State tax for that year was sixty-seven cents on every one hundred dollars.

And it further appeared from the evidence of Charles Sample, sheriff of said county for the year 1857, that in the latter part of the year, he demanded of the officers of the Morgan County

Bank the taxes above mentioned; and the payment of the same was refused.

Upon which evidence the court found the issue for the plaintiffs below, and adjudged that they recover of the defendant below the sum of four hundred and thirty-five fifty-hundredths dollars.

The defendant below thereupon moved the court for a new trial, for the following reasons, to wit:

1st. Because the court erred in admitting the letter of Jesse K. Dubois, the auditor, as evidence of the amount of property belonging to the defendant below, subject to be assessed and taxed.

2nd. Because the court erred in assessing the debt and damages of defendant below, based upon the amount of securities or stock deposited with the Auditor of State. Which motion was overruled by the court, and judgment rendered against the defendant below.

To which ruling of the court the defendant below excepted, and prayed that the bill of exceptions be signed and sealed by the court, which was then done.

The case is brought up by appeal—bond and security filed.

Errors assigned are:

1st. The court erred in overruling the objection to the admission of the auditor's letter in evidence, as proof of the amount of taxable property owned by said bank.

2nd. The court erred in admitting the said letter to be used in evidence.

3rd. The court erred in overruling the motion for a new trial, and rendering judgment against the bank, because the evidence introduced by the plaintiffs above, to prove the amount of taxable property owned by said bank, was incompetent, illegal, irrelevant and not in support of the cause of action set forth in said declaration, and that such finding of the court was contrary to law and evidence.

4th. The court erred in finding and entering judgment for the plaintiffs above, because—

First, The bonds or stocks deposited with the State Auditor as the basis of issue of said bank, were not legally taxable as property of said bank.

Secondly, The bonds and stocks deposited as aforesaid, were not subject to be taxed by any law of the State of Illinois.

Thirdly, The banking law, approved February 14th, 1857, amendatory to the general banking law, under and according to which said bank was assessed and taxed, in imposing additional burdens on the banks of the State, without any corresponding advantage or benefit conferred, not authorized at the time of

the passage of the general banking law, is wholly null and void, and in conflict with the constitution of the United States, as impairing the obligation of contracts.

Fourthly, The banking law, approved February 14th, 1857, amendatory to the general banking law, under and according to which the said bank was assessed and taxed as aforesaid, because it was never voted on and approved by the people of the State of Illinois, at any election called and held for that purpose, is null and void, and in conflict with the constitution of this State.

C. Epler, for Appellant.

D. A. and T. W. Smith, for Appellees.

Breese, J. None of the important questions presented by the record in this case, have been argued by counsel on either side.

One question of minor importance, that of the admissibility of the letter purporting to have been written and signed by the auditor of public accounts, we are prepared to decide without argument.

As to the admissibility of the auditor's letter in evidence on proof of his hand-writing, we have no doubt the Circuit Court erred in admitting it. The auditor's office is one of great public importance, the most so of any other, so far as the collection and disbursing of the revenue, and the establishing and conduct of banks and the operations of the banking system, are concerned.

By chapter 13, section 4, (Scates' Comp. 492,) the auditor is required to keep an official seal, to be used to authenticate all writings, papers and documents required by law to be certified from his office; and it is provided by that section, that copies of all papers, writings and documents legally deposited in his office, when certified by the auditor and authenticated by the seal of his office, shall be received in evidence in the same manner and with like effect as the originals.

The April report of the Morgan County Bank was legally deposited in the auditor's office, and a certified copy of it, under the seal of the office, should have been produced. It is the highest and best evidence of which the case pending was susceptible; nothing of an inferior character was admissible. All else is mere hearsay. This disposes of the three errors assigned.

As to the fourth error assigned, we refer to the case of *The*

Bank of the Republic v. *Hamilton County*, *ante*, 53, as decisive of this, on the other points made on this record.

For the first error, however, the judgment must be reversed and the cause remanded.

Judgment reversed.

Peter Fidler, Plaintiff in Error, *v.* Nancy McKinley, Defendant in Error.

ERROR TO FULTON.

In an action for breach of promise of marriage, the defendant may show in mitigation of damages, if the action is brought by the female contracting party, that she was a lewd woman, or otherwise of bad character, in mitigation of damages; and it is error to instruct the jury that the attempt to make such proof, when the attempt fails, even though made in good faith, should be taken into consideration as an aggravation of damages.

A judgment in such a case will not be reversed because of the amount of damage, unless it is apparent that the jury was prejudiced, or was misled by partiality or some fraud.

Admissions of one of the parties to a marriage contract, obtained under threats by the father of the party injured, with a deadly weapon in his hand, or by the artifice of counsel, should be received and weighed with great caution. (Breese, J.)

To sustain this action, there should be an offer to marry and a refusal, as well as proof of mutuality in the contract. (Breese, J.)

Seduction cannot be considered in aggravation of damages, unless the declaration is so framed as to admit such proof, and even then, quere. (Breese, J.)

This was an action of assumpsit, for breach of promise of marriage, tried at the August special term of the Fulton Circuit Court, before Bailey, Judge, and a jury.

The first count of the declaration is upon a promise to marry on request, the second on a promise to marry in a reasonable time, the third upon a promise to marry in the latter part of the fall or fore part of the winter of 1856, and the fourth on a promise to marry generally.

The general issue only was pleaded.

On the trial, the plaintiff called *Henry Walker*, as a witness, who testified that a case was pending, on complaint of plaintiff against defendant for bastardy, from June 12, 1857, to the 23rd of the same month, at Monterey, before Thomas Kane, a justice of the peace of Fulton county, and that he (witness) was then prosecuting the same as an attorney. That the defendant (Fidler) was under arrest and brought up for trial, and the witness having heard that there was a proposition made to com-

promise, talked to both plaintiff and defendant in regard to it.

The plaintiff then proposed to prove by the witness that the defendant promised to marry the plaintiff at that time, for the purpose of settling the bastardy case. To which the defendant objected, but the court overruled the objection and allowed such proof to be made, and the defendant excepted.

The witness then testified, that he advised the parties that if they married, it would as a matter of law terminate the prosecution for bastardy, then pending; that the case could be continued, and meanwhile defendant could obtain license, and the parties be married, and for that purpose the case might be continued a week. That witness told defendant that he knew what pledges he had made to plaintiff, and he ought to do what was right; that defendant replied that they would have been married long ago if he had been able to get a house to put the plaintiff in. Witness could not state the language used, but thought the defendant agreed to the proposition to continue the case for a week, and gave bond for his appearance the next week, and witness understood the defendant was to get license for the marriage, and be married before the time to which the case was continued. The plaintiff consented to this arrangement. The witness could not state the precise language used.

The defendant then moved the court to exclude the evidence of a promise to marry made while he was under arrest at Monterey for bastardy, and in regard to a compromise of the bastardy suit, but the court overruled the motion and refused to exclude such evidence, to which defendant excepted.

The witness further testified, that at the time to which the case was continued, it was prosecuted, and resulted in requiring defendant to give bond, etc. During the conversation at Monterey, the defendant did not make any complaint against plaintiff on account of her character or chastity, or other objections to her, but said he had no charge about chastity and had made no objections to her.

Thomas Kane was then sworn, as a witness for plaintiff, who testified that he was the justice before whom the bastardy case was tried; that he was present at the conversation between Walker and defendant, about a compromise. That defendant said they would have been married long ago, but were not in a situation to do so, and that plaintiff's father had interfered in the matter. That defendant agreed to a proposition made by Walker to withdraw an application for a change of venue, and that the case be continued; that meanwhile defendant was to go to Lewistown and obtain a marriage license and get married. That defendant said that they (plaintiff and defendant) would have been married long ago, but he (defendant) was not situated

as he wished to be, and would have been married now, but plaintiff's father had seemed mad and irritated. Defendant did not deny that he was the father of the child of which plaintiff was then pregnant. He seemed mortified, and said he was the father of the child.

The evidence of Thomas Kane in regard to a promise to marry to settle the suit, etc., made to Walker, was objected to when offered, but the court overruled the objection and allowed the same to go to the jury, to which the defendant excepted.

Plaintiff then called *Thomas J. McKinley*, who testified that he was plaintiff's father; that defendant had visited plaintiff for about three years, commencing September, 1854; that plaintiff was 23 years old; no other person paid such particular attention to her. She was living at her uncle's the most of the time defendant was visiting her. While at witness's house, defendant came sometimes once a week, and sometimes once in two weeks, remaining during the evening. She kept no other company. For about a year before defendant stopped visiting plaintiff, she was making quilts for house-keeping; had procured clothing. In April or May, 1857, witness first heard that plaintiff was pregnant. On the 28th May, same year, he went to see defendant, at plaintiff's request; found him in a cornfield, and asked him what he proposed to do about the trouble he had brought on the witness. Defendant said he did not know what to do—that he had no house. Witness said, "Pete, you know you promised to marry her, and ought to have done it long ago;" to which defendant replied, "he knew he did." Witness told defendant that he could get a house on his (defendant's) father's farm, to which defendant answered, that his brother wanted the house, but that he would go to see plaintiff on the next Sunday and make arrangements and set the time. Defendant did go on that day, but made no arrangements. In the conversation defendant admitted he had agreed to marry plaintiff. When defendant came to see plaintiff on the Sunday referred to, he requested a private conversation, and they both walked out in the yard and sat on a log, talking, for half an hour. Witness did not hear what was said.

On cross-examination, the witness stated that no person was present at the conversation in the cornfield between defendant and witness. The witness told defendant that if he did not marry plaintiff and went away, he (the witness) would kill him if it was twenty years after that. Witness had an open pocket knife in his hand at the time—had been whittling with it. The defendant then said he would go to see plaintiff on the next Sunday and make arrangements. The witness was angry and excited at the time. The witness also stated that plaintiff had

sent him to defendant, and plaintiff was then willing to marry him, and expressed herself willing to marry him at the justice's.

John McKinley was then called, and testified that plaintiff was his niece, and that she lived with him pretty much all the time that defendant visited her. Witness's wife is defendant's sister; knew of no one else keeping company with plaintiff.

The defendant has no real or personal property; is unmarried; lives with his father, and works on the farm.

The plaintiff here rested.

The plaintiff then asked for the following instructions to the jury:

1. The jury are instructed, that they are to judge from the facts and circumstances, as sworn to by the witnesses on the stand, whether the seduction proven, if any was proven, was consequent upon the promise of marriage by plaintiff to defendant, if such promise is proved, and if they so find, then the seduction is to be taken by the jury in aggravation of damages in this case, under the first three counts only.

2. That although the jury believe, from the evidence, that the defendant was seen lying on a bed asleep at Thomas Bybee's house, and that there were two young men sleeping in the same bed, unless they further believe, from the evidence, that the defendant refused to marry her on that account, then it constitutes no defense to this action.

3. The jury are instructed that the loss of reputation and character by plaintiff, on account of the wrongful acts of the defendant, and the refusal to marry (if the jury find there was a promise to marry,) and the acts consequent upon such promise of marriage and refusal, are to be taken into consideration by the jury in making up the verdict, and go in aggravation of damages in this case.

5. If the jury believe, from the evidence, that the defendant in this case has attempted to prove that the plaintiff was a lewd or base woman, or was of immoral or bad character, and has failed to establish and prove the same to the satisfaction of the jury, then such charge and failure on the part of the said defendant may be taken into consideration in aggravation of damages in this case.

7. And if the jury believe, from the evidence, that the defendant promised to marry the plaintiff, and that the parent of the plaintiff consented to it in presence of plaintiff, and she made no objection, this is evidence for the jury to take into consideration in determining whether the plaintiff assented to proposition of defendant to marry or not, and is implied consent on her part.

9. In making up the verdict in this case, it is proper for the jury to take into consideration (under the first three counts in

declaration) the wounded and lacerated feelings of the plaintiff, loss of society and character to her in consequence of the promise and refusal of defendant to marry her, the plaintiff, (if the jury so find) and the acts consequent upon said promise of marriage, and give the plaintiff therefor such damage as they may think she is entitled to.

11. The jury are also instructed that it is not necessary for the plaintiff to prove that she, in words, consented to accept the defendant, but the jury may infer such consent from the circumstances of her making no objection at the time of the promise and offer of defendant to plaintiff, (if the jury find that the defendant did so promise and offer to marry the plaintiff,) and her receiving the visits of the defendant in the capacity of a suitor.

12. And that in this action, if the jury find that defendant promised to marry the plaintiff, and if they also find that the said plaintiff carried herself as one consenting and approving of the offer and promise, that this is sufficient evidence of her promise to marry defendant.

If the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff within five years before the commencement of this suit, and under the pretense and promises of marriage seduced and begot the plaintiff with child, and then neglected and refused to marry plaintiff, that circumstances and violation of faith should be taken into consideration by the jury in estimating the damages of plaintiff.

To which and each of them the defendant objected, but the court gave the instructions as prayed for, to which the defendant excepted.

And the defendant prayed the following instructions to the jury:

10. If the jury believe, from the evidence, that the defendant agreed to marry the plaintiff, and that at the time of such agreement the plaintiff had been guilty of fornication with another person, or was an unchaste woman, then the plaintiff cannot recover damages for a breach of such agreement, unless it shall be proven by the evidence that the defendant knew of such bad conduct at the time he so agreed.

11. If the jury believe that the defendant promised to marry the plaintiff, acting under duress, force or fear, then such promise would not be binding upon him.

But the court refused to give such instructions, and the defendant then and there excepted.

The jury found a verdict of $1,350, for plaintiff; and the defendant then moved the court for a new trial, and assigned as reasons, the following:

1st. The verdict is contrary to the evidence and the law.

2nd. The court granted improper instructions to the jury.
3rd. The court refused proper instructions.
4th. The court admitted illegal and improper evidence.
5th. The damages are excessive.

The court overruled the motion and refused to grant a new trial, to which the defendant excepted.

The court therefore rendered judgment upon the verdict, to which the defendant also excepted.

The plaintiff in error now makes the following assignment of errors:

1st. The Circuit Court erred in admitting improper evidence on the part of the defendant in error.

2nd. The Circuit Court erred in granting improper instructions.

3rd. The Circuit Court erred in refusing instructions prayed by the plaintiff in error.

4th. The court erred in refusing a new trial, and overruling the motion therefor.

5th. The Circuit Court erred in rendering judgment against the plaintiff in error for the defendant in error.

GOUDY & JUDD, for Plaintiff in Error.

L. ROSS, and M. HAY, for Defendant in Error.

WALKER, J. This was an action brought by defendant in error against plaintiff in error, for a breach of marriage contract. The evidence shows that she was delivered of a child recently before the institution of the suit. On the trial, the jury found a verdict in her favor, and assessed the damages at one thousand three hundred and fifty dollars. A motion for a new trial was entered and overruled, and a judgment rendered upon the verdict, to reverse which, this writ of error is prosecuted.

We are asked to reverse this judgment because the court below instructed the jury that if they, from the evidence, believed that plaintiff was seduced by the defendant in consequence of a marriage promise existing between them, that the jury should take such seduction into consideration, as an aggravation of damages. This court held, in the case of *Tubbs* v. *Van Kleck*, 12 Ill. R. 446, that in actions for breach of marriage promise, a seduction, if in consequence of the promise, may be given in evidence in aggravation of damages. In that case the authorities were fully reviewed, and the decision made on mature deliberation, and we are satisfied that the rule there adopted is correct in principle, and just in its operation, and

are unable to see any reason for its being overruled or modified. Although there is a conflict of authority on this question, we think the weight is with the rule there adopted. The action is given to compensate the injured party for the wrong sustained, and the recovery should be commensurate with the injury done. In a case of a breach of promise, accompanied with a seduction, the injury is infinitely greater than where there is only a breach of promise. When there is a seduction, there is a total loss of character, and all hopes of future happiness and usefulness are blighted, and certain degradation and future misery, if not crime, are its consequences. And when this is produced by a breach of promise, and the fraud perpetrated upon the woman by the man entering into the engagement only to accomplish her seduction, the injury resulting therefrom is the immediate result and consequence of the breach of promise. If he were in good faith to perform his engagement, and keep his promise, such consequences would not result, but when he fails to do so, every consideration of justice requires him to repair the injury, as far as it may be done by adequate damages. This is the result of his own deliberate act, and he has no right to complain if he is required to respond in damages for all the injury he has inflicted upon the woman whose confidence he has betrayed. It is not an answer to say that the father has an action to recover for the loss he has sustained by being deprived of the services of his daughter. For, as the court in that case say, "When he sues for the loss of service he only recovers the damages he may have sustained in the disgrace brought upon his family, in his wounded feelings, or otherwise, and nothing is allowed on account of the suffering and disgrace of his daughter. He pays the father for the injury done him; if the daughter is permitted to recover, it is for the injury done her, etc. Whatever damages, therefore, the plaintiff suffered in consequence of defendant's refusal to marry her, she is legitimately entitled to recover in this action. How are these damages to be estimated unless we look at the circumstances of the parties, and the situation in which the plaintiff is left by the defendant's refusal to perform his contract?" The plaintiff, in all cases, is entitled to recover all damages which are proximate, and the natural result of the act producing the injury.

The reversal of this judgment was also urged because the court erred in giving the fifth instruction for plaintiff below. That instruction is, "If the jury believe, from the evidence, that the defendant in this case has attempted to prove that the plaintiff was a lewd or base woman, or was of immoral or bad character, and has failed to establish and prove the same to the

satisfaction of the jury, then such charge and failure on the part of the said defendant, may be taken into consideration in aggravation of damages in this case." The defendant, when sued for a breach of marriage contract, may undoubtedly show that plaintiff was a lewd woman, or was of bad or immoral character, in mitigation of damages. And if he makes the attempt to establish such facts, in good faith, under circumstances which induce him to believe that he can make the proof, and fails, he does not by that failure subject himself to additional damages. But when the attack is wanton, or dictated by malice, and only to further blacken the character of the plaintiff, and the attempt is not in good faith, it is a wrong that may be considered by the jury as an aggravation of damages. *Sloan* v. *Petrie*, 15 Ill. R. 426. Such is the rule where the defendant files a plea of justification in slander, and adduces no proof to sustain it, (*Sloan* v. *Petrie*, 15 Ill. R. 426,) or where the defendant has repeated the slander on different occasions from the one for which the suit is brought. And it makes no difference whether the slander is spread upon the record by plea, or is only oral, the aggravation is regarded as the same. And no reason is perceived why the same rule is not applicable to this class of cases. But the rule announced by the court to the jury in this case was too broad, and may have misled them, and it should have been so modified as to leave it to them to determine, from all the circumstances, whether the effort to show that she was a lewd woman, of immoral or bad character, was made in good faith, under such circumstances as to induce the belief that he might reasonably suppose he could establish its truth, or whether it was only a wanton or malicious attack, intended to blacken and further injure the plaintiff's character; and if for the latter purpose, then it would be an aggravation of the damages.

It was also urged that the damages found by the jury were excessive, and the judgment for that reason should be reversed. In cases of this character, it is almost impossible to lay down any rule, by which the measure of the damages can be fixed, with any degree of precision. There is no scale by which such damages can be graduated with certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice. Such injuries are accompanied with facts and circumstances, affording no definite standard by which such wrongs can be measured, and from the necessity of the case, must be judged of, and appreciated by, the view that may be taken of them by impartial jurors. To the jury, therefore, as a favorite tribunal, is committed the exclusive task of examining these facts and circumstances, and valuing the injury, and awarding

compensation in the shape of damages. The law conferring upon them this power, and exacting of them the performance of the trust, favors the presumption that they are governed by pure motives. It therefore makes every allowance for the difference of disposition, capacity, views and even frailties incident to the examination of such matters of fact, when no criterion can be supplied; and not till the result of the deliberation of the jury shocks the understanding, and leaves no doubt of their prejudice or passion, that courts find themselves compelled to interpose. The moral worth of the parties, their social position and standing in the community, and a great variety of other circumstances and facts, must necessarily be, and generally are, considered by the jury, in estimating the damages in this and all other actions sounding in damages. And in cases of this nature, the jury must be left to exercise a large discretion in awarding damages, and courts have rarely felt themselves called upon to disturb their verdicts, and then, only where it is apparent from the great disproportion between the offense and the finding, that the jury acted under prejudice, partiality, or gross ignorance or disregard of their duty. When a defendant has acted with a total disregard of the rights of others, and in violation of all principles of honor, or from principles of malevolence, the jury are warranted in giving such damages as will make the case an example to others, although these are beyond the real injury sustained by the plaintiff. But in a case like the present, it seems to us, that it would be hard to conceive what would be a compensation for the wrong done. If the seduction was the deliberate purpose of the defendant at the time he procured the marriage contract, such conduct merits at the hands of juries and courts no sympathy; but he should be made to respond in heavy damages—the only compensation which is given by law for the commission of an act, which occasions more suffering, and entails greater disgrace upon the party injured, than any other which can be inflicted.

If it is true, as the jury find, that the defendant below was guilty of a breach of marriage promise with defendant, and that the seduction was induced by that marriage contract, we do not think the damages excessive.

We perceive no other error assigned on this record which we regard as having any force. But as the court below erred in giving plaintiff's fifth instruction, the judgment of the Circuit Court must be reversed, and the cause remanded.

Judgment reversed.

Separate opinion of BREESE, J. I concur in reversing the judgment of the Circuit Court in this case, on the whole record,

believing that no sufficient case is made out against the defendant, and because the instructions were all of them against law, and because the damages, even if the plaintiff had a case, are excessive.

In the first place, there is no sufficient proof in the record, that any mutual promises ever existed between these parties to marry at any time. If a man offers to marry a woman and promises to do it, he is not bound to comply with it, unless she agrees to accept him. It takes two to make a marriage contract, as well as any other bargain. If there be a subsisting contract of marriage, and the man delays performance from time to time, she ought not to be allowed to sue, claiming damages, until she has offered to perform on her part, and he dishonestly refuses, and puts an end to the contract, for he might prefer the marriage to the suit, and should have a chance to make his choice.

The only proof about marriage, are the admissions of the defendant under very peculiar circumstances, which should have prompted the court and jury to discard them altogether.

The first admission was made, whilst the defendant was under arrest, on a charge of getting the plaintiff with child, on her complaint that he was the father of it. Her counsel, on that occasion, was Henry Walker, whose testimony is in the bill of exceptions, and, who it seems, was quite indefatigable in his endeavors to get something out of the young man. All that the defendant admitted on that occasion, was, that he, replying to some advice given him by his adversary's counsel, said "that they would have been married long ago, if he had been able to get a house."

Thomas Kane, the justice before whom the defendant was brought on the charge of bastardy, says he heard the conversation between Walker and the defendant, and that defendant said, "they would have been married long ago, but were not in a situation to do so, and that the plaintiff's father had interfered in the matter." The defendant "said he was the father of the child."

The father of the plaintiff, Thomas J. McKinley, testified, that the visits of defendant to his daughter commenced in September, 1854—that she was living at her uncle's most of the time defendant visited her. For about a year before defendant ceased his visits, plaintiff was making quilts for house-keeping, and had procured clothing—he first heard of her being pregnant, in April or May, 1857. On the 28th of May of that year, he went to see the defendant, at plaintiff's request; found him in a cornfield, and asked him what he proposed to do about the trouble he had brought on him, the witness. The defendant

said he did not know what to do—that he had no house. Witness then said, "Pete, you know you promised to marry her, and ought to have done it long ago," to which the defendant replied, " he knew he did." On his cross-examination it appears in this conversation, he told the defendant, that if he did not marry the plaintiff, and went away, he would kill him, if it was twenty years after that; that he was angry and excited at the time, and had an open pocket knife in his hand, with which he had been whittling. The defendant said he would go the next Sunday to see the plaintiff, and make arrangements. He further says, that after this conversation, fearing the defendant was about to run away, he had him arrested on the charge of bastardy, and had commenced suit in his own behalf, for the seduction, which was pending when this suit was tried. He also states, that the plaintiff, when he, at her request, had this interview with the defendant, was *then* willing to marry him, and expressed herself willing to marry him at the justice's, when under arrest on the charge of bastardy.

It was objected, on the trial, that these admissions should not go in evidence, but the court overruled the objection, and they all went to the jury.

I am inclined to think they should not have gone to the jury, without some remark, at least, from the court, as they can hardly be considered as free and voluntary. Innocent men have been known, in order to escape a threatened and immediate injury, to confess themselves guilty to a charge of murder.

The admission, while under arrest before the justice, was evidently the result of the interference of the complainant's counsel, who plied him so with questions, and, doubtless, so alarmed him as to the consequences of the dreadful deed he had done, that he would have admitted anything. So to escape the infuriated father, alone in a cornfield with him, with a deadly weapon in his hand, what would not a boy admit, under the apprehension of impending peril, with a threat to kill him, if it was twenty years thereafter. Such admissions should have been excluded from the jury, and the court, in regard to those made when arrested, should, at least, have cautioned the jury as to the weight to be given to them. A contract, made under the circumstances these admissions were made in the cornfield, would not be enforced in a court of justice, for it is the law, when the threat, whether of mischief to the person or the property, or to the good name, is of sufficient importance to destroy the threatened party's freedom, a contract will not be enforced, induced by such means. 1 Parsons on Cont. 322. *Foshay* v. *Ferguson*, 5 Hill, 154.

These admissions, thus obtained, comprise all the evidence in regard to a promise to marry, but do not show that there existed, at any time, mutual promises. From McKinley's testimony, I infer, that after she was got with child, and perhaps delivered,—for the proof is defective on that point,—she said she was willing to marry him, which is quite likely. To make this contract binding, there must be mutual subsisting contracts, for a breach of which either party can maintain an action. The proof here, would not sustain an action by the defendant against the plaintiff. Nor is it shown there was any refusal, by the defendant, to marry, or any offer, by the plaintiff, to marry the defendant. The willingness to do so, after she became pregnant, is no proof that a previous promise to marry existed, or that she had, at any time, offered to marry him.

Though courts are very liberal, contrary to my notions of right, in allowing juries to infer a promise to marry, yet they have always required the proof of some circumstances from which it ought to be inferred. Here, there is nothing but the defendant's admission that *he* had promised to marry; none that the plaintiff had promised—she was willing, nothing more, after she was got with child.

Now, as to the instructions, under this proof.

The first instruction assumes a fact which is nowhere proved. There is no proof of seduction by the defendant, caused by a promise of marriage, or a consequence of it. He admitted to Justice Kane, that he was the father of the child, and to him and Walker, that they would have been married long ago, but that they were not in a situation to do so, and that plaintiff's father had interfered in the matter. Nor is there any proof of a promise to marry, until after the plaintiff's pregnancy. We have said in several cases, that instructions must be based on the evidence given, (*Coughlin* v. *The People*, 18 Ill. R. 266; *Ewing* v. *Runkle*, 20 ib. 463); and there being no evidence, but assumptions only, to support the instruction, it should have been refused; and the same may be said of the seventh, tenth and twelfth instructions, as there is not a particle of evidence to which they can refer.

But the main objection is to that portion of the first instruction, which, presuming a promise of marriage, and seduction consequent upon it, gives the jury to be informed, that such seduction can be regarded by them, in aggravation of damages, under the first three counts of the declaration.

There is no allegation in any of the counts, under which such evidence is admissible, and on principle I think it is not admissible. The case relied on to support this doctrine, is that of *Tubbs* v. *Van Kleck*, 12 Ill. R. 446.

It will be seen, the opinion delivered in that case, was a majority opinion only, and however highly I respect the judges who concurred, I must say, and will show, it is not based on any authority whatever.

The elementary writers of England, whence we derive our laws, our language and our literature—the books of reports of decisions made by her illustrious judicial tribunals, may be searched in vain for any such doctrine. It is not recognized there, though thousands of cases must there have occurred, to develop it, if it was worthy of recognition. Where, then, and how, did the doctrine struggle into birth?

The first American case, I have been able to find, in which it was announced, though not in the case, and is, therefore, *obiter dictum*, is the case of *Harriet Paul* v. *Peter Frazier*, 3 Mass. R. 71, in 1807. It was an action on the case in the nature of deceit, for that the defendant at, etc., began to court the plaintiff, under a pretense of a design to marry her, and having, under that pretense, gained her affections, got her with child, and afterwards utterly forsook her, whereby she hath been greatly injured in her reputation, hurt in her peace of mind, etc.

On a plea of not guilty, and issue joined, the plaintiff obtained a verdict of one thousand dollars.

The court arrested the judgment, and the plaintiff appealed to the Supreme Court, where it was contended by the defendant's counsel, that no action lay for an injury of the kind complained of, except by the parent or master, who can recover damages for the loss of the service of the daughter or servant only. Of this opinion was the court, and Parsons, C. J., in delivering the opinion, says, "An action of this nature is not given by statute; and there is no principle of the common law on which it can be sustained. Fornication and adultery are offenses in this commonwealth created by statute, and the declaration amounts to a charge against the defendant for deceiving the plaintiff, and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting." This was an end of the case, but the chief justice proceeds to say, "It has been regretted, at the bar, that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject, will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage; *and if seduction has been practiced under*

color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law."

The syllabus of this case by the reporter is as follows: "No action lies for a single woman against one for seducing her and getting her with child under pretense of a design to marry her, no promise of marriage being alleged."

It will be seen what was said by C. J. Parsons, which I have italicised, is mere *dictum*, yet it has been made the foundation of the doctrine I am endeavoring to combat.

It will be observed no authority whatever is referred to for the *dictum*, nor reason urged why the law should be as stated. The Chief Justice stated truly, that as the law then stood, damages were recoverable for a breach of promise of marriage, just as for the breach of any other promise. The rest of the sentence, and which this court has taken as authority, is mere *dictum*—not in the case, and unsupported by a single reference. An eminent jurist has said, and I cordially agree with him, that mere *dicta* are dangerous guides, and if listened to as authority, they become highly prejudicial to free investigation and accurate science, and when any great principle of law is under discussion, it is safest to recur only to the decision of adjudged cases, and to such as involve the point in controversy.

The next case in the order of time, in which this doctrine is advanced, was in 1814, the case of *James Conn* v. *Eliza Wilson*, 2 Overton (Tenn.) R. 233. It was assumpsit on a promise of marriage, and the principal error assigned was, permitting, as in this case, evidence to be given, under the general issue, of seduction, and getting the defendant (in error) with child.

The court decides the evidence admissible, solely on the authority of the case of *Paul* v. *Frazier*, 3 Mass. R. 72, referring, however, to another case in the same court, of *Boynton* v. *Kelly*, 3 Mass. R. 189, in which last case, the question was not made, and the only point mooted and decided was, that in an action for a breach of a promise of marriage and for seduction, the defendant cannot give in evidence, the general bad character of the plaintiff between the promise and the breach, in mitigation of damages. The learned judge, in *Conn* v. *Wilson*, says, these cases of *Paul* v. *Frazier*, and *Boynton* v. *Kelly*, "demonstrate that it was proper to receive this evidence in aggravation of damages." No other authority is referred to, and I can only say, that if those cases are a satisfactory "demonstration" that the evidence was proper, that court required very little to satisfy it. And this case is cited as authority in *Tubbs* v. *Van Kleck*. The next case, also cited as authority, is the case of *Whalen* v. *Layman*, 2 Blackf. R. 194, and it is based on the

two cases from Massachusetts, *Paul* v. *Frazier*, and *Boynton* v. *Kelly*.

The only other case I have found, is *Green* v. *Spencer*, 3 Missouri R. 319, (225, new series,) and that is based on *Paul* v. *Frazier*, *Boynton* v. *Kelly*, and the Tennessee case of *Conn* v. *Wilson*, a mere emanation from them.

When, in the case of *Paul* v. *Frazier*, the court had decided the action was not maintainable, there was an end of the case. The Chief Justice says she was a partaker in the crime, and should not come into court to obtain satisfaction for *a supposed injury to which she was consenting*. His subsequent dictum seems at war with the decision, for if she could not come into court claiming directly, damages for her own turpitude, how could she do it indirectly, in an action for a breach of marriage promise? This case of *Green* v. *Spencer*, is used also by this court to prop up the case of *Tubbs* v. *Van Kleck*, and as they are all bottomed on Ch. J. Parsons' *dictum*, it may be safely said, all these cases are without authority, as they are clearly against well known principles of law, governing actions of assumpsit. That action will not lie, when the consideration of the promise was illegal or contrary to the policy of the law. A court, therefore, cannot, consistently with principle, permit a plaintiff to give in evidence, to aggravate damages, an illegal consideration, or one contrary to the policy of the law, when an action on a consideration of such a character cannot be maintained. The plaintiff is a partaker in the crime—she is a willing party to it, and to her own injury, and if she cannot maintain an action under such circumstances, as Ch. J. Parsons says she cannot, how is it, on what principle can she give it in evidence in another action, and thereby effect the same object? Chief Justice Treat, in *Tubbs* v. *Van Kleck*, presented the true view of such cases. He went upon established authorities, not mere *dicta*, and those *dicta* at war with the very decision pronounced in the case.

In cases of this kind, for a breach of promise to marry, it must be remembered, the female is the sole beneficial party, and she alone can bring the action. Her seduction forms another and distinct cause of action, the only remedy as yet provided by law in this State, being an action, by the father, for the expenses attending her lying in, if she has been confined, and loss of service. As Chief Justice Treat says, "They are separate and distinct causes of action, founded on entirely different considerations, and accruing to different persons." No case can be found, in which, in the action by the father, a breach of the contract to marry has been taken into consideration by the jury, nor, in the action by the daughter, for breach of promise, her

seduction, except in the few ill-adjudged cases on which I have commented. Should the daughter be allowed to do so, the recovery would be no bar to an action by the father, and, consequently, the defendant might be subjected to double damages for the same act.

The Chief Justice further argues, that it would be permitting her to recover for an immoral act, in the doing of which she equally participated. The parties are in *pari delicto*. If the plaintiff has been debauched, it was the result of her own voluntary consent. It is contrary to the policy of the law, to give one guilty party a remedy against an associate in crime or immorality.

Having now referred to all the cases in which evidence of seduction has been allowed, in an action of assumpsit for a breach of a promise to marry, and having seen that they all, without a single exception, have nothing but the *obiter dictum* of Judge Parsons to rest upon, I will now cite a few cases, in which the rules and principles of law and evidence have been duly regarded, and a conclusion, of course, totally different reached. The first, is the case of *Burks* v. *Shain*, 2 Bibb (Ky.) R. 343, a most exalted tribunal, favorably comparing with any other of that day.

The action was upon a promise of marriage, and the question arose, on a bill of exceptions, taken by the defendant, to the court's refusing to instruct the jury to give no damages for the seduction. In the case before us, the court did instruct the jury to give such damages.

The Supreme Court of Kentucky, say: "It was unquestionably a wrong in the defendant to have debauched the plaintiff, but it is a wrong of which she was *particeps criminis*, and had no right to complain in a court of justice. Besides, it appears that her father has brought suit for the seduction, and the consequent expense and loss of service. In that suit, the tort in seducing the plaintiff, is the ground of the action, and as it was aggravated or otherwise, would tend to increase or diminish the damages which the father ought to recover. But the action by the daughter, arises solely and exclusively upon the contract to marry; nor is there any allegation, either general or special, under which testimony of the seduction is admissible. We may add to these considerations, that the promise attempted to be proved on the trial, was made at a period subsequent to the seduction, and of which the seduction might have been the cause, but could not have been the consequence."

Another case, sustaining the view I take of this doctrine, is in 2nd Penn. State R. 80, *Weaver* v. *Bachert*. This was an action for a breach of a marriage promise, wherein this point was dis-

tinctly made. Chief Justice Gibson, in delivering the opinion of the court, says: "The decision of the point before us, by the Supreme Court of Kentucky, in *Burks* v. *Shain*, 2 Bibb, 343, seems to be founded in the true principles of the action." He says, "Illicit intercourse is an act of mutual imprudence, and the law makes no distinction between the sexes, as to the comparative infirmity of their common nature. A woman is not seduced against her consent, however basely it be obtained, and the maxim, '*volenti non fit injuria*,' is as applicable to her as to a husband whose consent to his own dishonor bars his action for criminal conversation." This maxim, as he says, and we all know, extends to contracts in the forming of which the parties are equally culpable, the consideration being immoral or illegal. If then, he asks, a woman cannot make her seduction a ground of recovery, directly, how can she make it so indirectly? In commenting on the cases I have cited, of *Paul* v. *Frazier*, and *Conn* v. *Wilson*, he regards them as of no authority. In *Tullidge* v. *Wade*, 3 Wilson, 18, and in *Foster* v. *Scoffield*, 9 Johns. 298, it was held, that in an action, by the father, for the seduction of his daughter, the daughter cannot be a witness, to prove a promise of marriage, in order to increase the damages, for she has herself a right of action against the defendant. The father's action is for a *tort;* that of the daughter, is for a breach of the contract made between her and the defendant.

The converse of this proposition is stated in *Burks* v. *Shain*, and in *Weaver* v. *Bachert*, and is unquestionably the law of the case.

Chief Justice Gibson says, as Chief Justice Treat said, in his dissenting opinion, in the case of *Tubbs* v. *Van Kleck*, "If a father could give such evidence, in his action for the seduction, and if the daughter could give evidence of seduction, in her action on the promise, the defendant would be doubly exposed to vindicatory damages. The bastardy ought, therefore, to have been excluded from the evidence and the charge." The case of *Baldy* v. *Stratton*, 11 Penn. State R. 321, recognizes the same doctrine, and none can deny that they are not founded on correct principles.

The action before us, arose solely and exclusively upon the contract to marry, and there is no allegation whatever in the declaration, under which proof of seduction could be admitted. I may add, that no express promise to marry was proved on the boy, as having been made prior to the supposed seduction. The only proof on that point is, when he was arrested on the charge of bastardy, and while the investigation was proceeding, being badgered by the complainant's lawyer, he did admit he had promised to marry the woman, and would marry her, but had no

place to put her in; and again when he was in the corn-field, where he said,—when the father came to him much excited, and declared if he did not marry her before he went away, he would kill him, if it was twenty years after that—that he had an open pocket knife in his hand at the time, with which he had been whittling—that he was angry and excited at the time,—that he would marry her, but had no house.

No authority can be found for the doctrine, save the *dictum* of Judge Parsons, that in an action for breach of a contract, the party complaining can recover vindictive or exemplary damages. As a general rule, a plaintiff in such action is only entitled to receive such damages from the defendant as will compensate him for the loss of the contract. The old common law never allowed the injured party, even in actions *ex delicto*, to recover, in addition to an adequate compensation for the injury sustained, damages by way of punishment to the wrong-doer. 2 Parsons on Cont. 446–7. By what argument then, can it be maintained, that in an action of assumpsit for the breach of a contract, such damages can be given? Whoever before heard of vindictive or exemplary damages in such an action? With as much propriety could a party suing in assumpsit for a breach of warranty on the sale of a horse—that he was gentle and free from vice—recover vindictive damages, on proof that the horse had bit and kicked, or otherwise injured the purchaser, and recover to the extent of those injuries, and for his nursing and cure.

A contract and its breach, is one thing; a tort and its consequences, another and quite a different matter, and are governed by different rules. It is not good policy, nor is it expected of courts, that they will attempt to wipe out the distinction between actions which have been so long recognized, and which alone the law-making power can rightfully do. Judicial legislation has no favor with me. It savors of usurpation.

Having considered the proof and the instructions, and the authority on which the most important one was based, I will now make a few suggestions in regard to the damages assessed.

It is, I believe, a settled principle, in cases like this, that if there be an imputation upon the character of the plaintiff, that fact should go, if not to the whole action, at least in mitigation of damages.

The testimony of Mr. Tybee, a witness for the defendant, fully establishes such an imputation, and though he says he never informed the defendant of it, yet the defendant may have been informed by Crawl or Floyd of the fact, and it may have operated with him to break the contract of marriage. At any rate, it is an imputation upon her character, and how a jury, under it, could

give the damages they did give, I cannot understand, and must refer it to passion, prejudice and perverseness on their part. Even if there was no such imputation, the damages are outrageously excessive, and the young man, unless very successful in his "battle of life," must be cramped in all his undertakings, and remain poor.

I concede that respectable courts have said that actions of this kind, though assumpsit, on a promise to marry, partake of the character of actions *ex delicto*. In this view it is, that juries have been permitted to regard the social position of the parties—any improper conduct of the defendant in which the plaintiff herself has not participated—such as his heartless, unprincipled and insulting conduct towards her, calculated to wound her feelings, and aggravate the distress his broken faith may be supposed to have brought upon her. The vanity and pride of most females, if they be virtuous, and have a good social position, are supposed to be severely shocked by the recreancy of one on whose plighted faith they had reposed, and something in the way of money must be given them, if they ask for it, to salve, if not to heal, the wounds thus inflicted. Considering these matters as legitimately connected with the alleged promise and its breach, I doubt, however, if a really good and virtuous woman has ever brought, or ever will bring, such a suit. Such actions are the resort, most generally, of the immodest, the mercenary—of those wanting in delicacy of sentiment, and fear not to bring their own shame before the public. The virtuous, modest woman, who has been deceived and deserted by her lover, will brood in secret over her wrongs, and shed many a bitter tear over disappointed hopes and broken vows, but she will not trouble courts or juries with them, or hire lawyers to blazon them to the world. It may be her death wound, but she will hide in her own pure bosom, the barbed arrow that inflicted it. Considering, contrary to all principle, the action as for a tort, it follows, if a woman will sue, the jury have quite a large discretion in measuring the damages, but their "sense of justice" and "intelligence" is poor dependence indeed, if they are not confined within some limit, for feeling, not reason, is too apt to sit in judgment, as this case shows.

My view is that once an action *ex contractu*, it should be so regarded throughout all its stages, and when it is proved that a contract to marry has been legally made, by parties capable of contracting—that there are mutual promises—and no fraud or circumvention practiced, and no imputation upon character, and a readiness to marry or offer to do so, shown, and no cause appearing to justify a refusal to perform the contract, materials for the formation of a proper verdict should be found in this consid-

eration,—what is the value of the contract? This of course depends in a great degree on the circumstances of the parties.

The wealth of the defendant would contribute essentially, in these mercenary times, to swell the value of the contract, and enhance the damages for its breach, for as a general fact, it may be safely asserted, that a contract to marry a rich man, all else being equal, is of more value, as the world goes, than a contract to marry a poor man. Putting such a case, the plaintiff herself being free from fault and causelessly deserted, fairly before an honest jury, no danger need be apprehended of the result. We have a striking instance of this, in a late case in an adjacent State, where the fair plaintiff—a reputable spinster—recovered a verdict of one hundred thousand dollars, the defendant having been proved to be worth near a million. This, doubtless, was a suit on speculation, as such cases generally are, and money was the object. I don't believe, myself, that the feelings of the plaintiff were very much lacerated by the desertion of her lover, with the frosts of sixty winters on his head, or that they had anything to do with the suit, or that the jury considered that, in making up their verdict. They looked at it as a valuable contract, which she had lost, and awarded accordingly.

Another element of a proper finding, would be the expenses which the plaintiff had necessarily incurred preparatory to her marriage,—providing proper apparel, furniture for housekeeping, in short, all necessary outlays and unavoidable expenses she may have incurred, suitable to her rank in life, and which may be proved.

These all grow out of the case, as one of contract, and courts should always restrict the proof to the contract. So far as it is made to partake of a tort, the jury are necessarily on a sea of uncertainty and conjecture, with no compass to guide them, and courts lament the difficulty of applying any certain rule by which to ascertain the damages.

This lamentation would not be necessary, if courts would adhere to principle, and not be led astray by a reported case founded on *dictum* only, though it may have the odor of popularity about it. Principle should never be departed from, nor should courts break down, by their rulings, those plain distinctions between actions, which the wisdom of ages has approved. If they overwhelm an unfortunate defendant, he must submit, the doctrine being that courts cannot interfere in such cases. My opinion is, and always has been, that in such cases the courts are bound to interfere, for the protection of the individual. By such interference, the court does not fix the amount of the verdict, but simply submits the case to the consideration of another jury. If the present action, with the principles applicable to it, does not

afford females, who complain of breaches of such promises, accompanied by seduction, a full and complete remedy for the wrong done them, the legislature, as some States have already done, must supply it by more effective enactments. As the law now is, on a breach of promise of marriage, the female ought only to recover as on an action *ex contractu*. For the tort done, the father or master, if she be a servant, has the action—she is not, in such case, the meritorious cause, but can be made so by the legislature.

On this whole record, believing that great injustice has been done, and great errors committed, I am for reversing the judgment, and remanding the cause.

Judgment reversed.

Harrison Dills, Appellant, *v.* Silas B. Hubbard, Appellee.

APPEAL FROM ADAMS.

If a party makes an entry upon land, under a conveyance of several adjoining tracts, his actual occupancy of a part, with a claim of title to the whole, will enure as an adverse possession.

This was an action of ejectment, brought by Dills against Hubbard, to recover possession of the south-west quarter of section seventeen in town two north, range five west. There was a plea of not guilty; there was a trial and verdict for the defendant. Motion for a new trial was overruled, and there was a judgment for the defendant; the plaintiff below, Dills, prayed this appeal. The facts, upon which the rule of the following opinion is declared, are sufficiently stated in the opinion of the court.

Skinner, Benneson & Marsh, and Williams, Grimshaw & Williams, for Appellant.

Browning & Bushnell, and Wheat & Grover, for Appellee.

Breese, J. We pass by most of the questions presented on this record, because, at the threshold an error has occurred which must reverse the judgment.

To make out his case, the plaintiff offered to introduce a tax deed from the sheriff of Adams county, for the premises in question, and which being objected to by the defendant except

for the purpose of defining the extent of plaintiff's prior possession of the land, was rejected by the court.

The question we have considered is, was this the proper limit to assign to the operation of the deed offered, defective as it was adjudged to be?

The distinction is, if a party does not make his entry under a proper title, his possession is considered as adverse only to the portion actually occupied. Whereas, if he makes the entry under conveyance of several adjoining tracts, his actual occupancy of a part, with a claim of title to the whole, will enure as an adverse possession of the entire tract. The possession is to be regarded as co-extensive with the description in the deeds under which he enters, and the original entry as a disseisin of the owner to the same extent. *Turney* v. *Chamberlain*, 15 Ill. R. 273, and the cases there cited.

We think the effect allowed by the court to the entry under the deed, was too limited. It should have been admitted to show the *animus*, the intention with which the party entered upon it, in connection with the possession and improvements on the adjoining quarters.

In *Brooks* v. *Bruyn*, 18 Ill. R. 542, this court say, there is no reason why a party having entered upon a tract of land under claim and color of right, and commenced improving it with intention of completing the improvement for actual use, should not be protected in his possession, as against a trespasser, to the extent of the entire tract entered upon, and to which his color of right extends.

The court should judicially take notice, that the three tracts of land claimed by the plaintiff were adjoining quarter sections. Being so, an entry upon one of them, claiming the whole and commencing improvements, with the intention of completing and extending them, would constitute a sufficient possession to enable him to maintain an action against a mere wrong doer, a trespasser upon any part of the tract, thus made an entire tract by the fact of the several tracts adjoining each other.

So in *Davis* v. *Easly*, 13 Ill. R. 200, this court say, the possession is considered as co-extensive with the claim of title, and the acts and declarations of the person entering upon a tract of land, and while in the occupancy thereof, may be given in evidence to explain the character and extent of his claim and possession.

On this point then, we reverse the judgment, and remand the cause for further proceedings in conformity with this opinion.

Judgment reversed.

James A. Brundage, Plaintiff in Error, *v.* William Camp, Defendant in Error.

ERROR TO SANGAMON.

If a party sells goods to another and delivers them, although the purchaser is to give a note, with security, for the goods, at a future day, a sale by the purchaser will be good, and the buyer from him, in good faith, will hold the goods against an action of replevin, by the first vendor.

This was an action of replevin, commenced by James A. Brundage, the plaintiff in error, against Wm. Camp, the defendant in error. The suit was instituted by the plaintiff, against the defendant, for two mules, in the Circuit Court of Sangamon county. The cause was tried, October term of said court, A. D. 1857.

The action of replevin is for the unlawful detention of the mules of the plaintiff by the defendant; not for the taking.

To this declaration the defendant pleaded:

1st. Not guilty of the detention, as described in the declaration.

2nd. Plea of property in defendant, negativing the right in plaintiff.

And to these two pleas, the plaintiff replied:

1st. Affirming the detention as in declaration, and joining issue to the country.

2nd. That the property in the narration was, and is, the property of the plaintiff, and not that of the defendant. Issue joined on this.

The plaintiff introduced a witness, who stated as follows: That he was present when the trade was made, between Brundage and one Crouch, and that said trade was to this effect: that the said Brundage agreed to sell said mules to said Crouch, upon condition that Crouch was to give $300 for said mules; Crouch agreed to give that sum for the mules, payable in three months, with security, and the names of two or three persons were mentioned, as security. After this part of the agreement had been made, Crouch asked plaintiff if he, Crouch, might take the mules with him then, and the plaintiff said he might, provided he, Crouch, would give him note and security by or on the following Monday. Crouch agreed so to do, and took the mules. A day or two afterwards, Crouch sold said mules to defendant. Nineteen days after said sale, said plaintiff demanded said mules of the defendant, who refused to give them up.

The following instructions were given for plaintiff:

The jury are instructed that if they believe, from the evidence, that the mules in dispute were sold under the following condi-

tions: that Brundage should give Crouch three months' lenity for said mules, said Crouch giving Brundage good personal security mentioned, and that Brundage delivered over the possession to said Crouch, and Brundage agreed that the mules should be Crouch's, if he procured the security agreed upon, then the property should be Crouch's, then the jury are instructed to find for the plaintiff.

The jury are further instructed, that if they believe, from the evidence, that Brundage agreed to sell to Crouch the mules in dispute, and it was agreed that if Crouch brought the agreed security by Monday, that then the property should belong to Crouch; if the jury believe this, the property does not pass to Crouch, and the jury are instructed to find for the plaintiff.

The instructions were refused as asked for, and to which the plaintiff excepted. They were given, with the following modification:

Provided, The jury also believe, from the evidence, that defendant was not a *bona fide* purchaser for a valuable consideration from Crouch.

And thus:

Provided, They also believe, from the evidence, that the defendant was not a *bona fide* purchaser, for a valuable consideration from Crouch.

And to the giving of which, as modified, the said defendant then and there excepted.

The defendant below asked for the following instruction:

That, even if they believe, from the evidence, that Brundage sold the mules to Crouch, on condition that Crouch should give his note, with security, on the next Monday, and deliver the mules to Crouch, yet if they believe, from the evidence, that Camp purchased the mules of Crouch, *bona fide*, and for a valuable consideration, they ought to find for the defendant.

Which said instruction was given as asked for, and to the giving of which, the said plaintiff, by his attorney, excepted.

The jury found, under the instructions, for the defendant; and thereupon the said plaintiff made a motion for a new trial.

The court refused the motion for a new trial, and entered up judgment on the verdict.

Lincoln & Herndon, for Plaintiff in Error.

Logan & Hay, for Defendant in Error.

Breese, J. The questions presented by this record arise out of the instructions, as given by the court. The plaintiff insists, they were, on his part, improperly modified, before given by the

court, and that the instruction given for the defendant, should have been refused.

The plaintiff contends, that both the sale and delivery of the mules, to Crouch, were conditional only, passing the possession, but not the title, to him; and being so, Crouch, by a sale, could confer no title on his vendee, Camp.

It may be admitted that the sale was conditional, but it can hardly be pretended that the delivery was so. The delivery was upon the promise of Crouch, that he would give the note and security, by Monday. On this promise the plaintiff relied, and delivered the mules, saying, at the time, if he gave the note and security on the Monday, the mules should be his.

Here then, was an unconditional delivery. It did not depend, and could not depend, on the giving a note and security at a future day, for the delivery was in *presenti* and absolute, qualified by nothing—by no condition.

The cases cited by appellant's counsel, go to support, for the most part, the view they have pressed upon the attention of the court, but they are not of binding authority upon this court, nor are they, in their leading features, like this case.

The case of *Heath* v. *Randall*, 4 Cushing, 195, was between the parties to the sale, and was an action of trespass for breaking and entering the plaintiff's close, and taking and driving away a yoke of oxen, the property of the plaintiff. The defendant pleaded that he was the owner of the oxen, and had a right to enter the plaintiff's premises and take them. The facts were, that plaintiff had bought of defendant the oxen, and was to pay him $75 for them—that the cattle were to remain the defendant's until paid for, and defendant had the right to take them away any day, until paid for, even if it was the next day. The oxen were then delivered to the plaintiff, who put them in his pasture. Before they were taken, the plaintiff had paid twenty-five dollars on the oxen. The court instructed the jury that if the contract of sale was as stated by the witness, the defendant had a right to take the oxen without any previous demand of the purchase money, and had a right to go upon the plaintiff's land to take them.

Shaw, C. J., in giving the opinion of the court, says, we think the direction of the court below right. The sale of the oxen was a conditional one, and the condition was precedent, so that no property passed by such sale to the vendee, until performance. It *seems* that such a conditional sale, though accompanied with an actual delivery for a special purpose, will not vest the property, so that it may be attached by a creditor of the vendee. *Barrett* v. *Pritchard*, 2 Pick. 512; *Reed* v. *Upton*, 10 ib. 522. But however that may be, the court are of opinion that such a

condition is valid *as between the parties*, and no right can be set up by the vendee against the vendor."

The case of *Barrett* v. *Pritchard* was this: A. delivered wool to B., taking a receipt in this form, "Received, etc., wool to manufacture into cloth on the following conditions, viz: the wool is to be reckoned at seventy-five cents per pound, amounting, etc., which amount I agree to pay in six months; the wool before manufactured, after being manufactured, or in any stage of manufacturing, to be the property of A. until the above amount is paid." It was held, that until such payment the property in the wool remained in A., as well against B.'s creditors as against B. himself. 2 Pick. 512.

The case in 10 Pick. 522, refers to this case, and is the same in principle.

In *Beesom* v. *Dougherty*, 11 Humphrey, 50, the question was, whether the written contract was a mortgage or an absolute sale. It was decided that it was a sale on condition, and until condition performed, no title passed to the vendee.

In 2 Duer, 20, *Herring* v. *Hoppock*, it was held, where by the express terms of a contract of sale, the title is not to vest in the purchaser until the price is paid, the title of the vendor is not divested until payment made, notwithstanding time for payment is given by the contract, and there is a delivery of the property when the contract is made.

The case in 2 Pick., the case in Humphrey, and the case in Duer, were cases in which creditors were parties claiming under execution or attachment, and in the last case, the execution creditors had notice of the plaintiff's claim, and of the conditions under which he had parted with the possession of the property.

The case of *Tibbetts* v. *Towle et al.*, 12 Maine, 341, is the strongest case cited on the part of the appellant, and was briefly this: A. sold a yoke of oxen to B. for a stipulated price, to be paid at a future day. A. to hold the oxen till paid for. A. permitted B. to take possession of them, who sold them to C., and the latter to D., for good consideration and without notice of A.'s lien. The court held that the lien was not defeated, but that A. could maintain trover against D. for the conversion of the cattle, and that too, without waiting the expiration of the term of credit.

The doctrine, as laid down in Shepherd's Touchstone, 118, 119, and 120, is made the basis of the decision in this case. It is there said: "It is a general rule, that when a man hath a thing, he may condition with it as he will. A contract or sale of a chattel personal, as an ox or the like, may be upon condition, and the condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the

same do pass through the hands of an hundred men, yet it is subject to the condition still." In *Patton* v. *Mc Cane*, 15 B. Monroe R. 555, the court say, that a sale with delivery of a chattel at a fixed price, to be paid at a future day, but until paid for, the title to remain in the vendor, does not vest the property in the vendee as to creditors or third persons—that the payment of the money is, by such contract, a condition precedent that must be complied with before the title passes; and reference is made to *Barrett* v. *Pritchard*, 2 Pick. R. 512; Long on Sales, 109; 3 Campbell, 92; *Chisk* v. *Wood*, Hardin, 532.

Almost all the cases cited by the counsel for appellant, are referable to this old principle.

Views somewhat different from those expressed in the cases referred to, have been entertained by this court. They are to be found in the case of *Jennings* v. *Gage et al.*, 13 Ill. R. 614.

Gage & Co. had sold to one Van Valin, a bill of goods, at four, six, and nine months, taking his notes and a mortgage on certain real estate, to secure their payment. The goods, by the contract of sale, were to be shipped to Chicago, but were not to be delivered to Van Valin, until he gave an indorser on the notes satisfactory to I. H. Burch.

The goods were forwarded to Chicago, to Van Valin, care of James Peck & Co., who were instructed by Burch not to deliver them without instructions from him. Van Valin, however, paid the charges and obtained the possession of the goods without giving the indorser, and subsequently sold them to Jennings, the defendant. Gage & Co., after a demand and refusal, brought trover, and recovered a judgment for their value.

Among the instructions asked by the defendant, was this: "If the jury believe, from the evidence, that Jennings purchased the goods in good faith of Van Valin, and that at the time of such purchase, Van Valin had actual possession of such goods, and that they were marked in New York by plaintiff with Van Valin's name, and transmitted to him at Chicago, and then actually delivered to him by the plaintiffs' agent and consignee, then as against Jennings, the plaintiffs cannot recover."

The court gave this instruction, qualified thus: "If, however, the agreement between the plaintiffs and Van Valin was, that the goods were only to be delivered to Van Valin upon the condition of his giving security for the price, then if the possession was obtained by Van Valin without giving the security agreed upon, and in violation of the agreement, then he derived no title to the goods which he could sell to Jennings, even if Jennings was a purchaser in good faith, and for a valuable consideration."

This instruction, as modified, makes the case very like the case now under consideration, as the counsel for appellants

would understand, their client, the plaintiff, being substituted for Gage & Co., and Camp, the defendant, for Jennings.

The questions of law arising upon this instruction, which are the same in principle as those given by the court in the case under consideration, are thus disposed of by the court. They say, "That instruction is based on the supposition that Jennings was a purchaser of the goods in good faith, and for a valuable consideration. Whether the evidence would have justified the jury in finding he was such a purchaser, is not now the question."

In this case, the jury have found this defendant was such a purchaser.

The court say, "The good faith of the transaction was a matter peculiarly appropriate for the consideration of the jury, and as such, the defendant had the right to have it submitted to, and passed upon by them. As between plaintiffs and Van Valin, there is no question that the title to the goods would not pass on the state of case supposed in the instruction; but it is insisted that, as between the plaintiffs and Jennings the law is different, and that, as between them, both parties being innocent, the loss should fall upon the owners, who, by intrusting Van Valin with the possession of the goods, enabled him to commit a fraud, rather than upon Jennings, who is presumed to have acted in good faith and with proper caution."

This the court say is unquestionably the law, where the owners, with the intention of sale, have voluntarily parted with the possession of the goods, and clothed the vendee with the *indicia* of ownership, though under such circumstances as would authorize a rescission of the sale, and a recovery of the goods as against the vendee.

But the court say, "this principle does not apply to sales upon condition, and when the original owner has never consented to the transfer of the property. If he consents to the transfer, though such consent be temporary only, and obtained by fraud, and therefore revocable as against such unfair purchaser, still an honest purchaser from him will be protected, and the first owner must bear the loss."

The qualification of the instruction, the court say, was therefore erroneous, and the judgment was reversed.

Now, in this case, the plaintiff, with the intention of selling, voluntarily parted with the mules on the deceitful promise of Crouch to furnish the note and security. The plaintiff put Crouch in full possession of the property—clothed him with the strongest marks of ownership of such property, enabling him thereby to commit the fraud, which he did commit by the sale

to the defendant, who is a *bona fide* purchaser for a fair price. Who ought, in justice, to bear the loss?

The rule in such cases seems to be accurately stated by Chancellor Kent, in 2nd Com., page 497. He says, "If it was even a condition of the contract that the seller was to receive, upon delivery, a note or security for payment at another time, he may dispense with that condition, and it will be deemed waived by a voluntary and absolute delivery without a concurrent demand of the security. But if the delivery in that case be accompanied with a declaration on the part of the seller, that he should not consider the goods as sold until the security be given, or if that be the implied understanding of the parties, the sale is conditional, and the property does not pass by the delivery, as between the original parties; though as to subsequent *bona fide* purchasers or creditors of the vendee, the conclusion might be different."

In 25 Barbour, 483, *Flecman* v. *McKean*, the court say, "It was insisted on the argument that the rule contended for by plaintiff (as here,) would, if it should prevail, defeat the title of subsequent purchasers, and be highly prejudicial to the interests of commerce. I asked the counsel for the defendant whether, even supposing that a delivery under the circumstances of the case should be deemed incomplete as between the parties, a sale by the purchaser to an innocent dealer would not be valid? My impression at the time was, and still is, that as the original owner voluntarily places the goods in the hands of the purchaser, and thus makes him the ostensible proprietor, a sale by the possessor to a *bona fide* dealer, without notice, would be valid, and so pass the title; it was so decided in *Haggerty* v. *Palmer*, 6 Johns. Ch. 437, and the decision was sustained by the Court of Appeals in *Smith* v. *Lyne*, 1 Selden, 41."

In *Harris* v. *Smith*, 3 Serg. and Rawle, 22, Gibson, Justice, says, "If a vendor rely on the promise of the vendee to perform the conditions of the sale, and deliver the goods absolutely, the right of property will be changed, although the conditions are never performed."

In *Smith* v. *Dennie*, 6 Pickering, 262, where a chattel was sold upon condition that the vendee should give an indorsed note, but was delivered without any express reference to the condition, and remained in the possession of the vendee eight days, when it was attached by his creditors, and no reason was assigned why the vendor had omitted to make his claim known, it was held there was a waiver of the condition, so far as to warrant the attachment. The same point was decided in *Carlton et al.* v. *Sumner*, 4 Pick. 516.

These cases but fortify the reasoning in the case of *Jennings* v. *Gage & Co.*, 13 Ill. R. 614. It seems to be right and just, that after the delivery of property on a sale, the vendor relying on the promise of the vendee that he would give the stipulated security, that the vendor should be held to this, and innocent persons be protected from any claim he may set up, growing out of the refusal or neglect to give the security.

In New York, it has been frequently held, and the rule is considered there settled, that if a sale and delivery are conditional, or there is fraud or imposition on the part of the purchaser, though the property passes, the title does not, and on a refusal to comply with the terms of the sale, the vendor may pursue the property and reclaim it, unless protected in the hands of a *bona fide* purchaser. Nelson, J., in *Furniss* v. *Howe*, 8 Wend. 256.

It seems to us that any other rule would be attended with great inconvenience and embarrassment, in such a community as ours, where it is impossible to inquire into the various neighborhood transactions of our people, of which the sale of personal property forms so important a part. Information cannot be had of the private arrangements between parties, not placed on record, and only to be established through imperfect memories. A sale and delivery of a chattel, so far as a *bona fide* purchaser from the first vendee is concerned, without any notice of any reserved claims or rights on the property, ought to be sufficient for his protection.

In *Wilbraham* v. *Snow*, 2 Saunders R. 47, (b), it is said, that if a bailee or other person who has only a special property, sells and delivers the goods to another as his own, *bona fide* and without notice, the general owner cannot maintain trover or any other action against the vendee, because by such a sale by a person who has a special property in, and possession in fact of the goods, the property of the general owner is altered.

And if the owner of goods suffer another to have possession of his property and of those documents which are the *indicia* of property, then perhaps, a sale by such a person would bind the true owner. *Dyer* v. *Pearson*, 10 Eng. C. L. 29.

In the case of *Copeland* v. *Bosquet*, 4 Wash. Cir. C. R. 594, to which appellant's counsel refer, the court say, "If the possession (of personal property) be delivered by the real owner, together with the usual *indicia* of property, or under circumstances which may enable the vendor to impose himself upon the world as the real owner, this might be a case of constructive fraud, which would postpone, even at law, the right of the real owner in favor of a fair purchaser without notice and for a valuable consideration."

We think the true principle is here affirmed, and sustains the view we have taken of the principles applicable to cases of this kind.

There is no pretense in this case that Camp, before his purchase, had any notice whatever of this secret claim of Brundage on the property. He is, to all intents and purposes, a purchaser in good faith for a valuable consideration, and without notice of any liens on the property.

There is evidence going to show that Brundage had confidence in Crouch, his vendee, by going security for him shortly before the sale of the mules, on one or more notes. He trusted Crouch, made a sale and a delivery of the mules to him, and put it in his power to defraud others by a sale of them. An innocent purchaser of this property for a valuable consideration, without notice, ought to be protected. Such were the views entertained by the Circuit Court, and believing them to be correct, we affirm the judgment.

Judgment affirmed.

The Board of Supervisors of Fulton County, Appellants, *v.* The Mississippi and Wabash Railroad Company, Appellee.

APPEAL FROM FULTON.

The answer of a corporation aggregate, should be under seal, but not under oath. If a sworn answer is desired, some managing officer should be made a party, who can answer under oath.

Where a party is directed or asks leave, to file a further answer, or to amend one, the original answer is not to be changed by erasures or interlineations, (except for scandal or impertinence,) but a formal separate answer is to be drawn.

An answer cannot be taken from the files, after exception is taken to it, nor amended, unless in some matter of form or mistake in date.

An answer is irregular, and may be rejected, which is not properly entitled and does not show what bill it purports to answer;—if by a corporation, which is without the seal, and the signature of its chief officer—or if interlined or erased.

If the answer to the charges in the bill is not full, the court should enforce an answer to each specific interrogatory.

Where a party agrees to admit the truth of an affidavit for a continuance, it cannot be contradicted.

Where a company was incorporated to build a railway across the State, as a continuous project under one management, with a common interest, if the charter is afterwards amended so as to divide the project into three parts, to be under separate control, the unity of interest being destroyed, and no proper acceptance of the change of charter has been manifested, subscribers to the stock will be released—the change being so extensive and radical as to work a dissolution of the original contract.

In submitting to the qualified voters, whether the county shall aid in the construction of a railway, it is improper to submit more than one project at a time.

THIS cause was commenced by bill in chancery, filed in the Fulton Circuit Court, October 9, 1857, by the Board of Supervisors of Fulton county, against the Mississippi and Wabash Railroad Company, and John W. Ingersoll, William N. Cline, A. L. Hasleton, Thompson Maple, and John H. Piersol, requiring several and respective answers from them under oath, and praying an injunction, restraining the issuance of $60,000, of the bonds of said county, to the central division of said railroad company, and, also, to enjoin the disposal of $12,000, out of $15,000, of such bonds, then already issued to said central division, and in the hands of some of the defendants, also praying for a perpetual injunction in the premises on the hearing, and a decree for the return of, or compensation for, the $15,000 of bonds so issued, etc., which injunction was issued on the same day, and duly served on the several defendants.

The bill states that the Mississippi and Wabash Railroad Company was chartered by act of the legislature of Illinois, in force 10th February, 1853, to construct a railroad, to commence at Warsaw on the Mississippi river, in the county of Hancock, and running from thence on the most eligible route, eastwardly, by the city of Bloomington, in McLean county, to the east line of the State, with the condition that the work should commence within two years.

The amended and joint and several answer of the railroad company, J. W. Ingersoll, W. N. Cline, A. L. Hasleton, and Thompson Maple, admits the statement.

The bill states that at the solicitation of the railroad company, the complainants, for the purpose of submitting the question to the voters of Fulton county, whether the county should subscribe the sum of $75,000 stock to the company, adopted at their September session, 1853, an order which is made a part of the bill, the first part of which reads as follows:

"Ordered, that the county of Fulton subscribe to the Mississippi and Wabash Railroad Company, and the Petersburg and Springfield Railroad Company, stock to the amount of seventy-five thousand dollars to each of said companies, and that, at the general election, to be held in November next, the question be submitted to the voters of said county, whether said county take stock to the amount of one hundred and fifty thousand dollars, that is to say, seventy-five thousand dollars to each of said companies, according to the provisions of the statute in such case made and provided; that the bonds be issued for said stock to each of said companies, under the provisions of said statute, shall be payable as follows, to wit." Here follows a narration of the terms of the bonds.

"*Provided*, no bonds be issued to either of said companies until the following conditions be complied with, to wit: when it shall be certified to the clerk of this board, by the secretary of the Mississippi and Wabash Railroad Company, that there is seven hundred thousand dollars of the capital stock of said company subscribed, and five per cent. on the same paid into the said road, then the said bonds to issue to said company as the law contemplates." The remainder of the order relates to the Petersburg and Springfield Railroad Company, and the giving of notices for the election.

And the bill continues and states that the election was held in pursuance and on the basis of such order, and the propositions adopted upon the conditions of the same.

The answer admits the statements.

The bill states that the work was not commenced within two years.

The amended answer avers that work was done in the engineering department within the two years, and that, within that time, by an act of the legislature, approved and in force February 9, 1855, the time for the commencement of the work was extended for two years longer, and that the work was commenced by grading, bridging, etc., about the 1st April, 1856, and has been in constant progress ever since.

The bill alleges that since the vote by the people on said proposition, and since the 1st January, 1857, and before the application for the bonds, the charter of the company was materially altered by the legislature, so as materially to change the project, without the assent of the county of Fulton, so as to create three divisions, each under the control of separate boards of directors, and each, in fact, a separate road and enterprise—one division being called the eastern, being all east of the Illinois river, one the central, including all between the Illinois river and the Northern Cross Railroad, and the other the western, embracing all west of the Northern Cross Railroad, and that thereby the terms of the contract between the county and the company have been materially altered.

The amended answer denies that the charter or project has been materially altered, but avers that the legislature, by an act approved in February, 1857, amended the charter, and that it was so amended with the assent of the county, because the county was represented in the legislature by one senator and two representatives who had full knowledge of such amendment, and assented thereto; and that, in the month of March, 1857, the Board of Supervisors of said county assented thereto, and then changed the conditions on which the bonds were to be issued, and ordered the clerk to issue the same when evidence

should be produced that $375,000 had been subscribed to the capital stock within the limits of the central and western divisions, and five per cent. paid thereon.

The bill states that the eastern division has been abandoned.

The amended answer denies the statement, and avers that it is now and always has been the intention of the company to build and construct the entire line as fast as their means would permit, and that the divisions were made for the express purpose of facilitating the prosecution of the enterprise. It avers also that the eastern division was organized under the law of 1857, on the first Wednesday of January, 1858, by the election of commissioners, and that up to the time of organization, such division had been under the management of the company and their agents; that the organization was made in good faith, for the purpose of constructing the eastern division to the state line, and not for the purposes of this suit; that the division was under the charge of James R. Babcock, William S. Mauss and James Harriott, since June 10, 1856, when they were appointed commissioners by the directors of said company; that before the application for bonds, they had purchased of the State the old grade of nine and one half miles east of Pekin.

The amended answer here avers, (but not responsively to any allegation of the bill,) that the complainants, on the 10th September, 1855, passed an order, by which they authorized the clerk to subscribe $75,000 to the stock of the Mississippi and Wabash Railroad Company, in pursuance of the vote and order aforesaid, when it was certified to him by the secretary of the company that $700,000 had been subscribed, and five per cent. paid thereon, as contemplated by the order by which the question was submitted to vote, and that the clerk, in pursuance of said order, did subscribe that sum in July, 1857.

The bill states that the directors had also made material alterations in the plan and design of the road since the taking of the vote of the county.

The amended answer avers that the whole line of the road has been located *via* Bloomington, Pekin, Canton and Carthage, except between Carthage and the west line of Fulton county. That it was the intention of the respondents, and they believe of the directors of the company, to locate and construct the road from Carthage to the west side of Fulton county, so as to connect the entire line of said road, and also to build the road through the entire line, so as to form a continuous line of road as prescribed in their original charter. That said road has not been changed to run by the city of Peoria, nor have any other changes been made so as to change the road to any other route than the one contem-

plated in the original charter. That said road was located as aforesaid, before the application for the bonds.

The bill states, that in the fore part of September, 1857, John M. Ingersoll, president, and one of the commissioners of the central division of the Mississippi and Wabash Railroad Company, and claiming to act as agent of the company, presented to John H. Piersol, clerk of Fulton County Court, three certificates, one of which is a certificate of M. T. Hunt, secretary of the western division, and W. N. Cline, secretary of the central division, that $375,000 had been subscribed to the capital stock of said company, and five per cent. paid thereon, dated July 9, 1857, under the hands of the secretaries, but not sealed.

Another of these certificates is as follows, to wit:

"This may certify that there is seven hundred thousand dollars subscribed to the capital stock of the Mississippi and Wabash Railroad Company, and five per cent. paid thereon.

JOHN GRIDLEY, Secretary,
Mississippi and Wabash Railroad Company.

Pekin, August 29th, 1857.

The third of these is another and more formal certificate by John Gridley, Secretary Mississippi and Wabash Railroad Company, of the same facts, and is under the private seal of Gridley, there being no corporate seal, as stated in such certificate.

And the bill continuing, states that said Ingersoll, at the time of the presentation of such certificates, demanded bonds of the clerk, of a certain blank form presented at the time for the purpose of being filled up, the obligatory part of which reads as follows, viz.:

"Know all men by these presents, that there is due from the county of Fulton to the central division of the Mississippi and Wabash Railroad Company, or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually, on the first day of July in each year, at the treasury of the said county of Fulton, on the presentation and surrender of the annexed coupons. The principal is to be due and payable ten years after the date hereof."

And the bill charges that thereupon the said clerk issued and delivered to said Ingersoll, bonds, as demanded, to the amount of fifteen thousand dollars, of $500 each, and numbered from one to thirty inclusive.

The said answer admits these statements.

The bill states that $700,000 had not been subscribed at the time of the date and presentation of said certificates, and that such amount had not since been subscribed in good faith, and

that five per cent. had not been paid in on such sum, and has not since been paid, but that the certificates were false and fraudulent, and made and procured for the purpose of fraudulently procuring the said bonds of the county, and that by means of such false and fraudulent certificates, such bonds to the amount of $15,000 were obtained.

The amended answer denies that such certificates were false and fraudulent, and avers that there was, at the date of the certificates, subscribed in good faith the sum of $906,050, to the capital stock of said company.

The bill states that a large amount of the subscriptions to the capital stock, and which remain on the books of the company, had, before the application for the bonds, been released and discharged.

The answer denies that any part of the said $906,050 has been released, and avers that James H. Stipp and others, and James Kuykendall, have been released, but that their subscriptions are not estimated in fixing on the amount set forth in the answer, and avers that the whole of the $906,050 remains now on the books of the company in good faith, and not discharged, or any part thereof.

The answer also states that the commissioners of the central division did, at a meeting of their board, appoint John W. Ingersoll to erase the names of such subscribers to the capital stock, as had subscribed to the Jacksonville and Savanna Railroad Company, to an amount equal to the subscription made by them to the stock of the latter company, but that none of such subscriptions have been erased or in any manner released by the said Ingersoll, or any person acting under his authority. That they have been advised by counsel that the action of the commissioners was void, and that the subscriptions are valid. That the amount which was so authorized to be released did not exceed $50,000, including $6,000 subscribed by the Babcocks.

The bill states that a large amount of the stock subscribed is encumbered with conditions, restrictions, manner and time of payment, so as to be unavailable, and cannot and ought not to be taken as a part of a good faith subscription of $700,000 aforesaid.

That a large portion was subject to the express condition that "not more than five per cent. of such subscriptions should be called for until the directors of said Mississippi and Wabash Railroad Company should have reasonable assurance that sufficient funds could be secured to insure the completion of the whole road," and that the subscription books all contained said proviso at the time of the vote by the county. And the bill avers that no such assurance has been had; and hence such sub-

scriptions are not available within the terms of the order under which the county was authorized to issue bonds.

The said amended answer admits that subscriptions are upon such condition, except as otherwise set forth below, and states that the subscriptions of the city of Keokuk, $150,000; city of Pekin, $100,000; city of Warsaw, $50,000; county of Hancock, $100,000; total, $400,000; are without any condition.

That the subscriptions by the county of Tazewell, $75,000; citizens of Pekin and vicinity, $29,500; total, $104,500; are upon the condition that the road should be located through Pekin, which has been complied with by such location; and that there is no other condition to such subscriptions.

That the subscription by the city of Bloomington, $50,000, is upon the condition that bonds shall not be issued, however, till a sufficient aggregate amount of stock is *bona fide* subscribed, to insure the building and equipment of the entire road.

That the subscriptions by citizens of McLean county, $7,400, are upon the sole condition that they should be expended between Pekin and Bloomington.

That the subscriptions by other citizens of McLean county, $41,200, are upon the condition "that no additional payment over and above the five per cent. now paid, shall be made till a sufficient amount of stock is *bona fide* subscribed to insure, in the opinion of said directors, the building of the road and placing the entire work under contract;" which condition (the answer avers) has been complied with.

That the subscriptions by citizens in vicinity of Tremont, (Tazewell county,) $12,900, are upon the condition that no more than five per cent. shall be called for until the company have reasonable assurance of being able to build and construct said road.

That the subscriptions by citizens of Fulton county, $108,600, are upon the sole conditions "that the road is located through the town corporate of Canton, and a permanent depot be established and maintained therein; and further, that not more than five per cent. shall be called for until the directors shall have reasonable assurance that sufficient funds can be secured to insure the completion of the whole road."

That subscriptions by other citizens of Fulton county, $3,000, are upon the conditions "that a depot be established and kept in Harris township, and that the road shall be contracted from Canton to the Northern Cross Railroad, before any portion of said subscription shall be called for."

That subscriptions by other citizens of Fulton county, $9,100, are upon the conditions "that a warehouse be established, and kept at Cuba, and such other points as public interests may re-

quire, and no portion of subscription to be called for until the road is under contract from Canton westward, and not until after the 1st of January, 1858." And part of these subscriptions are also on other special conditions specified.

That subscriptions by citizens of Hancock, $32,900, are without condition.

That subscriptions by other citizens of Hancock, $6,450, are upon condition that half should be due when the iron laying has been commenced, and balance in three months, with ten per cent. on installments till paid.

That subscriptions by citizens of McDonough county, $100,000, are upon condition that the road shall be located by the way of Fountain Green and Blandinsville to Bushnell.

That the subscriptions of Keokuk and Hamilton Ferry Company and others, $5,000, are without conditions.

The answer avers, that at the date of the certificates, the road was located in and through the towns of Canton and Cuba and the township of Harris, depots established and contracts made with E. P. Buel & Co., for the erection thereof; and that the directors had and still have reasonable assurance that sufficient funds can be secured to insure the completion of the whole road.

That all the subscriptions by corporate bodies were made in pursuance of law, and are valid and binding.

That there may be a small part of the subscriptions that are worthless and unavailing.

That the central and eastern divisions intend and believe they can construct the road from Canton to the east line of the State, in a continuous line, in a reasonable time. That they have available means for that purpose, amounting to one million dollars, which can be increased as soon as the road is under contract.

That on the western division, seventeen miles are ready for the iron, which has been purchased, and the track laying commenced.

That it is the *bona fide* intention of the respondents to construct the road from Canton to the Northern Cross Railroad, by the fall of 1859, to intersect the western division, and that the central division has a contract for putting the same in running order, and twelve miles are graded. That the contractors have made a contract for the iron between Canton and the Northern Cross Railroad, and expect it to be shipped early in the spring, to Liverpool, in Fulton county.

The bill states that John W. Ingersoll, William N. Cline and A. L. Hasleton are commissioners of the central division, and Thompson Maple, treasurer.

The answer admits the statement.

The bill states that six of the bonds issued by the Fulton county clerk, amounting to $3,000, have been disposed of, and that the balance, $12,000, are in the hands of the commissioners or treasurer of the central division; and unless restrained, they will dispose of such balance.

The said answer states that $4,500 of the bonds issued have been disposed of, and that the balance ($10,500) of them are in the hands of Thompson Maple, treasurer.

The bill states that said Ingersoll, Cline and Hasleton, claim that they are entitled, on behalf of the central division, to the remaining $60,000, of Fulton county bonds, and have given out that they intend to apply to Piersol, clerk, for the same, at an early day.

To this there is no answer.

The bill requires the defendants to answer pertinent and specific interrogatories propounded—numbered from one to eighteen, inclusive—based upon material allegations and charges in the bill.

To these interrogatories there is no answer except so far as they may be in general terms replied to, in the way of answering the stating part of the bill.

The original answer was the joint answer of the Mississippi and Wabash Railroad Company, John W. Ingersoll, William N. Cline and A. L. Hasleton, and was the same as the amended answer, except that Thompson Maple joined in the amended answer, and except also as appears in the following statement:

The court having sustained certain exceptions to said original answer, and other exceptions to the separate answer of Thompson Maple filed in the cause, the respondents asked and obtained leave to amend their answers, but no manner of making such amendments was suggested by the respondents' solicitors, or granted by the court; and the solicitors of respondents took from the files the original joint answer aforesaid, and erased parts of the same, made interlineations, and attached parts on separate pieces of paper to be interpolated and read as a part of the answer; and the original affidavit to the joint answer was interlined and altered, and the jurat erased and a new jurat attached; and the affidavit as amended was resworn. Such alterations and changes are now a part of the amended and only answer on file, and the interlineations are in brackets in the record, (both in the amended answer and in a bill of exceptions,) and numbered in the margin from one to twenty, inclusive. The said answer being so altered and filed on the 3rd of March, 1858, complainants moved for a rule on respondents' solicitors to strike out the interlineations, interpolations, and to restore

the answer and affidavit to their original condition, which the court overruled, and complainants excepted and now except.

The said amended answer is entitled as follows:

"STATE OF ILLINOIS, FULTON COUNTY, *ss:*

THE BOARD OF SUPERVISORS OF FULTON COUNTY, *vs.* THE MISSISSIPPI AND WABASH RAILROAD CO. and others. } *In Circuit Court of Fulton county, Ill. In Chancery. Of February term.*

"The joint and several answer of the Mississippi and Wabash Railroad Company, John W. Ingersoll, William N. Cline, A. L. Hasleton and Thompson Maple."

And said answer is signed as follows, no seal for the corporation being attached:

"The Mississippi and Wabash Railroad Company, John W. Ingersoll, William N. Cline, A. L. Hasleton, and Thompson Maple."

"G. BARRERE, WALKER & GEE, Solicitors for Defendants."

The complainants then moved the court to strike the amended answer from the files, for the following reasons:

1st. The said paper is not properly entitled for an answer.

2nd. The same does not show to what bill of complaint it is filed for an answer.

3rd. The answer is not signed by said individual defendants in their proper hands respectively.

4th. The said Mississippi and Wabash Railroad Company have not signed the same by its chief officer, nor has the seal of the corporation been affixed.

5th. The original answer has been erased in part, interlineations made therein and other alterations to make an amended answer, without the consent of the court.

6th. The same is otherwise informal.

Which motion the court overruled, and complainants excepted.

The complainants filed thirty-seven exceptions to the original joint answer, and the court overruled those numbered 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 17, 18, 19, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 33, 35, and 37, and the complainants excepted.

The whole thirty-seven exceptions to the original joint answer stood as to the amended one, and a portion of which are substantially as follows:

3rd. Defendants have not, etc., answered whether, since the Fulton county vote, the charter of the Mississippi and Wabash Railroad Company has been materially changed, so as to alter the contract with the county, *without the assent of the county.*

4th. Defendants are impertinent, evasive, frivolous, etc., in charging assent of the county by reason of representation in

the legislature; also, in charging assent through subsequent action of the supervisors.

9th. No answer as to whether or not Ingersoll was agent for the Mississippi and Wabash Railroad Company when he applied for the bonds, etc.

The answer admits that Ingersoll applied for the bonds, etc., "claiming to act as agent for the company," but fails to answer whether or not he was in fact such agent.

14th. No sufficient answer as to whether the conditions of subscriptions have or had been complied with, so as to render them available.

No answer as to compliance with condition of seventy-four shares. As to $120,000, subscription of Fulton county citizens, no compliance set out. Not is any compliance set out as to the $100,000, subscription by citizens of McDonough county.

16th. No sufficient answer as to whose and what amount of subscriptions had been released and discharged at the date and producing to the clerk of said certificates; nor as to what has been done by the company, or the directors or commissioners thereof, in respect to such releases and discharges; nor whether any subscriptions had been receipted for, without payment in full.

17th. No sufficient answer as what amount of subscriptions were and are available.

No answer as to whether or not the proviso or condition, that "not more than five per cent. of such subscriptions shall be called for until the directors of the Mississippi and Wabash Railroad Company shall have reasonable assurance that sufficient funds can be secured to insure the completion of the whole road," was contained on all the subscription books of the company, at the time of the order and vote in reference to the Fulton county subscription, as charged in the bill.

19th. No sufficient answer as to whether or not the directors of said company, at the time of such certificates and the issue of bonds, had reasonable assurance that sufficient funds could be secured to insure the completion of the whole road.

23rd. No answer as to when the corporation bonds, paid or to be paid on subscriptions, are or are not to be payable, nor as to the market value of such bonds.

26th. No answer as to what subscribers' names and what amount of subscriptions have been erased from the stock books, and under what authority.

27th. No answer as to what the construction of said road would cost, nor as to how much of the amount the company have "reasonable assurance" can be secured, nor as to in what the reasonable assurance consists.

30th. No answer as to whether Ingersoll, Cline and Hasleton, have given out that they are, on behalf of the central division of said company, entitled to the bonds of Fulton county, to the further amount of $60,000, and that they intend to apply for the same at an early day.

33rd. That defendants have not, etc., answered the specific interrogatories (numbered from 1 to 18, inclusive) in the complainants' bill, nor any or either of them.

35th. The answer is not properly signed; the railroad company not having signed by any authorized officer or agent, nor used its corporate seal, and all the other parties having only signed by solicitors.

And the court overruled each and every of the said exceptions, and held the answer to be sufficient, to which the complainants excepted.

Afterwards, and on the 5th of March, 1858, the complainants filed a general replication to the amended answer; and on the same day a decree was rendered by the court, by agreement of parties, that the cause be heard and determined by the court, in vacation of McDonough April term, as of the then Fulton term, reserving the right to either party, however, to take further evidence to 10th April, 1858, to have a further continuance, upon sufficient cause shown, and fixing terms of appeal, etc.

At the McDonough April term, 1858, the parties appeared before WALKER, Judge, and the complainants moved for a continuance, predicating their motion upon the affidavit of Asoph Perry, one of the agents of complainants. After the formal parts, the affidavit proceeds in substance, as follows:

"That the complainants expect to, and this deponent believes they can, prove by Henry Farnam, William McAlpine and Norman B. Judd, that the two first are civil engineers, of long and large experience in building railroads, in different parts of the United States, including this State; that said Farnam has also been an extensive contractor and builder of railroads in this country, and that he has bought and sold, and negotiated large sums of county and city bonds, and other railroad securities, within the last several years, and has been and is now well acquainted with the value of such bonds and securities, and the amount that can be realized therefrom, and the cost of constructing railroads; by the said McAlpine, that he was for some time chief engineer of the State of New York, and is well acquainted with the cost, value, uses, and manner of constructing railroads, in this State; and by said Judd, that he has for the last eight or ten years been largely interested in, and engaged in, the construction and management of railroads in this State, and that he is well acquainted, from the practical experience, with what it

costs to construct and equip railroads in this State; and by the said Farnam and Judd, that they are acquainted with the country, and the resources for the support of a railroad, along the line of the contemplated Mississippi and Wabash Railroad; and by the said Farnam, McAlpine and Judd, that a reasonable price at which western city and county bonds to railroad companies, could be used in the construction of railroads, at and during last fall, would not exceed fifty per cent., and that for two or three years before that time, they could not be used for more than seventy-five per cent.; and that the average cost of equipping the Mississippi and Wabash Railroad, will average $25,000 per mile, from Warsaw, Illinois, to the east line of the State, in cash funds, or an equivalent thereto; that a reasonable cash basis to insure the construction of the whole line of said railroad, will not be less than $10,000 per mile for the whole distance; and a reasonable cash basis for the central division, in case the eastern division is not completed, and the western division is not built, to meet the central division at the Northern Cross Railroad, and in order to insure the completion of the same, will not be less than $12,000 to $15,000 per mile, and for a less portion thereof, not completed to the Illinois river, it would require at least $15,000 per mile; and that the value of stock in the whole road completed, from Warsaw to the east line of the State, would be equal to a fair average value of the best roads in the State; and that the dividends on such a road would be as much as on the best lines in the State; and that the stock and dividends in a road from the Northern Cross Railroad to Canton, would be nothing and entirely worthless; and that the stock and dividends in the central division, if completed, and not connecting with the eastern and western divisions, would probably be worthless, and at most of very little value; that the stock of the best roads in the State, until within a year past, was worth from 80 cents to $1.20, and since from 50 to 80 cents; and that the amounts of stock set forth as subscribed in the answer, would not, at any time since the charter of the company, furnish any reasonable ground to expect that the entire line, or the central division, could be completed." * * *

"That complainants expect to prove, and deponent believes they can prove, by Charles K. Hume, that he procured some $50,000 to $60,000 of subscriptions to the stock of the Mississippi and Wabash Railroad Company; and by Hiram Markham, that he obtained some $30,000 of subscriptions to the capital stock of said company; and by both of said witnesses, that such subscriptions were procured by them, not as agents of the company, but in behalf of the citizens of McDonough county, for the purpose of proposing the same to the western division

of said company; that the said subscriptions were all conditioned to be paid only in case the said railroad should be located by the way of Blandinsville and Bushnell, there to meet the central division of said road; that the said books and subscriptions still remain in the hands of the said Hume, Markham, and one Dan Markham, and have never been delivered to said company, or the western division thereof, or any of the officers of either, and have never been offered to them; and that the said subscriptions have never belonged to or been under the control of said company; and further, to prove by the said Markham, that certain obligations, executed by responsible persons, to grade and tie the road through McDonough county, east to Bushnell, in case the said road was to be located to Bushnell by way of Blandinsville, are still in the possession of the said Markham, and have never been delivered or offered to the company, or any division or officer thereof, and that the same are not obligatory or binding on the persons signing the same; and that the said subscriptions, so procured by said Hume and Markham, are the same that are claimed as the $100,000 subscription to the capital stock of said company, in McDonough county, in the answer of respondents, and in the affidavit of M. T. Hunt, thereto attached."

The remaining portions of the affidavit relate to the diligence exercised by the complainants, in order to procure such testimony, etc., as the foundation for a continuance.

The affidavit being read to the court, in support of the motion, objection was made to the allowance of the motion, by respondents, but the court overruled the objection, and decided that the cause should be continued, unless the respondents admitted the truth of the facts set forth in the affidavit; which they agreed to do, and the court thereupon refused to continue the cause, and the parties proceeded to trial.

The complainants introduced, and read in evidence, without objection, the deposition of *John W. Ingersoll*, in which he testified substantially as follows: That he resides in Canton, and is president of the board of commissioners of the central division of the Mississippi and Wabash Railroad; that he was elected one of the directors and vice-president of the company, in June or July, 1853, and has continued to hold such offices to the then present time; and in June, 1856, he was appointed a commissioner of the western division; has not been suspended in these offices.

That the Mississippi and Wabash Railroad line was surveyed in the summer of 1853, from La Fayette, Indiana, to Canton, Illinois; the old survey of the Peoria and Warsaw Railroad was adopted from Canton to Warsaw, and since then, various

surveys and locations have been made in different parts of the line of the road. From witness's knowledge, no survey, except as above stated, from the east line of the State to Bloomington. From Bloomington to Warsaw, the road has been surveyed and located, with the exception of the location between the Northern Cross Railroad and Carthage. Such location runs through the towns of Tremont, Pekin, Kingston, Canton, Cuba, Marietta, Carthage, Hamilton and Warsaw. The location from Bloomington, westward, runs to a point five miles east of Bardolph, on the Northern Cross Railroad. There is no definite location of the road from this point, five miles east of Bardolph, westward to Carthage. There are two surveys; can't state which the company will adopt. If the northern one is adopted, the road will run through Bushnell and Blandinsville, to Carthage; if the southern one, it will run through Bardolph, Macombe, and to Carthage. Bardolph is about six miles south-west of Bushnell.

That the length of the Mississippi and Wabash Railroad, is about two hundred and twenty or two hundred and thirty miles.

Witness knows of no local basis for building the road from Bloomington, east to La Fayette. The company have expended none of their means, in erecting a bridge across the Illinois river, at Pekin; witness knows of a bridge being built by the Illinois River Railroad Company, and witness has understood that by some arrangement, (don't know what) the Mississippi and Wabash Company can cross said bridge.

No depots or station-houses have been built along the line of said Mississippi and Wabash Railroad, but they have been established and contracted for, to be built at such points in Canton, Cuba, and in Harris township, as the directors shall determine upon and direct. The particular points in such places are not yet decided upon by the directors of the company, for the establishment of such depots and station-houses.

Kellogg and Kenyon's subscriptions of $100,000, made at the organization of the company, were released, and the subscription of the city of Pekin, of $100,000, substituted in lieu.

A majority of the subscribers to the Mississippi and Wabash Railroad stock, named in interrogatory 27th, of respondents' answer, are subscribers to the Jacksonville and Savanna Railroad stock, and by the resolution of the board of commissioners of the central division of the Mississippi and Wabash Railroad Company, they might be released to the amount of their subscriptions to the Jacksonville and Savanna Railroad Company, (amounting to about $50,000,) by forfeiting all payments heretofore made by them, (being generally five per cent.,) and applying to me (as the authorized agent) to erase their names

from the subscription books of the Mississippi and Wabash Railroad Company. Witness has not erased any names.

There was action by the board of directors of the Mississippi and Wabash Railroad Company, in June, 1856, at Peoria, in relation to releasing such subscribers. Witness's impression is that the action of said board, at that time was, that subscribers to the Mississippi and Wabash Railroad residing in Fulton county, were not to pay their subscriptions to said Mississippi and Wabash Railroad, until the two local directors of said road, residing at Canton, Fulton county, should call on them.

There is a general understanding in the community, based upon the action of the aforesaid boards of directors and commissioners, that the subscribers to the Mississippi and Wabash Railroad, who have subscribed to the Jacksonville and Savanna Railroad, were released from their subscriptions to said Mississippi and Wabash Railroad, to the amounts subscribed to the Jacksonville and Savanna Railroad.

The $50,000 subscriptions spoken of are not considered available means to the road, and it is not the intention of the officers of said company to collect the same.

About thirty miles of the central division (from Canton to the Northern Cross Railroad) are under contract. The entire length of that division is about fifty miles, and that portion between Canton and Pekin, (about twenty-two miles,) is not under contract.

It is the intention of the officers of the central division, either as an independent line, or in conjunction with the Peoria and Hannibal Railroad, to construct the said railroad between Canton and Pekin; and witness thinks we (officers of the central division) have reasonable assurance that the company will build the same. These assurances are, that thirty miles of railroad now under contract for completion and equipment, will form a good basis for expenditures for further continuances of the work. $50,000, subscription to the stock of the road, promised by the Kingston Coal Mining Company, to be subscribed. $175,000, subscribed by Peoria and Fulton counties, to the Peoria and Hannibal Railroad Company. The line of both said roads covers the same ground from Canton to a point opposite Pekin, which roads may be consolidated, or jointly use the same track. Said joint occupancy or consolidation has been a matter of conference between the directors of the two companies. The progress and completion of portions of the work on other divisions is a further assurance, and the increased private subscriptions that may be obtained when the work is about to be commenced. These are all the assurances I know of, that the company have of constructing the road from Canton to Pekin.

This part of the road has not been put under contract by the Mississippi and Wabash Railroad Company, nor by the central division thereof. No contract has been made between the Mississippi and Wabash Railroad Company, and the Peoria and Hannibal Railroad Company, to run on the same track.

Under our contract, the cost per mile to construct and equip the road between Canton and the Northern Cross Railroad, including rolling stock, depot, water-tanks, fencing and turn-tables, etc., is to be $19,000.

The available means belonging to the central division, 9th October, 1857, was about $75,000 of private subscription, and further pledges of private subscription dependent upon the point of intersecting the Northern Cross Railroad, and the further sum of $75,000, subscribed by Fulton county, (the subject matter of this suit;) and the further sum of $350,000 to $400,000, of the bonds of the central division of said company, agreed to be paid by the central division, and agreed to be received by the contractors in payment for their work. The contingent subscription referred to, is $15,000 to $20,000, subscribed in the vicinity of Bardolph, conditioned upon the road crossing the Northern Cross Railroad at that point, and a pledge of a portion of the town site, the value of which is unknown to the witness. The amount of subscription in vicinity of Bushnell is unknown to witness. The whole amount of private subscriptions belonging to the central division is about $135,000, including the conditional subscription at Bardolph. Would say that $10,000 of this is most available, over and above the $50,000 spoken of before. This statement of the available means of the central division includes the expenditures already made on that division.

On the 9th of October last, there was no contract between the central and eastern, and western divisions as to making connections, but conferences had been held in the matter.

The commissioners of the central division organized on or about the 6th of April, 1857, under the law dividing the road into divisions.

Witness was somewhat acquainted with the cash value of county and city corporate subscriptions to railroads, about 9th of October, 1857. At that time the market value was very much depressed. A short time before, they would command from 75 to 90 cents on the dollar; since then, up to the time of testimony, (March, 1858,) they have ranged from 40 to 60 cents on the dollar.

The board of directors of the Mississippi and Wabash Railroad Company, in June, 1853, cancelled and set aside the

subscriptions, made at the organization of the company, of the following persons and amounts:

John W. Ingersoll, $20,000; James H. Stipp, $20,000; Amos C. Babcock, $5,000; William Babcock, $20,000; A. L. Hasleton, $5,000; Thompson Maple, $20,000; William H. Rosevelt, $9,000,—they having been supplied by sundry persons in Fulton county, as per Exbibit F. of the answer of respondents. This was besides the release and discharge of Kellogg and Kenyon's $100,000 subscription.

The subscriptions to the Mississippi and Wabash Railroad Company, to the amount of about $100,000, in the vicinity of Fountain Green, Blandinsville and Bushnell, are upon the condition that the northern route, heretofore spoken of, shall be adopted; and the probabilites are that such route will be adopted.

On cross-examination by counsel for the respondents, the witness testified substantially as follows:

None of the subscriptions of Ingersoll and others, spoken of above as having been cancelled and discharged by the company in June, 1853, were mentioned in the answer of respondents as good and valid subscriptions, except the subscription of $9,000 by William H. Rosevelt, the release of which is not acknowledged by the commissioners of the western division to be good.

The deposition of *Edgar P. Buell*, taken at the same time, was then read in evidence, without objection, in which he testified substantially as follows:

Am a railroad contractor—reside in Canton. I have a contract in writing to build a railroad, now produced and attached to the depositions.

This contract is dated 8th July, 1857, and purports to be between the commissioners of the central division of the Mississippi and Wabash Railroad Company, and Edgar P. Buell and George Higby, under the name of E. P. Buell and company, and by which said Buell and company agree to build, construct and equip a railroad, equal in kind and work, etc., to the Illinois Central, from Canton, Fulton county, to the Northern Cross Railroad, in McDonough county, Illinois, etc., etc., and deliver the same by the 1st July, 1859, for $19,000 per mile of main track, and $8,000 per mile of side track—the payments to be made as follows:

Fulton county bonds, $75,000; cash, $150,000; balance in first mortgage bonds.

It is understood that the amount specified for cash payment is more than the cash subscription to the road, and if the commissioners of the central division are unable to raise the $150,000 cash, then they may substitute any amount not exceeding

$75,000, an equal amount of stock in said road, on first mortgage bonds, (as elected by Buell and company,) in lieu of cash, at the value of 75 per cent. on the dollar. The payments are to be made as the work progresses in cash, county bonds and stock in proper proportions. First mortgage bonds sufficient to cover the iron, rolling stock, and transportation, are to be furnished Buell and company, when procured and delivered by Buell and company.

The commissioners are to furnish the right of way.

Arthur Bell testifies in substance as follows:

Resides in Canton. Witness subscribed to the amount of $1,000 to the Mississippi and Wabash Railroad stock. In September or October, 1856, I made an arrangement with William Babcock, that if I would take $500 stock in the Jacksonville and Savanna Railroad Company, that I should be released from the $1,000 subscribed to the Mississippi and Wabash Railroad Company, by loaning the five per cent. I had paid in. I subscribed and paid the $500 to the Jacksonville and Savanna Railroad Company.

I got a letter from Dr. William N. Cline, in May or June, 1857, in which he stated that $500 of my subscription to the Mississippi and Wabash Railroad Company had been transferred to the Jacksonville and Savanna Railroad Company, leaving me owing $500 to the former company. I afterwards called on J. W. Ingersoll, who told me there was an official recognition by the board, of the acts of the agents making the transfers, and that I was released to the extent that said Babcock had represented to the officers of the Mississippi and Wabash Railroad Company. Dr. Cline's letter I think was signed as secretary of the company.

At the time of the agreement to release or transfer my subscription, I asked Babcock if he had any authority to act, and he said he had, and that the whole thing was dead, and I should never be called upon for the money. John W. Ingersoll recognized Babcock's acts.

On cross-examination, the witness stated: I was informed by Dr. Wm. N. Cline, that I was released from half of my subscription to the Mississippi and Wabash Railroad Company. Don't know whether it is in writing or not. John W. Ingersoll informed me also that I was released, but he didn't say for how much. Don't know whether or not my subscription has been erased from the books of the Mississippi and Wabash Railroad Company.

John Shinn testified in substance as follows:

Was present at a railroad meeting in Canton, when the Jacksonville and Savanna Railroad books were opened. I sub-

scribed $500 to the Jacksonville and Savanna Railroad on William Babcock's book, and he told me I was released from my Mississippi and Wabash Railroad subscription.

I have paid my Jacksonville and Savanna Railroad subscription, and have not been called on for my Mississippi and Wabash Railroad subscription, except the $25 paid at first. I paid part of my Jacksonville and Savanna Railroad subscription to David J. Waggoner, who told me he was authorized to release me from the Mississippi and Wabash Railroad subscription, and he went to Maple's book and came back and told me that my subscription was crossed off. Thompson Maple also told me I was released from my subscription to the Mississippi and Wabash Railroad Company.

Several others testified to similar facts.

James H. Stipp testified substantially as follows:

I was a director of the Mississippi and Wabash Railroad Company, released, I believe, in June, 1853, and have continued such director ever since, unless the act of the legislature, dividing the road into three divisions, repealed me out of office. I did have a hope of said road being built up to the 10th July, 1856. After that time, as a member of said board, as far as Canton was interested, I considered said road dead. At the same time it was the intention of the board to keep up the organization. If the act of the legislature, in January or February, 1857, dividing said road into three divisions, can be considered as resuscitating said road, it was then done, that being the first thing towards resuscitating it to my knowledge, after 10th July, 1856.

There was a meeting of the board of directors of said road, held at Peoria, I believe, on the 10th June, 1856. At that meeting a resolution was adopted, of which, I believe the following is a substantial copy:

"*Resolved*, That the stock subscribed in Fulton county, or by persons residing in Fulton county, shall not in any event be required to be paid in by them, or any part thereof, unless the director or directors residing in said county shall desire the collection thereof, nor until that portion of said road lying in said county shall be contracted for construction and completion; and that not until the happening of both of said events, shall said stock be deemed payable to said railroad company.

"*Provided*, That within thirty days from the date hereof, offers acceptable to the vice-president, and afterwards confirmed by the board in substance, shall be made for the construction of the road between Canton and the Illinois river, or Canton and Peoria, that then and in such case, the above resolution shall have no force."

That was the only thing done by the board toward changing stock from the Mississippi and Wabash road to the Jacksonville and Savanna road. The object of the resolution was, if there was not something done within thirty days, it was our intention at Canton to abandon the project of the Mississippi and Wabash Railroad, and go on to the Jacksonville and Savanna Railroad; and it was our intention not to call on the subscribers to the Mississippi and Wabash Railroad for their subscriptions who should subscribe a like amount to the Jacksonville and Savanna Railroad. I did give such subscribers assurance that their subscriptions to the Mississippi and Wabash Railroad would not be called for, if they subscribed to the Jacksonville and Savanna Railroad.

Said Mississippi and Wabash Railroad was abandoned by us at Canton, and the Jacksonville and Savanna taken up, for the reason that we could not raise the means for making a connection with Peoria, and we wanted to make a connection by railroad to some point, and believed we could make one with the Peoria and Oquawka Railroad. I think that under this arrangement something like $50,000 was subscribed to the Jacksonville and Savanna Railroad by those who had subscribed to the Mississippi and Wabash Railroad.

John W. Ingersoll and myself were the local directors in Fulton county, of the Mississippi and Wabash Railroad, in June and July, 1856, and there has been no change up to this time in the original board for said county.

I have never requested, expected, or desired the subscribers to the Mississippi and Wabash Railroad Company who have subscribed to the Jacksonville and Savanna Railroad, to pay the subscriptions to the former company, and I have never heard that Mr. Ingersoll had. Since the 10th July, 1856, I have not, in my capacity as one of the local directors of the Mississippi and Wabash road required or attempted to make any collection of subscriptions to the Mississippi and Wabash Railroad, and I have no knowledge of John W. Ingersoll having done so.

No portion of the Mississippi and Wabash Railroad lying in the county of Fulton, has been put under contract by the directors. Have been told by the commissioners of the central division, that that part of said road between Canton and the Northern Cross Railroad, has been put under contract.

Since the 10th June, 1856, there has not, to my knowledge, been any offers or propositions to said Mississippi and Wabash Railroad Company, to build said road between Canton and the Illinois river, or between Canton and Peoria, which were accepted by the vice-president and confirmed by the directors.

On the 9th of October, 1857, and at the present time, I should

think it would take $2,000,000 to give reasonable assurance to the directors to insure the completion of said Mississippi and Wabash Railroad. The company have not at any time, I think, since July, 1856, had reasonable assurance that sufficient funds could be raised to secure the completion of the whole road.

The complainants then read in evidence a stipulation by the parties, agreeing to the following facts:

That James Haines, the treasurer of said railroad company, (Mississippi and Wabash,) has no money belonging to said company in his hands.

That the commissioners of the eastern division of said road, have no funds in their hands belonging to said division.

That there has been no regular meeting of either the old or new board of commissioners of said division; that they have not elected any president, treasurer or secretary of the board, and that there has been no record left of any meeting, or of the proceedings of either of said boards.

That on the subscriptions, purporting to have been made by the county of Tazewell, no five per cent. or any other amount has been paid in to the company by said county, but that a mandamus is now pending to compel the said county to issue bonds to said company.

That at the same time that a vote was taken by said county, to subscribe said stock, the said county also voted for and against subscribing $25,000 to the eastern extension of the road crossing at Peoria, called the eastern extension of the Peoria and Oquawka Railroad.

That the city of Pekin has taken stock in the Illinois River Railroad to the amount of $100,000, and $30,000 in the erection of a bridge across the Illinois bottom, and issued her bonds for the same.

That the county of Tazewell has voted $100,000 to the capital stock of the Petersburg and Tonica Railroad Company, which vote was taken in the year 1857.

That the Mississippi and Wabash Railroad Company have not paid anything on the building of the railroad bridge across the Illinois river, at Pekin, but that the work done on the same, was done by the Illinois River Railroad, and that the said Mississippi and Wabash Railroad have no contract or agreement for the use of the same.

That William B. Parker, as clerk of the city of Pekin, has access to all the records of the city, and that we will make no objection to the form or substance of the certificate thereto attached.

That the board of commissioners appointed by the board of directors of the Mississippi and Wabash Railroad Company,

have purchased the grade of the Bloomington and Pekin Railroad Company, and paid five or six hundred dollars. That they have also caused the line of said Mississippi and Wabash Railroad from Pekin, to the east line of Tazewell county, to be surveyed ; and also caused an estimate of the cost of construction of the same to be made ; and also advertised for the letting of the same. That the only record or minute of the same, is the minutes or memorandum of W. S. Mauss, one of said commissioners, for the purpose of reporting the same to the board of directors, or to the board of commissioners of the eastern division.

And the complainants then read in evidence, without objection, the following copy from the records of the Mississippi and Wabash Railroad Company :

" *Resolved*, That should this road, or our successors, not permanently locate said road through the city of Pekin and Canton, the subscriptions made by the citizens of Tazewell and Fulton counties aforesaid to the stock of this road, shall, at the option of said subscribers, be declared null and void, and the five per cent. installment paid thereon be refunded to said subscribers, with ten per cent. interest."

" *Resolved*, That the subscription made by Benjamin Kellogg, Jr., and D. P. Kenyon, for one hundred thousand dollars to the capital stock of said company, may be cancelled, and the corporate subscription of Pekin substituted therefor."

" *Resolved*, That the subscriptions of John W. Ingersoll, James H. Stipp, Amos C. and Wm. Babcock, A. L. Hasleton, and Thompson Maple may be cancelled whenever the pledged subscriptions of sundry citizens of Fulton county shall be regularly made upon the books of the company."

" *Resolved*, That the route of Pekin and Canton be adopted, if a right of way can be reasonably obtained, and a favorable line is indicated by the surveys."

" The president and vice-president now report that it appears that private subscriptions to the stock in Fulton county, to an amount exceeding the subscription of John W. Ingersoll, for $20,000, James H. Stipp, for $20,000, Amos C. Babcock, for $5,000, W. Babcock, for $20,000, A. L. Hasleton, for $5,000, Thompson Maple, for $20,000, and William H. Rosevelt, for $10,000, amounting in all to $100,000. It is therefore ordered by the road, with the assent of the said John W. Ingersoll, James H. Stipp, Amos C. and Wm. Babcock, A. L. Hasleton, Thompson Maple, and Wm. H. Rosevelt, that the above named subscriptions be, and the same are hereby cancelled and set aside, except $1,000 of the subscription made by Wm. H. Rosevelt."

"*Resolved*, That James Kuykendall of Fulton county be and is hereby released from any liability on his subscription to the stock of the Mississippi and Wabash Railroad Company, he forfeiting his five per cent. already paid us."

The following meeting was held at Peoria, the 10th of June, 1856, and was the last meeting held by the board.

"Board met pursuant to adjournment.

"*Resolved*, That the stock subscribed to the Mississippi and Wabash Railroad Company by persons residing in the county of Fulton, shall not in any event be required to be paid by them, or any part thereof, unless the director or directors residing in said county, shall desire the collection thereof, nor until that portion of said road lying in said county, shall be contracted for construction, and that not until the happening of both of said events, shall said stock be deemed payable to said railroad company. Provided, that within thirty days from date hereof, offers acceptable to the said vice-president, and afterwards confirmed in substance by the board, shall be made for the construction of the road between Canton and the river, or Canton and Peoria, that then and in such case, the above resolution shall be of no force."

The parties agreed that the last meeting held by the directors of the Mississippi and Wabash Railroad Company, was on the 10th June, 1856, at Peoria, and that the last above order is the last entry appearing on the records of the proceedings of the company, which was of that date.

The complainants then called upon respondents in open court, to produce all the books of subscription to the capital stock of said company, in their possession or control, and they having produced certain books, their contents were read in evidence by the complainants:

On Book No. 1, opened at Pekin, July, 1853, $2,100, are subscribed, conditioned that the road is located through the city of Pekin.

Also, on the same book, subscriptions are made to the amount of $76,000, without condition, including a subscription of $75,000, in the name of Tazewell county, by the county clerk.

A copy of the above subscription book was read in evidence, by agreement of parties.

On Book No. 2, opened June, 1853, there appears to be subscribed, without condition, and chiefly by attorney, $276,300, including the following: A. C. Babcock, $5,000, Thompson Maple, $20,000, Benj. Kellogg, Jr., $75,000, James H. Stipp, $20,000, Wm. Babcock, $20,000, D. P. Kenyon, $25,000, John W. Ingersoll, $20,000, A. L. Hasleton, $5,000, W. H. Rosevelt, $10,000, city of Warsaw, $25,000; also including $7,500, the

names of the parties subscribing which, are cut out of the book; also $2,000, the name of the person subscribing which, is scratched off the book.

The same book also contains further subscriptions to the amount of $2,800, without condition.

Book No. 3, contains an agreement to subscribe $5,000, without condition.

Book No. 4, (Bloomington) contains subscriptions to the amount of $48,600, conditioned "that no additional payment over and above the five per cent. now paid, shall be made till a sufficient amount of stock is subscribed *bona fide* to insure, in the opinion of said directors (of the Mississippi and Wabash Railroad Company), the building of the road, and the placing of the entire work under contract."

This book also contains the subscription of $50,000, by the city of Bloomington, through the mayor, payable in seven per cent. city bonds, at twenty years from their date, conditioned that said bonds shall not be issued, however, till a sufficient aggregate amount of stock is *bona fide* subscribed to insure the building and equipment of the entire road.

Subjoined to the foregoing subscription list, is an agreement that they will pay, of the above subscriptions, $7,400, without any conditions or restrictions, except that the money shall be called for only as other subscribers are required to pay, and shall be expended on the line between Pekin and Bloomington.

One of the books opened at Canton, July 1st, 1853, contains subscriptions to the amount of $41,850, upon the proviso that "said railroad is located through the town corporate of Canton, and a permanent depot is established and maintained by said company therein, and further provided, that not more than five per cent. of our subscriptions shall be called for until the directors of said company shall have reasonable assurance that sufficient funds can be secured to insure the completion of the whole road." $6,000 of the above subscription (by the Babcocks) is also subject to the condition that "the road is located through Utica, and a side track and depot is built at or near Utica, at the most convenient point for the Copperas Creek business."

Another book opened at Canton, 1853, dated 1st July, 1853, contains subscriptions to the amount of $21,900, subject to the same provisos as those last above quoted; $100 of the above is payable on the completion of the road.

On each of the above mentioned Canton books, there are several subscriptions, in addition to those included in the above amounts, but which appear to be erased from the books, by ink lines drawn through them, etc.

The complainants then called on the respondents to produce a record of the proceedings of the commissioners of the central division, since their organization, which they did, and the complainants offered and read in evidence, without objection, the following order:

"At the first meeting of the commissioners of the central division of the Mississippi and Wabash Railroad Company, held in the city of Canton, on Thursday, the 7th day of May, 1857,

"On motion, John W. Ingersoll was elected president, and W. N. Cline, secretary of said Board.

"On motion, the following preamble and order were adopted:

"Whereas, during the temporary partial suspension of the Mississippi and Wabash Railroad Company the last eighteen months, certain subscribers to the stock of said road in the city of Canton and vicinity, subscribed to the stock of the Jacksonville and Savanna Railroad, with the understanding implied, that they would be released from their subscriptions to like amount in the Mississippi and Wabash Railroad;

"It is therefore ordered, that subscribers to the stock (in Canton and vicinity) of the Mississippi and Wabash Railroad, who have heretofore subscribed to the stock of the Jacksonville and Savanna Railroad, are hereby released (if they so desire) from the subscription heretofore made to the stock of the Mississippi and Wabash Railroad, to the same amount they have subscribed to the said Jacksonville and Savanna Railroad.

"Provided, persons so released forfeit all payments heretofore made to the stock of the Mississippi and Wabash Railroad; and John W. Ingersoll is hereby authorized to erase the names of such subscribers from the books of said Mississippi and Wabash Railroad Company, in accordance with the provisions of the foregoing order."

And in the consideration of the evidence the court decided that the statements in the affidavit of Asoph Perry for a continuance, and admitted by the respondents, were not to be taken as absolutely true, but were to have the same weight as if such facts had been sworn to by the witnesses named therein, and were liable to be contradicted or qualified by other evidence; to which decision the complainants then and there excepted.

And the court then dissolved the injunction, and dismissed the bill, and rendered a decree to that effect as of the February term, 1858, of the Fulton Circuit Court, in pursuance of the decree then entered; to which the complainants excepted.

The complainants below now assign the following errors in this court:

1st. The Circuit Court erred in overruling complainants' exceptions filed to the original joint answer of the Mississippi and Wabash Railroad Company, John W. Ingersoll, William N. Cline and A. L. Hasleton.

2nd. The Circuit Court erred in overruling complainants' motion for a rule on respondents' solicitors to strike out the interlineations, interpolations, amendments and alterations made in the original answer aforesaid, and the affidavit subjoined by way of making an amended answer for the parties named in the first assignment of errors joined by Thompson Maple, and to restore the answer and affidavit to their original condition.

3rd. The Circuit Court erred in overruling complainants' motion to strike from the files the paper purporting to be the amended answer of the Mississippi and Wabash Railroad Company, John W. Ingersoll, William N. Cline, A. L. Hasleton and Thompson Maple.

4th. The Circuit Court erred in overruling complainants' exceptions to said amended answer.

5th. The Circuit Court erred in admitting and considering improper evidence.

6th. The Circuit Court erred in its decision as to the statements in the affidavit of Asoph Perry for a continuance.

7th. The Circuit Court erred in dissolving the injunction and dismissing the bill, and rendering the decree therefor.

8th. The proceedings below were otherwise irregular, informal, and insufficient.

GOUDY & JUDD, for Appellants.

WILLIAMS, GRIMSHAW & WILLIAMS, and C. L. HIGBEE, for Appellee.

BREESE, J. Very many important questions are presented by this record, and ably argued by counsel; but we do not deem it necessary to notice all of them, inasmuch as we are satisfied one of them alone is quite sufficient to determine the case in favor of the appellants. There are, however, some questions of practice determined against the appellants, which ought to be noticed for the government of future cases in chancery, and which, we think, were erroneously determined, and might, of themselves, be sufficient to reverse the decree.

It appears, by the record, that the answer of the individual defendants was sworn to. The answer of the corporation was not in the mode required by law in such cases. Formerly, it was uncertain whether defendants, as a body politic and cor-

porate, were to answer in a suit against them in equity, under an oath; but now, it is well settled, that a corporation aggregate must make its answer, not as in common cases, under oath, but under the common seal. Angel & Ames on Corporations, 595. In the case of the *Fulton Bank* v. *The New York and Sharon Canal Company*, 1 Paige Ch. R. 311, Ch. Walworth said: "Corporations answer under their seal, and without oath. They are, therefore, at liberty to deny everything contained in the bill, whether true or false. Neither can any discovery be compelled, except through the medium of their agents and officers, and by making them parties defendants. But no dissolution of an injunction can be obtained, upon the answer of a corporation, which is not duly verified by the oath of some officer of the corporation, or other person, who is acquainted with the facts contained therein."

To the same point, is the case of *Brumly* v. *The Westchester Manufacturing Company*, 1 Johns. Ch. 366.

It is now the usual practice to make such of the individual members of a corporation parties, as are supposed to know something of the matters inquired after in the bill, and such was done in this case, two of the directors having been made defendants. They answered jointly with the corporation, under oath, and another defendant, Maple, separately, without oath; and on certain exceptions, filed and allowed, to the joint answer as well as to the separate answer of Maple, the respondents asked and obtained leave to amend their answer, which was done by erasures and interlineations of the original answer, and by attaching separate pieces of paper to it, to be read as parts of the answer; and then, by interlining and altering the original affidavit, the jurat was erased and a new one attached, and when so amended, the affidavit was re-sworn. On this appearing, complainants moved for a rule on the respondents, to strike out the interlineations and interpolations, and to restore the answer and affidavit to their original condition, which the court refused, and complainants excepted.

The practice in chancery, in this State, is understood to be substantially the same as in the English chancery, modified and changed, in some particulars, by our statute. In both, exceptions are treated and considered as allegations in writing, stating the particular points or matters with respect to which the complainant considers the answer scandalous or impertinent, or not sufficiently responsive to the matters charged in the bill. In his exceptions, he is to state particularly such parts of the bill as he conceives are not fully answered, and ask that the defendant may, in such respect, put in a full answer to the bill. Justice Story held, in *Brooks* v. *Byam et al.*, 1 Story C. C. 296, that

an exception to an answer for insufficiency, should state the charges in the bill, the interrogatory applicable thereto, to which the answer is responsive, and the terms of the answer *verbatim*, so that the court may see whether it is sufficient or not. 1 Newland Pr. 259. And it is a rule that such exceptions can only be sustained, when some material allegation, charge or interrogatory in the bill, is not fully answered. But it is said, exceptions will not lie to the answer of corporations, nor to an answer to which the oath of the defendant is waived, because such answers are not evidence for the party making them. 2 Daniel Ch. Pr. 879; 1 Barb. Ch. Pr. 177; *Bartlett* v. *Gale*, 4 Paige Ch. 504. So that in this case, the court below should not have regarded any exceptions taken to the answer of the corporation, purporting to have been made on oath, except as to the individual directors jointly sued with the corporation, nor to the unsworn answer of Maple. When exceptions are allowed, and the answer is adjudged insufficient, the defendant must file a further answer, within such time as the court shall direct, and on failure so to do, the bill may be taken for confessed; and if such further answer is also adjudged insufficient, the defendant must then file a supplemental answer, and pay all costs attendant thereon; if that is adjudged insufficient, the defendant may be proceeded against for a contempt. (Scates' Comp. 141.) The further answer required, we understand to mean a formal answer, specially directed to the matters excepted to, and to supply the deficiency of the first answer. We do not understand that the original answer is to be changed by erasures, interlineations, or in any other manner, except for scandalous or impertinent matter, or the jurat altered. They must remain as they were originally, as an unmutilated and unaltered file of the court; it must be preserved in its original style, so that it may be used as evidence, if necessary, in another case, or that perjury may be assigned upon it. We know the practice has obtained, on the circuits, to amend bills and answers, and declarations and pleadings, in this manner, and there is not so much objection to it, when such papers are not sworn to. It will be seen by the 22nd section, above cited, that on allowance of exceptions, it is not contemplated that the original answer shall be amended; the rule is, for "a further answer," which further answer must be wholly disconnected in fact, from the original answer, and must be in proper form, and on separate paper. 2 Daniel Ch. Pr. 912, (note.) The court even, cannot order an answer to be taken from the file, after exceptions to it, notwithstanding the answer be evasive. 1 Barb. Ch. Pr. 181. In mere matters of form, or mistakes of dates, etc., an answer can be taken from the file and amended, but it is not allowed to make any material

alteration in it, (2 Daniel Ch. Pr. 911, note 1, where all the authorities are referred to.) This objection was well taken, and should have been allowed.

It is further objected, that after the original answer was thus amended, by erasures, etc., it was not entitled properly, and the seal of the corporation was not attached.

Whereupon the complainants moved to strike the amended answer from the files, for the following reasons: First, that the paper is not properly entitled for an answer; Second, it does not show to what bill of complaint it was filed for an answer; Third, the answer is not signed by the individual defendants, in their proper hands, respectively; Fourth, the company have not signed the same by its chief officer, nor has the seal of the corporation been affixed; Fifth, the original answer has been erased in part, interlineations made therein, and other alterations, to make an amended answer, without the consent of the court; and for other informalities not specified. The court denied the motion, and the complainants excepted.

All the reasons given in support of this motion were good, except the third, for we suppose it is not absolutely necessary each individual defendant should write his own name to an answer. It is sufficient if his name is there without objection from him.

As to the first and second reasons, the paper purporting to be an answer, does not refer to any bill as pending. This is held to be good ground for taking an answer from the file for irregularity. 2 Danl. 841. So also, where the plaintiff was misnamed in the title, an order was made to take the answer off the file, and for process of contempt to issue. Ib. An answer with these defects is a nullity, and in the notice of the motion to take it from the file, it must not be called an answer, but "a certain paper writing." Ib. This strictness, perhaps, would not be required in our practice, yet we will require that the answer shall clearly indicate to what bill it is an answer. For reasons already given, the fourth and fifth objections should have been sustained, and it was error to disallow them.

On the refusal of the court to take the amended answer from the file, the complainants presented the same exceptions as to the original bill, some of which should have been allowed, which were disallowed, especially those numbered nine, fourteen, sixteen, seventeen, twenty-third, twenty-sixth, and twenty-seventh. The thirty-third exception is to the want of direct answers to the specific interrogatories of the bill.

Of the nine distinct parts which make up a bill in chancery properly framed, several of them are not considered as indispensable. As in amicable suits, the fourth, charging combina-

tion, etc., is always omitted, and so is the charging part often omitted, and is not indispensable in any case, for the stating part of the bill ought fully to unfold the complainant's case, and the charging part in general contains little more than an enlargement of the stating part. It is useful as anticipating the defense, and is in effect a special replication. Nor is the interrogating part absolutely necessary, for if the defendant fully answers to the matters of the bill, with their attendant circumstances, or fully denies them in the proper manner on oath, if the oath be not waived, the whole object of the special interrogatories is completely accomplished. They are, however, quite useful to sift the conscience of the defendant, and are quite universal in practice, except in amicable suits, and in cases where the oath is waived. In this case, imperfect and insufficient answers having been given to many of the charges and statements of the bill, every opportunity should have been afforded by the court, to complainants, to "sift the consciences" of the defendants, and should have compelled them to answer fully to each specific interrogatory, the interrogatories being based upon the charges and statements in the bill. When the answer is full, it is not necessary to answer the interrogatories. In our practice, where the oath of a defendant is waived, answering interrogatories, or failing to answer them, is of but little importance, as there is no conscience in the matter. Here the defendants most interested, the two directors, answered under oath, and they should have been required to answer to each specific interrogatory, inasmuch as their answers to the charges and statements of the bill, were not as full and direct as they might have been. The peculiar boast of equity is its efficiency when the common law fails; and this efficiency is mainly attributable to the virtues of its searching interrogatories, by which the defendant is, or is expected to be, purged. When facts or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction. 3 Bl. Com. 437.

Another objection was taken to the ruling of the court on the motion of complainants to continue the cause on the affidavit of Asoph Perry. The defendants, rather than the cause should be continued, admitted the affidavit, the court deciding that the statements in the affidavit were not to be taken as absolutely true, but were to have the same weight only as if such facts had been sworn to by the witnesses named in the affidavit, and were liable to be contradicted or qualified by other evidence.

We think, on principle, this view of the court was correct, as all parol testimony should be open to contradiction, and to

rebuttal, but this court, having at a very early day, established a different rule by declaring that when an affidavit for a continuance is admitted by the opposite party, the facts stated in it cannot be contradicted, and that adhered to up to this time, we do not feel justified in disturbing it. *Willis* v. *The People*, 1 Scam. R. 402.

Having disposed of the minor questions in the case, we will now proceed to state the meritorious grounds on which the decree should be reversed.

It appears the Mississippi and Wabash Railroad Company was chartered by an act of the general assembly of this State, approved February 10th, 1853, (Laws of 1853, p. 73,) by that style and name, and was authorized to construct and equip a railroad from Warsaw, in Hancock county, on the most eligible route eastwardly, by the way of the city of Bloomington, to the east line of the State, with the privilege of connecting by contract with any railroad in the State of Indiana, at any point within twenty miles north or south of the latitude of Bloomington.

On the 14th February, 1857, (Laws 1857, page 1053,) the general assembly passed an act amendatory of this charter, reciting "that for the purpose of facilitating and more effectually securing the early construction of certain portions of the Mississippi and Wabash Railroad line, the said railroad line, with all the stock, work, subscriptions, franchise and effects thereunto belonging, are hereby divided and set apart into three divisions," describing them. The western being that part of the line between Warsaw and the Northern Cross Railroad—the central being that part between the Northern Cross and the Illinois river, and the eastern the remainder, being that part of the original line running between the Illinois river and the east line of the State.

The second section provides that each of the divisions shall be under the control of three commissioners, to be annually elected by the stockholders, private and corporate, and that the respective boards of commissioners thus elected for each or either division, shall have and exercise all the powers of the original or whole board of directors of said company, upon and pertaining to the contracting, constructing and completing their respective divisions of said road, and operating the same, and shall hold their offices until their successors are duly elected and qualified.

The third section provides for the equitable division of the liabilities of the whole company, theretofore incurred, between the different divisions, each division to liquidate its just proportion of the same, and each division to be capable of contract-

ing, and be liable and alone responsible for its own debts or obligations contracted; and nothing herein contained is intended, or to be construed, to invalidate or annul any contract, agreement or subscription made by or to said railroad company.

The fourth section provides that the road as located, from Warsaw by way of Hamilton to Carthage, shall not be materially changed, but that there shall be a branch, or an extension of said road from Hamilton to the easterly shore of the main channel of the Mississippi, opposite the old limits of the city of Keokuk, Iowa, with a proviso for additional subscriptions to make the extension. The fifth section provides that the line of the central division, shall be located and constructed by Canton, in the county of Fulton, and may be extended and terminate at Peoria.

The sixth provides that the western and central divisions may each or either contract and connect with the Northern Cross Railroad, and the western division may contract or connect with the Warsaw and Rockford Railroad, to build, equip and operate the road between Hamilton and Warsaw.

This amendatory act, presents the questions on which we decide the case, and they are,—does this act make a fundamental change in the charter—is it so extensive and radical, as to work a dissolution of the original contract? Or, is it merely auxiliary to the original design, and has it been legally accepted?

This is the test to be applied to alterations of all charters. When the vote of Fulton county was taken, to subscribe stock, the charter provided for one continuous road across the State, from the Mississippi river, on the west, to the state line, on the east, two hundred and thirty miles in length, and traversing by far the most beautiful and fertile part of the State. An enterprise, it must be confessed, of great magnitude, and promising facilities for a vast and extended commerce and intercommunication with distant markets, an object well calculated to claim and receive the favorable regard of the people of a county lying on its track. This may safely be taken as one of the inducements to the vote for a subscription to its stock by the people of Fulton county. A great thoroughfare across the State, presided over by an intelligent and competent directory, whose management and counsel would be equally beneficial to all portions of it, and large dividends resulting, were objects, compared with which, a county debt of seventy-five thousand dollars, would be quite insignificant. It was for such a road, so to be governed and controlled, the people voted, whose dividends, when completed, as the proofs show, would equal those of the best lines in the State. The presumption always is, that such investments are made with a view to the profits to be derived from the stock

subscribed, as an investment. The expected dividends are to be considered as the moving cause of subscription to the stock.

It is also in proof, that the dividends on the central portion of this road, if completed and not connected with the eastern and western divisions, would probably be worthless, and at most of but little value. There is no proof in the record, that any arrangements have been made to connect the different divisions, and no assurances that they will be connected; and if there should be, there are no assurances of such running arrangements on the several divisions as to make the several divisions a continuous, through line of travel; and even if there were, Fulton county would be a stockholder, not in a line of road the eastern and western divisions of which would be making good dividends, but in the central portion of it only, in which no dividends may be declared. As to Fulton county then, the great enterprise, originally contemplated, has dwindled down to a mere local road fifty miles in length, having no important termini, the stock in which, as appears by the record, would be of a nominal value only. We cannot but think, in this view, that the alteration of the original charter, by dividing this great road, was fundamental, and the stockholders released from their subscriptions.

The facts in the record show that a great and most important and very promising line of travel has been broken up into fragments—each fragment deprived of the united counsels of a board of directors for the whole line, and their several interests confided to local commissioners, and the several divisions in no way bound or pledged to prosecute the original enterprise. By the amendment, the plaintiffs have an interest in fifty miles only of the road, and none in the remaining one hundred and eighty miles from which the profits may be derived. These fragmentary parts have no necessary connection with each other, and is such a disposition of the original corporate powers of the company as to amount to its dissolution. At any rate, it is not the corporation in which the plaintiffs intended to become stockholders.

But it is argued, that the company has accepted the alteration, and such acceptance is binding on the subscribers. If this is so, the stockholders would not be liable.

In the cases referred to, (*Barret* v. *The Alton and Sangamon Railroad Company*, 13 Ill. R. 504; of *Sprague* v. *The Illinois River Railroad Company*, 19 ib. 174, and *The Illinois River Railroad Company* v. *Zimmer*, 20 Ill. R. 654,) it is nowhere intimated that fundamental changes, by the legislature, shall not release subscribers to stock, though those changes in the charter be accepted by the directors. It is only such alterations as may be fairly regarded as auxiliary to the original design.

But has this amendatory act of 1857 been accepted by the original company? The record does not show that it has. The eastern division had not accepted it previous to the commencement of this suit, and the western and central divisions by user only—by electing commissioners as provided by the act. The old corporation had not had a meeting for several months before the passage of the act of 1857, nor since, so far as the record shows; and it would seem, that all parties interested considered the original project abandoned, subscribers to stock having been permitted to erase their names from the stock books, and to appropriate their subscriptions to the Jacksonville and Savanna Railroad. No acceptance by the old company of this act is shown, and it is indispensable that this should be shown. This transmutation, by this amendatory act, must be sanctioned in some mode known to the law, by the original company. Neither one of the new corporations, nor could all of them, acting separately, ratify and accept the change.

The demand for these bonds is made of the plaintiffs by J. M. Ingersoll, assuming to be the president and one of the commissioners of the central division of the Mississippi and Wabash River Railroad Company. We cannot but consider, for the reasons given, this company thus acting, as another and different company from the one to which the subscription was made, and there is nothing appearing on the record to show that it has succeeded to the rights of the original company in any form authorized by law. There is no evidence of the acceptance of the provision in the amendatory law, authorizing such succession of rights. For anything that appears, the old company in its original form is still in being, and may demand these bonds. We are clearly of opinion, the central division of the road is not entitled to the bonds, and accordingly reverse the decree entered in the cause.

Another objection has been made by complainants which we deem necessary to notice now. It is as to the manner in which this question of subscription to the stock of this road was submitted to the vote of the people.

By the act of November 6, 1849, authorizing counties and cities to subscribe stock to railroad companies, (Scates' Comp. 950,) it is provided in the 1st section, that whenever the citizens of any city or county in this State, are desirous that said city or county should subscribe for stock in any railroad company, already organized or incorporated, or hereafter to be organized or incorporated, under any law of this State, such city or county may, and is hereby authorized, to purchase or subscribe for shares of the capital stock in any such company, in any sum not

exceeding one hundred thousand dollars, for each of such cities or counties.

The 4th section provides that no subscription shall be made, or bonds issued, unless a majority of the qualified voters of such city or county, shall vote the same. Thirty days' notice of the time of voting is to be given, "requiring said electors of said counties or cities, to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock, which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear," etc.

The order made by the board of supervisors of Fulton county, under this law, does not seem to be in strict conformity to it. The law evidently contemplates a vote for or against subscription, to some one company only, specifying the company. The order is for a subscription to the Mississippi and Wabash River Railroad Company, and the Petersburg and Springfield Railroad Company, seventy-five thousand dollars to each.

This is not only not pursuant to the law, but is manifestly unfair. All elections, as well for measures as men, should be perfectly free, uninfluenced by any consideration, other than the merits of the individual man or measure proposed. We boast of the freedom of the elective franchise, should we not strive to swell the boast by its purity also? A single, isolated measure, such as a railroad, may not unite a majority of a county to whom it is proposed. It may favor, if constructed, one portion of a county more than another, and thereby be prevented from receiving a clear majority vote, such as the law clearly contemplates shall be given. Is it fair, in order to accomplish this object, to attach another measure to it, to be voted on at the same time, which may benefit the opposing portion of the county? The law never intended that two roads should be coupled together, and the people forbidden to vote for one if they did not also vote for the other, the one road being really a bribe offered for votes for the other. The truth is, the voters of Fulton have never had an opportunity to vote, and never have voted this subscription, for the question was at no time distinctly before them. The question before them was, will you vote for a subscription to two roads? Neither road has received the approving vote of the people, and until that is done, until the naked single question shall be fairly presented to those voters, they ought not to be bound, or injuriously affected, by any such jockeying management and log-rolling. By this system, condemned as it has always been, by the moral sense as well as

sense of justice, of the whole country, it should at this day find no favor in the courts. We do not hesitate to say, this proposition to vote on two roads at the same time, was not authorized by the law, and is a fraud on the people.

This tacking one measure upon another, is unjust in another view, as it gives the County Court power to weigh down a popular single measure, by attaching odious measures to it, and thus virtually depriving the people of their right to vote on the one measure, the success of which would greatly promote their interests.

Such maneuvering should be condemned everywhere, as unfair and unjust, and we so regard it. The order made by the board of supervisors, in thus obtaining the vote of the people, is considered as unauthorized by the act.

The decree of the Circuit Court is reversed.

Decree reversed.

DECISIONS

OF

THE SUPREME COURT

OF THE

STATE OF ILLINOIS,

APRIL TERM, 1859, AT OTTAWA.

HENRY JUMPERTZ, Plaintiff in Error, *v.* THE PEOPLE, Defendants in Error.

ERROR TO COOK.

The genuineness of hand-writing cannot be proved or disproved, by allowing the jury to compare it with other writing of the party, proved or admitted to be genuine.

The practice of experiments in a capital case before the jury, for the purpose of illustrating whether a deceased person could commit suicide by hanging upon a screw or hook, inserted in a door, and leaving the door so experimented upon to be exhibited to the jury during the recess of the court, should be permitted with great caution.

It is irregular for the counsel for the people to introduce testimony in chief, in a capital case, to show that the person murdered, was of a cheerful and healthy condition of mind, and not inclined to commit suicide; although the counsel for the prisoner had stated that their line of defense would be to establish such inclination; such testimony should have been offered as rebutting, after the case for the defense had been closed.

A court should admit proof of the declarations of a murdered person, intended to show the sanity of such person, under great precaution, in order to avoid improper influences upon the jury.

If a juror sworn in a capital case is permitted to be separated from his fellows, a special order authorizing the separation should be entered of record, and the juror placed in the charge of an officer, who should be specially sworn not to permit the juror to go out of his sight and hearing; he should also be sworn not to converse with him about the trial himself, or permit others to do so, and to cause the juror to return as soon as practicable.

In a capital case, the jury should not be permitted to separate; if they do, it will be a ground for a new trial, unless it is made to appear that the prisoner could not by any possibility have been prejudiced by the separation.

Jurors impanneled in such a case, should not be permitted to eat with others at the public table of an hotel.

This was an indictment for the murder of Sophie Werner. The bill was found in the Cook Circuit Court, at the June special term thereof, A. D. 1858. The prisoner, Jumpertz, was arraigned, and plead not guilty, and the cause was continued. In September following, the indictment was certified by the clerk of the Circuit Court, to the Cook County Court of Common Pleas. In November of the same year, said indictment, with a transcript of the record of the proceedings in the Common Pleas, was refiled in the Circuit Court, which record is substantially as follows:

At a regular term of said Cook County Court of Common Pleas, commenced on the second Monday, (being the 13th of September,) in the year 1858, and on the 20th day of September, in said term, the following proceedings in said cause were had:

The People of the State of Illinois, *vs.* Henry Jumpertz. } *Indictment for Murder.*

And now on this day came the said People by Carlos Haven, their attorney, and on his motion, it is ordered that this cause be continued to next term.

That afterwards, the said cause stood for trial at the regular trial term of the said Circuit Court, in November, 1858. That at the trial term last aforesaid, the said Circuit Court continued the said cause, with all the other criminal business, until the January term, 1859—a term specially called for criminal business.

That at the time of the said last continuance of the said cause, neither the prisoner nor his counsel were present, nor had at the time any knowledge of the order.

And afterwards, on the 6th day of January, 1859, the said defendant filed in the said court his motion, in writing, as follows, to wit:

The People of the State of Illinois, *vs.* Henry Jumpertz. } *Indictment for Murder.*

The defendant, Henry Jumpertz, moves the court:

1st. To set him at liberty, and discharge him from further imprisonment under said prosecution, etc.

2nd. To set him at liberty, and discharge him from further prosecution on the indictment against him for the murder of Sophie Werner.

And assigns the following reasons:

That he has been imprisoned on said charge since 26th of May, 1858.

That said cause was put at issue at the June term, 1858. That at the said June term of this court, and at the regular

September term of the Cook County Court of Common Pleas, in same year, the said cause was continued, on the motion of the prosecuting attorney, on behalf of the People; and that the same stood for trial at the November term of this court, 1858, but was continued, and that all of such continuances were without the consent of the defendant. That three terms of said courts, at either and each of which said defendant might have been tried, had passed without his having been tried, and without his, said defendant, having moved for or consented to any continuance, during all of which time he had been imprisoned without bail.

And on the hearing of the said motion, the said defendant, by his attorney, and the said Carlos Haven, in behalf of the People, filed their written stipulation, in the words and figures following, to wit: "That the defendant, Henry Jumpertz, was arrested in May, 1858; that he was indicted, and pleaded thereto at the June term of the Cook County Circuit Court, 1858; that the cause was continued on motion of the People's attorney, at the said term, in opposition to the request of the prisoner; that the cause was then transferred to the Cook County Court of Common Pleas, and was called for trial at the regular September term thereof, in 1858, and was then again continued, against the request of the said defendant, and on motion of the said attorney for the People, and then the cause was transferred back to the said Circuit Court, and stood for trial at the regular trial term thereof, in November, 1858.

That at the regular trial term last aforesaid, the said Circuit Court continued the said cause, with all the other criminal business, until the January term, 1859—a term specially called for the criminal business. That at the time of the last said continuance of the cause, neither the prisoner nor his counsel were present, nor had at the time it was made, any knowledge of the order; but that they learned soon after, and during the term, that such continuance had taken place, and expressed to the court no dissatisfaction with said order.

(Signed,) CARLOS HAVEN, *State Attorney.*
E. W. McCOMAS, *Counsel for Prisoner.*

And the said McComas and Haven then and there presented said stipulation to the court, and agreed that said facts were true, and that they, together with the record in the case, should be in evidence before the court on the hearing of said motion.

And thereupon the said court overruled the said motion; to which opinion and decision of the court overruling the said motion, the said defendant, by his counsel, excepted, etc.

And afterwards, to wit: On the 11th day of the month and

year last aforesaid, the said People filed in the said court, a written motion, in the words and figures following, to wit:

PEOPLE, *vs.* JUMPERTZ. } *Indictment for Murder*—January 9, 1859. To HENRY JUMPERTZ, *Defendant;* McCOMAS & VAN BUREN, *Defendant's Counsel.*

Gentlemen—Please to take notice: That the People will call, on the trial of the above cause, the following witnesses, whose names are not on the indictment, to wit: Minna Kacher, August Herzberg, Catherine Herzberg, Eliza Raabe, Frederick W. Raabe, Anna Dapus, Elizabeth Dapus, Minna Feitenhamer, Edward Vallert, and Nicholas Kessler, Milwaukee.

And afterwards, to wit: On the 24th day of the month and year aforesaid, at the January term of said court, the following proceedings were had in said cause: The said defendant comes and moves the court, on affidavits filed, for a continuance of said cause, which affidavits are as follows:

PEOPLE OF THE STATE OF ILLINOIS, *vs.* HENRY JUMPERTZ. } *Indictment for Murder.* January Special Term.

Henry Jumpertz, being duly sworn, says: That he is defendant in said cause; that he was imprisoned in May, 1858; that the indictment was found at the June term of said year, at which term he in good faith urged for his trial.

That the said cause again stood for trial at the September term of the Cook County Court of Common Pleas, when defendant again urged for a trial, but the cause was continued. That said cause again stood for trial at the November term of this court, and was again continued without affiant's consent or knowledge. That owing to his imprisonment, affiant has had to rely solely on the assistance of his counsel, and that he, and as he believes his counsel, were ignorant that a special term was to be held in January, 1859, for the trial of said cause, or that said court had a right to postpone the said trial to any time during said term. The affiant has no means in his hands to procure witnesses; that all the property he has, has been taken from him by the officers, at his arrest, and has been only partially restored, and that within a few days past.

That just previous to the last visit of the deceased, Sophie Werner, to Chicago, affiant received a letter from her, which, he is advised, will greatly aid in his acquittal. That said letter was taken from affiant's possession, when he was first arrested, and has ever since been kept by the prosecution.

That affiant's counsel, soon after his arrest, applied to the officer who had it, to permit him, said counsel, to see it; which was refused. That at length, on the 18th day of January last, for the first time, the said letter was, by order of the court, placed in possession of the sheriff; and that immediately there-

after, affiant's counsel, accompanied by said sheriff with said letter, proceeded to Milwaukee, where the deceased had lived, to search for witnesses who knew the hand-writing of the deceased by whom to prove said letter; and did not return until Friday last; and that the said sheriff did not return with the letter until Saturday last; and that immediately on his, said sheriff's, return, affiant's counsel went forthwith to various persons in Chicago, who knew Sophie Werner, to find proof of her hand-writing. That on the eleventh day of January, 1859, defendant's counsel was served with a notice of a large number of additional witnesses, and with a notice of two others to-day, which the prosecution would examine on the trial, among whom were a number from Milwaukee.

That until this notice, it was not known that the prosecution would attempt to impeach or discredit the letter, or that said Milwaukee witnesses were to be used. That a subpœna has been issued for J. Weglehner and wife, and sent to Grundy county. That his counsel, as he is informed and believes, has been unable to see several persons in Chicago, whom he believes would testify to the hand-writing of Sophie Werner, for want of time to do so since the return of the sheriff with said letter.

That, as affiant is informed by his counsel, he can prove by a Mrs. Davis that said Sophie Werner was of a most desponding temper, and expressed to her her conviction that she should not be long in this world. That said Mrs. Davis lives in Milwaukee, and expresses her readiness to come and testify on his trial, but has just been confined in child-bed and cannot leave her room. And defendant believes he can procure the attendance of said witness at the next term of said court. That he is advised by his counsel, and believes that the testimony of said witness is most material and necessary for him in his defense, and that he cannot safely go to trial without it.

That the prosecution, as he is advised and believes, have made elaborate preparation, while he has been compelled to remain in ignorance of the proof to be brought against him.

(Signed,) HENRY JUMPERTZ.

THE PEOPLE, *vs.* HENRY JUMPERTZ. } *Indictment for Murder.*

E. W. McComas, being sworn, etc., says: The moment the letter mentioned in the affidavit of defendant filed in this cause was given to the sheriff of said county, under the order of the court, he went with said sheriff and said letter to Milwaukee, and in company with said sheriff examined and conversed with several witnesses and persons in relation to the alleged crime

of defendant, and among others, Mrs. Eliza Raabe, Minna Kacher and a Mrs. Davis. These were the names they gave.

That they all expressed a willingness to attend the trial, and agreed to do so positively if it were possible, but rendered the following excuses respectively:

Mrs. Davis had just been confined, and was unable as yet to come, the evidence of which was present and manifest to affiant as well as others. Said Mrs. Davis stated to affiant in substance that Sophie Werner was of a desponding temper, and spoke of not expecting to live long.

(Signed,) E. W. McCOMAS.

Thereupon, the court, after continuing the said cause until the following day, upon the attorney for the State informing the said court that he had heard from the said witness and others mentioned in said affidavits, and should be able to, and would procure their attendance on the trial, the said court overruled and denied the said motion; but remarked that if the attorney for the People should not procure said witnesses, he would consider their absence and his failure to produce them on a motion for a new trial on the ground of surprise.

To which ruling and opinion of the court overruling said motion, the said defendant excepted.

And afterwards, on the 26th day of January, in the year last aforesaid, it was ordered that a jury come, etc., whereupon a jury came, etc., and were duly elected, tried and sworn, etc., to try said cause. And the court being about to adjourn till the following day, it is ordered that the sheriff or some other officer of the court take charge of the jury and keep them together, etc.

Afterwards, on the 27th day of said January, the People by their attorney, and the prisoner, in person and by his counsel, being present, the testimony was commenced and continued from day to day, until the 2nd day of February, when the evidence was closed, and the argument of the said cause was commenced, and continued until the 5th day of February, when the argument was closed.

On the 5th day of February, the argument of counsel being closed, and the jury, having heard the instructions of the court, retired to consider of their verdict, and returned a verdict of *guilty*.

Whereupon the said defendant, by his counsel, moves the court for a new trial and in arrest of judgment.

Which motions were entered of record, and the cause was continued to the next term of the court for hearing.

And afterwards, to wit: on the 20th day of February, A. D.

1859, the said defendant, by his counsel, filed in the court aforesaid his motion for a new trial of said cause as follows:

The defendant, Henry Jumpertz, moves the said court to set aside the verdict of the jury in said cause, and award a new trial therein, for the following, among other reasons:

1st. Because the court never acted on or decided the motion to quash the indictment.

2nd. The defendant never plead to the indictment, nor was called on to do so.

3rd. On account of the absence of Mary Fisher, a witness, as shown in affidavit.

4th. On account of the absence of the witness, Theobold, at the trial, as shown by affidavit.

5th. Because the jury were not kept together, but were permitted to separate.

6th. Because one or more of the jury did separate from their fellows, without being in charge of an officer, and were conversed with by persons not of the jury, and about the cause.

7th. Because the verdict was against the evidence in the cause.

8th. Because the court permitted illegal evidence to go to the jury, to wit: The statements and declarations of Sophie Werner, deceased, made to different persons, between the time the prisoner left Milwaukee—December, 1857—and the time when said Sophie Werner left Milwaukee, on or about 3rd of March following.

Second, The statements of Sophie Werner, of the contents of Jumpertz's letters to her.

Third, The court permitted and directed experiments to be made with door, hooks, etc.

Fourth, Also, that another door was exhibited to the jury, with hooks in it, broken or bent down, both in and out of court.

Fifth, The court permitted a receipt, purporting to be signed by Sophie Werner, to be given in evidence, for the sole purpose of enabling the jury to judge of the hand-writing of said Sophie, by comparison.

9th. The court permitted a mass of evidence to go to the jury, consisting of statements of Sophie Werner; and then, at the close of the trial, instructed them that it was only to be considered as evidence of her state of mind.

10th. The court misdirected the jury.

11th. The court refused to grant motion for continuance.

12th. Same in substance.

13th. The officers who had charge of the jury were not sworn.

14th. Because the State attorney was allowed to argue the guilt of the prisoner, from his countenance, demeanor, and because he did not believe in a God.

In support of which motion, the defendant filed in said court the following affidavits:

Henry Jumpertz, the said defendant, being duly sworn, etc., says: Ever since the finding of the indictment in said cause, E. W. McComas has been his counsel, and that being closely confined to jail, he has been compelled to depend solely on his said counsel to find and procure the attendance of his witnesses. That he is informed and believes that his counsel saw and conversed with one Theobold, in Milwaukee, who stated to said McComas that he would testify, just before Sophie Werner left Milwaukee she spoke to him in a most desponding tone, and said she would not be long in the world, etc. That said Theobold promised to come and attend said trial, if sent for.

That one Kennedy was sent for the Milwaukee witnesses, with money to pay their fees and expenses, and that in the hurry of his departure he did not procure a full list of said McComas, and the name of said Theobold was accidentally omitted, and he was not obtained.

And that said Kennedy did not return till the evening before the evidence in said cause was closed, when it was too late to obtain said witness.

That he is informed, and belives that one Mary Fisher stated to his said counsel before the trial that she would swear that she knew Sophie Werner, and was well acquainted with her; and that one Sunday morning in the month of March, between nine and ten o'clock, the said Sophie came to her, said Mary Fisher's, house, in Chicago, and seemed greatly depressed in spirits, and stated her troubles and sorrows, and spoke of putting an end to her existence, and said that she had bought a bottle of laudanum with which to destroy her life, and asked her, the said Mary, if she thought it was sufficient to kill her, and showed her the bottle; that something was said about the best mode of committing suicide, and a young woman who was present said the best way was by hanging, etc.

That a subpœna was issued and served on said Mary Fisher to attend said trial.

That during the trial, affiant's counsel learned that said Mary Fisher was about to leave the county of Cook, and thereupon moved for and obtained an attachment for her, and she was arrested and brought into court, but before an opportunity arrived to examine her in said cause, she by some means got out of the custody of the said officer and left the city, and could not be found when her testimony was wanted. And that she

left without the knowledge or consent of affiant or his counsel; but that her place of residence has since been ascertained to be Cincinnati. But such information was not obtained in time to procure her affidavit on this motion. Affiant further states that he never consented to any separation of the jury in said case.

John Van Arman, being sworn, etc., says: That he and E. W. McComas were the only counsel of said defendant on his trial. That neither of them, to affiant's knowledge or belief, consented to any separation of the jury, nor was any such separation directed or permitted by the court in his hearing. That no witness by the name of Mrs. Davis was sworn on the said trial; nor was any such witness in attendance, to the knowledge and belief of affiant.

That on one morning during the trial of said cause, affiant came into the court room before the court was opened, and found the jury in their seats, and that standing directly behind and in plain view, and but a few feet from them, was a door, with divers hooks and screws, driven or screwed into it, some or all of which were broken or bent down; that while the door was so placed, affiant saw some of the jury turn around and examine the said door, etc. This occurred both before and after the opening of the court. That after the opening of the court, affiant called the attention of the court to said door, etc., and inquired for what purpose it was there; whereupon the attorney for the People stated that experiments had been made on it with weights hung on the hooks, and it had been brought in and exhibited to prove the impossibility of the deceased having hanged herself, as stated by Jumpertz in his confession. That said affiant then moved to exclude said door, etc., from the room, which was done.

That the attorney for the People then proposed to bring into court the door of the room occupied by Jumpertz at the time of the alleged murder, and two hooks and a quantity of screws found in said room at the time of his arrest, and make and allow the jury to make experiments on them, by driving said hooks and screws into said door, and hanging weights on them for the purpose of enabling the jury to determine whether the deceased could have hanged herself in the manner stated by the defendant in his confession.

To this proposition the defendant by his counsel objected; which objection was overruled by the court, and said experiments directed to be made; and that said experiments were then made as proposed with said door, screws, hooks and weights, in the presence of the jury, and that the counsel for the people were permitted to, and did argue from said experi-

ments that it was impossible for the deceased to have hanged herself as alleged by the affiant in his confession.

E. W. McComas, being sworn, etc., says: That he has been the counsel for defendant ever since the finding of the indictment. That he conversed with one Theobold, at Milwaukee, who promised to attend said trial as a witness, if sent for. That said Theobold stated to him in substance that he would testify on said trial that, just before the deceased, Sophie Werner, left Milwaukee to come to Chicago, she spoke in a most desponding tone, and told him she would not be long in this world. That money was provided to send for the witnesses at Milwaukee, and George Kennedy was sent after them. That owing to the pressing engagements of counsel during the trial, said Kennedy was not furnished with a full list of the witnesses, and the name of the said Theobold was accidentally omitted, and that affiant was not aware of the omission until return of said Kennedy, on the evening that the evidence in said case was closed. That some time previous to said trial, one Mary Fisher, stated to affiant as follows: That she did not know the defendant; that she was acquainted with the deceased, Sophie Werner. That on Sunday morning, in the month of March, between 9 and 10 o'clock, the said Sophie came to her house in Chicago, and seemed to be greatly depressed in spirits, and stated her sorrows, and that she was desirous to put an end to her existence, and had bought a bottle of laudanum for that purpose, and asked her, the said Mary, if she thought it was sufficient, showing it to her. That something was then said about the best mode of committing suicide, when some young woman present told her not to take laudanum, as she would fail: that the easiest way was to hang herself, if she wanted to die. That said Sophie cried a good deal, and went away. That said Mary Fisher was subpœnaed to attend said trial as a witness, and that during the trial, affiant learned that said witness was about to leave the city, and procured an attachment and had her arrested by an officer, under said attachment; and that affiant seeing that she was in custody, rested satisfied; but before the time came to examine said witness, she had by some means got out of the custody of the said officer, and gone away, and could not be procured on said trial. That said witness left without the knowledge or consent of affiant, and as he believes, of the prisoner or his other counsel, and that he intended to examine her as a witness.

That he has since learned that she is in Cincinnati, but not in time to procure her affidavit on this motion.

That he was present during the whole of defendant's trial,

and that neither the prisoner or his counsel consented to the separation of the jury.

Wirt Dexter, being sworn, etc., says: He was present at the trial of said Jumpertz, and assisted in making some experiments with screws on a door. That he used some screws that he bought at a hardware store, and some said to have been taken from Jumpertz's room. That affiant was assisted in making said experiments by the said jury, and other experiments were made in which he did not participate. That affiant was not a witness in said cause, nor was he sworn therein; and while he was making said experiments, the said jury conversed with him, and he with them, about the said experiments; and while other experiments were being made, he heard directions given by various persons as to the manner of making them—none of whom does he now remember, except Haven, the State Attorney, and C. P. Bradley. That he was not one of the counsel for defendant, but voluntarily assisted in collecting the evidence of the defendant.

That he talked with Mary Fisher, and she told him the same in substance as testified by McComas. That he did not consent to, or know of her departure from the custody of the officer who had her in custody under attachment.

Abner Sutton, being sworn, etc., says: That he is a deputy sheriff of Cook county, and was one of the officers who had charge of the jury in said case. That at noon of the first day after the jury was empanneled and the testimony commenced, I was directed by John Everts, another deputy sheriff, to take one of the jury, by the name of Loomis, to his own house, to see a member of his family who was sick. I took said Loomis, separately from the rest of the jury, from the court house, to his own house, in Edina Place, from one-half to three-fourths of a mile. When arrived at his house he left me sitting in the parlor, and went up stairs, and was absent from me ten or fifteen minutes, or more. I do not know who was in the upper story of the house. I then accompanied said juryman back to the Sherman House, where he and I took dinner at the public table. On the next day the same thing was done again, and the juror remained up stairs the same time as before.

Ira Snow, being sworn, etc., says: That during the argument of said cause by counsel, one of the jurymen, by the name of Bliss, was separated from the rest of the jury, and left in the court room while the rest of the jury went to the hotel to dinner, for half an hour or more; that affiant, as deputy sheriff, remained with said Bliss; that when the doors were opened, he put the jurymen in an adjoining room, and that a woman, purporting to be the wife of the said Bliss, remained in the court

room and conversed with him during the time; that he did not hear them (Bliss and the woman) speak of the case except as to how long it would probably last; but they talked a good deal together in a whisper, which affiant did not hear and understand.

Simeon Y. Prince, being sworn, etc., says: He is deputy sheriff of Cook county, and had charge of the jury during the trial of said case. That on the evening of the second day of the trial, at the direction of Mr. Curtis, another deputy, he accompanied one of the jurymen named Loomis from the court house to his own house in Edina Place, from half to three-quarters of a mile; no one else went with us; when arrived at the house, he left me in the parlor, and went up stairs out of my sight, and remained absent about ten minutes, and then came back to me with a woman, who, I was told, was his wife; and after conversing with her ten or fifteen minutes, went back with me to the court house; on the next evening, the same thing occurred again, in the same manner. During the trial, the jury were lodged at the Sherman House (an hotel), in two different rooms, five in one and seven in the other, in different stories of the house. On one morning while the said trial was in progress, I accompanied the whole of the jury to the house of said Loomis, and left him there, and accompanied the balance of the jury about the distance of a block to the house of another juryman; I there waited in front of said house while said last named juryman went in, and was gone out of my sight in the house some five miuutes; I then went back to the house of Loomis, who was out of my sight and presence about fifteen minutes; no officer accompanied either of said jurymen.

The following affidavits were filed, in opposition to defendant's motion for new trial:

1st. John C. Miller: Knew Mary Fisher for about two years; she lived on Clark street. About a week before trial, was at an interview between said Mary Fisher, himself, the district attorney, and J. Rehm. Being interrogated as to her knowledge of Sophie Werner, she stated that she was well acquainted with her, first while Sophie was living with her husband; witness was then living with one Hulme; she never knew Jumpertz at any time. Sophie stopped at her house, on Clark street, with book in her hand; stated she had come from church; said she had caught cold waiting for the bridge; could not tell whether it was one or two years ago; was uncertain. Sophie said she was satisfied that Jumpertz would not marry her, and that she did not know what to do; that she had a vial in her hand; said she had a good mind to take poison and kill herself; advised Sophie to get girls and open a house; said she was too

old. A girl who was present advised her to go to the pier and drown herself; she said she had tried that twice, but when she came to the water she was afraid. The girl then advised her to hang herself. They were all laughing, talking that if she poisoned herself they would pump it out of her. Minna Debus, of Milwaukee, was produced as witness. Affiant then and still believes her to be the same person called, by the defense, Mrs. Davis.

2nd. James Taylor, deputy sheriff: Served attachment on Mrs. Fisher, for defendant; brought her into court; placed her in jury room, in charge of Prince, a constable. Dexter went into room. This was Saturday, first week of trial. Prince *told* him how she left.

3rd. S. Y. Prince, deputized to take charge of the jury: Received Fisher when brought in on attachment; put her in jury room and locked it. Dexter applied to be admitted to said room to see witness; let him in; left the key in the door. Dexter soon came out, and he again locked the door and left key in door. Dexter visited witness several times; advised him to keep the door locked. About an hour after, went, and found witness gone; went to Dexter, and asked him why he left the door open, and told him Mrs. Fisher was gone. Dexter replied, "Is she? Well, I have been talking with her, and we don't want her, and if we do, we can send for her." I went then and told Taylor.

Thereupon, and after argument of counsel, the said court overruled the said motion, to which ruling and decision the defendant excepted.

The testimony relating to the conduct and declarations of the deceased and Jumpertz, at Milwaukee, as proved by the prosecution, was substantially as follows:

Minna Kacher. I live in Milwaukee; I knew Jumpertz, from June, when they came there, till they left; it is a year since they left. I also knew Sophie Werner; they, Sophie and Jumpertz, lived next door to me, in Johnson street. I saw them every day. I supposed she was his sister. They afterwards lived in Market street.

I might know Sophie Werner's hand-writing; can't tell. I have seen her write, several times. [Letter purporting to be written by Sophie Werner to Jumpertz, shown to witness.] I can't say for certain whether it is her writing. I think she wrote finer.

Sophie left Milwaukee, I think, the 3rd day of March, in the last train of cars. She had sent all of her bedding before. She took with her two traveling boxes, a mattress, clock, looking glass, and basket of things.

Sophie said she wanted to go; that Jumpertz had written to her to come; that she was to sell everything; if not, to put it up at auction, and sell it for eight or ten dollars, if it would not bring more. That he had written to her to come in the night train; that she should veil herself, and speak to no one on the train; that they (she and Jumpertz) would not stay in Chicago; that Jumpertz had written that he intended to go to St. Louis; that Jumpertz did not wish to stay in Chicago with her—he had written so; that she would go to him, but if he did not treat her better, she would not remain with him; that he had written to her not to bring on her clothes, he would buy her everything new.

On the cross-examination, witness says: She cannot be certain about the hand-writing of the letter shown her; can't say it is her letter, from appearance; she wrote finer and closer together.

Defendant's counsel moved to strike out all the testimony of this witness, relating to conversations between her and Sophie Werner, on the same ground on which it was objected to, and also on the ground that it purports to state the contents of letters, supposed to be written by defendant to Sophie Werner, and no foundation has been shown for such secondary evidence. Motion overruled, and exception taken.

Witness proceeds: [Letter again shown witness.] I think this letter has been twice before shown me, in Milwaukee; once in Mr. Beck's office, and once before in the summer. I don't remember seeing it any other time. Mr. McComas, one of defendant's counsel, showed me a letter at Milwaukee at my house; I did not read much of it; Mr. McComas asked me if that letter was Sophie Werner's hand-writing; I said I did not know, could not tell; I did not say it was her writing, nor give my opinion that it was; I never saw the letter that McComas showed me, before or since; the letter that McComas showed me is not the one shown me here in court; I never read the letters of Jumpertz to her, and only know about them what she told me; the inner part of this letter is like Sophie Werner's.

The contents of the letter that McComas showed me were like what Sophie had said to me; that was what I said to McComas, but I said I was not certain as to the writing; the sheriff was with McComas; the letter he, McComas, showed me, was not the letter shown me here in court.

Eliza Raabe, sworn, etc. Live at Milwaukee; knew Jumpertz and Sophie Werner there; I lived in the same house they did in Market street. Sophie said Jumpertz was her brother, at first; afterwards she said the child she gave birth to was his. Sophie left Milwaukee on the 3rd of March; Jumpertz had left

a little before Christmas. Immediately previous to Sophie's leaving Milwaukee, I did not talk much with her; the last time I saw her to talk with her, was a month before she left. I knew of her receiving letters from Jumpertz; she read to me the first one soon after he left.

Attorney for People proposes the following question: Do you know, from anything Sophie said to you, why she left Milwaukee?

Objected to by defendant, on the ground that the evidence called for is hearsay, and not admissible. Also, because statements called for not confined to the time of her leaving Milwaukee. Objection overruled, and exception taken.

Answer. Because she said that Jumpertz wrote she should come; this was all she told me. Jumpertz had written that she was to stay there until September or October; he had been to see her in August; she sold some of her things.

Question by People's attorney. Why, if you know, did she sell them?

Objected to by defendant's attorney, on the ground that the reason which she had or gave was immaterial and irrelevant. Objection overruled, and exception taken.

Answer. She said the defendant had written to her to sell them.

Defendant moves to strike out the last answer, because it is hearsay, and purports to give the contents of Jumpertz's letter. Overruled, and exception taken.

The court here ruled, and decided that he would permit the prosecution to prove any conversation of Sophie Werner, had with any person, between the time Jumpertz left Milwaukee, and the time Sophie Werner left, relating to her reason for leaving; to which ruling and decision, the defendant, by his counsel, then and there excepted.

Witness continues: Sophie Werner said to me, that Jumpertz had promised to marry her when she came to Chicago; that was what she always said to me; she told me about selling the furniture shortly before she left, when she got a letter from Jumpertz; it might have been three or four days before she left; she came up to my room, and said she had got a letter to sell everything and go to Chicago; that she was to go on the 1st of March, but could not sell her things, and get ready till the 3rd.

Counsel for defendant here moved to strike out all of above testimony of said witness, giving statements of Sophie Werner, for same reasons as before given. Overruled, and exception taken.

Witness continues: I don't know as I should know her hand-writing; I have seen her write directions on letters. [Letter of Sophie Werner, the same shown to last witness, exhibited to her.] The hand-writing I can't distinguish, but as to the contents, it might be hers; it don't coincide with what I have seen on the covers of letters of her writing; that was finer, and not so distinct.

Cross-examined. Sophie and Jumpertz lived friendly together; I should have known if they had not lived happily, as I could hear all that was going on in their room; they brought a good many things there from Chicago; Jumpertz bought others; he paid her rent half a year in advance before he left; she had supplies when he left, for a long time; she was generally pretty gay, sometimes in her serious moments, desponding; she said, how unhappy I am, and if witness only knew how unhappy she was, etc.; said she had some sorrow at her heart. The sheriff and Mr. McComas were at my house one or two weeks ago, and showed me a letter to read. I said after reading it, as I have said here, the contents might be hers, but as to the hand-writing I could not be sure; I said it (the letter) spoke in the same tone she often told me; I was asked if it was her writing; I asked to read it; did read it, and said, from the contents, it might be hers; I did not express any opinion only as to the contents; I did not say I thought it was her hand-writing.

Direct examination resumed. The letter that McComas and the sheriff showed me, is not the one shown me here in court at all; I don't know if this is the same hand-writing as the one McComas showed me; I think it is nicer; the one the sheriff and McComas showed me, looked more like Sophie Werner's hand-writing; I can't tell whether this is Sophie's hand-writing or not, with a certainty.

Frederick W. Raabe. I live in Milwaukee; I knew Jumpertz and Sophie when they lived in Milwaukee; they came to live in the same house with me, I think about the fall of 1857, on Market street; I carried letters for Sophie to the post-office, directed to Henry Jumpertz, Chicago, Illinois; one letter had ten dollars in it.

Question by People's Attorney. How was the address on the letter spelled—how was the word Henry spelled? The defendant objects to question, because the writing itself is the best evidence, and no foundation laid to introduce secondary evidence, and because spelling is not admissible as evidence of hand-writing. Objection overruled, and exception taken.

Answer. It was spelled *Henry.*

Minna Veitenheimer. I live in Milwaukee; knew Sophie Werner, and I think Jumpertz; they lived two houses from me

in Milwaukee. Jumpertz left about New Years or Christmas; Sophie left on 3rd of March.

Question by People's Attorney. Had you any conversation with Sophie when she left, about her reasons for leaving?

Answer. Yes, I was there when she left.

Question. State the whole of said conversation.

Objected to by defendant's counsel, on the ground that evidence is hearsay. Overruled, and exception taken.

Answer. She said Jumpertz had written to her to come; that they would live together; that they would open business in some small town.

Question by People's Attorney. State what Sophie said to you in such conversations about Jumpertz. Defendant objected, because the evidence is mere hearsay, and inadmissible. Counsel for People said, that defendant had set up that deceased died by suicide, and that he should show by acts and conversation of deceased, a state of mind indicating a tendency to suicide, and that this evidence was to rebut, by showing state of mind of the deceased. Counsel for defense admitted their intention to prove a tendency in the deceased to commit suicide, and did not object to order of evidence offered, but to its competency. Court overruled the objection, and defendant excepted.

Witness answers: She told me she had letters from Jumpertz, and was going away. She said she had received letters; that she was to follow him. Said that the last letter she received from him he wanted her to speak to no one, veil herself closely, and he would call for her; in a letter he had written to her before that, he had written to her to sell all her things, to send them to a store and sell them if they didn't bring but nine or ten dollars, and send the money to him, so that he could furnish them anew.

Defendant moves to strike out the above testimony of this witness, relating to conversations of Sophie Werner, purporting to give the contents of Jumpertz's letters, as inadmissible, for reasons before stated. Overruled, and exception taken.

Witness proceeds: She said she would write to Jumpertz; that she would like a few days to sell the things, so as to get more for them; she would carry some few things with her; he had written to her to sell everything, the dresses too, as he would buy new ones; can't tell how long before she left, it was that she said she received these letters, perhaps three or four weeks; she used to come to my house almost every day; when she went away she bid me good-bye; said she would write to me in four weeks; she was usually very gay; I had conversation with her once in my store, and she said she was going to travel to Chicago, and they (she and Jumpertz) were going to open business to-

gether; I can't say how long this was before she left, it might have been two months.

Counsel for defense moved to strike out all the testimony of this witness, relating to conversations of Sophie Werner, as mere hearsay. Motion overruled, and exception taken.

Cross-examined. I saw Jumpertz and Sophie together very little; what I did see, they were very loving together, on one occasion.

August Herzberg. I live in Milwaukee; knew Sophie Werner, not Jumpertz; after Jumpertz left, I had some conversation with Sophie relative to Jumpertz; three or four weeks before Sophie left, she came to my house; she said among other things, in the course of the conversation, that she had received a letter from Jumpertz, in which she was called to come to Chicago, on the 1st of March; she said she couldn't do that, as she couldn't sell her things; because she said she had been requested in that letter to sell all her things, even her dresses; she said she had received another letter after that, telling her to come; that she was to come veiled, and was to speak to no one, and remain at the depot till he (Jumpertz) called for her; I advised her not to do it; she said he was a smart man, and did not believe in any God, and such religious matters as she was telling of; she told me she had lived with her first husband and had become acquainted with Jumpertz; she said she had stated that she and Jumpertz were brother and sister, because Jumpertz had told her to say so; she said that she and Jumpertz were married by an American preacher secretly; the very last time she said she had written to Jumpertz, she had written that she wanted to come to Chicago; she said she had written so several times, and was only quieted some time longer; I saw her when she was packing up to go; she said she was going to Chicago; she said she had got money which had been paid for rent, returned to her; told me she had $60 to $80; said she would write soon; she has told me at different times, that she sent money to Jumpertz at Chicago, to help him pay for a lot he had bought some days before she left; I told her not to send money to Jumpertz; she said she would not; she was of good temper; was often longing for Jumpertz.

The testimony of this witness, relating to the conversations of Sophie Werner, was all objected to, and motion made to strike the same out, on same ground as other similar testimony, and overruled, and exception taken.

Elizabeth Debus. I am fifteen years old, and live in Milwaukee; knew Jumpertz and Sophie Werner in Milwaukee; Jumpertz left Milwaukee before Christmas; after he left, Sophie said she wanted to follow him soon; she received letters, one or more

a week; don't know who wrote them; I had heard he was her brother, but she told my mother it was not so; have seen her write four or five times. [Letter shown to other witnesses, is exhibited to witness.] I can't tell exactly if this is hers, but is the manner in which she wrote; I am not so certain about it; her writing was like this, not clear (plain), as far as I can recollect; she wrote as this is written; the form of the letters is like hers, perhaps a little longer, and not so separate as this; she might have written this; I got a letter from the post-office for Sophie; she said it contained good news; she could go to Chicago, and when she got to Chicago, Jumpertz would go with her to St. Louis; she said the day she left, she was going to Chicago; she said the day before, that she was to have gone by the 1st of March, but could not sell her things; she said he had written that she should be there by the 6th of March; from the time she got the letter, which she said contained good news, until she went, might be three weeks. The testimony of this witness, giving Sophie Werner's conversation, excepted to, etc.

Edward Vollert. I live in Milwaukee; know Jumpertz and Sophie Werner; sometime in August, 1857, they lived in same house with me in Market street; he left in December; she the 3rd of March following; she told me she had received a letter from her husband requiring her to come to Chicago, and asked me if I would not return the money that had been paid in advance for rent of house by Jumpertz; I paid her back $20 and wrote a receipt, and she signed it. [Receipt shown and identified.] She said she would start the next day in the train; she said she was going to Chicago to her husband; Jumpertz had rented the room, I think August 13, 1857; paid rent in advance to December, then paid again six months in advance. The statements of Sophia Werner, to this witness, objected to, and motion made to strike out, and overruled, and exception taken.

Catharine Herzberg. I live in Milwaukee; I knew Sophie Werner; did not know Jumpertz.

Question by People's Attorney. Did you have any conversation with Sophie, after Jumpertz left Milwaukee? Objected to by defendant on same grounds as before. Objection overruled, and exception taken.

Answer. Yes, she talked with me about him several times.

Question. What did she say? Objection overruled, and exception taken.

Answer. I can't state the time; she said Jumpertz was in Chicago, and would write to her when she was to come to him; she was not to come yet; she was to stay in Milwaukee till July before she would come; and that she was to remain with him, and she told me of the letters he had written her, and

what was in them. Objection was made by defendant to her stating anything that Sophie said was in the letters, because hearsay, and no foundation or reason shown for introducing secondary evidence of their contents. Objection overruled, and exception taken by defendant.

Answer. She was to come to Chicago, veiled, and speak to no one at the depot; that he, Jumpertz, would send a man for her, who would lead her to the house; that his room was four stories high.

That she was to sell everything; to bring the ironing board and the hatchet; to sell everything but these; was to sell because they wanted to go to St. Louis; she said he had at different times written her to send him money. The child's things she must sell; she said she would not; she could sell them in Chicago, if necessary; she said he had requested her not to show the letters, but to burn them immediately.

She then told what she had written to Jumpertz. Defendant objects to witness giving relation of said Sophie Werner, of contents of her letters to Jumpertz, for same reason as above given. Overruled, and exception taken.

Answer. She said she had written to him, that *she would come to see him once more, veiled;* would come for his sake. She cried then a good deal; she said she was to come veiled; she said that she had written to him that for his sake she would come to see him once more; she said if he did not treat her well she would go away, and take a room and wash. It was on Monday she told me she had written to Jumpertz; she had the letter lying there; I did not read it; this was on the 1st of March; I never saw her write except that Monday; it was on first of March; I should not know her signature, but the letter I saw I think I should know. [Same letter shown to other witnesses exhibited to this witness.] I can't say with certainty, but I think the letter I saw was a little more bluish; the letter I saw had a blank at the head, of about four lines; I can't say with certainty that this is the letter; I did not go very close to her; I can't tell certain whether this is the same letter I saw; it was to Henry Jumpertz, I think.

Question by People's Attorney. Did Sophie state to you whether she and Jumpertz were married?

Objection by defendant's counsel, and overruled, and exception taken.

Answer. She said they were married by an English priest. When she started she said she was going to Chicago, etc.; she was glad to go; she sold me things; we were together almost every day while she was at Milwaukee.

Cross-examined. I saw her cry several times during these times; can't say how often; she said she was so unhappy; she had

to thank Jumpertz for her misfortune; said she had married him in New York, and had moved with him to Chicago.

Anna Debus. I live in Milwaukee; knew Jumpertz and Sophie Werner; they lived close by us, up stairs, three months from June, 1857. Jumpertz left in December; after he left, I had conversation with Sophie about him.

Question by People's Attorney. State what it was. Objection, and overruled, and exception by defendant.

Answer. She said they were not brother and sister, but lived together; were not married; that they wanted to get together; she always wanted to go to Jumpertz; she said she was going to Chicago, because Jumpertz had sent for her; they would go to St. Louis; she would sell everything, and go with only a carpet bag, if she could get only eight or nine dollars; she sold me the old things, but took some away, two trunks; I saw her the day she left Milwaukee.

In reference to the experiments before the jury, the bill of exceptions states substantially as follows:

Before the opening of the court on this morning, a door, having a number of hooks and screws driven and screwed into it, was brought into the court room, and placed immediately in rear of the jury, and in plain sight of said jury, many or all of said hooks being bent or broken down, which door, with said hooks and screws, remained in the presence and plain sight of the jury until the opening of the court. The defendant's counsel called the attention of the court to said door and hooks and screws, and inquired for what purpose it was exhibited. To which the attorney for the People replied that the said hooks and screws had been screwed into the said door, and experiments tried on them, by placing or hanging weights on said hooks and screws, to show the impossibility of the deceased, Sophie Werner, having committed suicide by hanging herself on a hook or screw, screwed or driven into a door in the manner stated by the defendant in his confession.

The counsel for the defendant then objected, and took an exception to the exhibition of the said door to the said jury, and moved the court that the said door, hooks and screws be removed from the presence and sight of the jury, which motion was granted by the court, and the said door was removed.

There was no evidence tending to prove that the door so exhibited to the jury, was the door of the room in which the said deceased was stated by the defendant to have hanged herself; but, on the contrary, the door of the said room was afterwards produced in court, and it appeared to be, and was a different door; nor was there any proof that the said hooks and screws were the same found in the room of the defendant; nor

were they in any manner identified. When the court ordered the last mentioned door to be removed, it decided that no experiments would be allowed to go to the jury, except those to be made on the door of the prisoner's room, and that those should be made in the presence of the jury.

The attorney for the People then brought into court the door of the room occupied by the defendant at the time of the alleged murder, and two hooks and a quantity of screws found in said room at the time of the arrest of the defendant. Some new hooks and screws, together with a new hemp cord, had also been brought into the room by a Mr. Dexter, as a friend of the prisoner, and in his behalf.

The prosecution then proposed to make experiments on the door of the prisoner's room, in the presence of the jury, with a view to test the possibility of the deceased having hung herself in the manner alleged by the prisoner on his arrest. To such or any experiments being made in the presence of the jury, the defendant, by his counsel, then and there objected, and assigned among others the following reasons:

1st. The prosecution does not propose to produce the same screws or hooks, or the same rope, (or one even of a like kind,) upon which the deceased hung herself, as alleged.

2nd. Nothing but the testimony of experts is competent upon a question of skill or science.

3rd. Upon questions of common experience, no evidence whatever is admissible.

4th. It is not proposed to give in evidence any fact or circumstance alleged to have occurred, nor any admission of the defendant.

5th. Because the proposed experiments are immaterial, irrelevant, necessarily uncertain, and otherwise incompetent.

But the court overruled the objection of the defendant, and directed the experiments to proceed in the presence of the jury; to which opinion and ruling the defendant excepted.

And thereupon the prisoner's counsel stated to the court that certain screws with hooks on them, to wit, one large and one small one, were presented, and were alleged to have been found in the prisoner's room at the time of arrest; that he understood the prosecution would make the experiments upon the supposition that the rope was attached to the curve of the hook; that the screws of the hook were in fact long enough to reach through the door and still leave room enough on the shaft of the screw, between the shoulder and the door, to amply hold a rope; and that the defense would contend that the rope was placed by deceased between the shoulder and the door, and not on the curve of the hook; and that if the prosecution were

first allowed to make the experiment on the curve of the hooks, and break or bend them, that no experiments could be made on the prisoner's view of the case; and that while the prisoner objected to the experiments *in toto*, yet he requested, for the reason aforesaid, that the first experiments should be made by the prisoner, as it was conceded on all sides that if the prisoner failed on his hypothesis of the mode of placing the rope, he certainly must in that of the prosecution.

The court conceding the reasonableness of the prisoner's request, decided that the prisoner should have the full benefit of his exceptions to the experiments, and still, for the cause assigned by his counsel, would allow the first experiments to be under the control and direction of the prisoner. The experiments were then proceeded with. All the experiments were made on the door by placing the same against the judge's stand, and the jury holding the same against the wall and suspending one of the jurymen, who stated that he weighed about one hundred and forty-three pounds, by the said new hemp cord.

The first experiments were made by Dexter, who made them at the instance and request of defendant's counsel. The experiments made by him, and under direction of prisoner's counsel, were made partly on the two hooks, and on two of the screws brought into court by the prosecution, and found in his room at his arrest. The experiments made subsequently by the prosecution were made with the same rope, attached to leather straps at the shoulders of the juryman who was suspended, and on the two hooks from the prisoner's room, and on two screws, one found in said room and the other brought in by said Dexter, as aforesaid.

The result of said experiments was as follows:

The door was placed against the shutters in the rear of the judge's bench, and the experiments commenced.

1. A hole was bored in the head and tyle of the door, and a two-inch screw screwed in, A. Wheaton, a juryman, hung to it, and held.
2. An inch-and-a-half screw was then used, with the same effect.
3. The juryman stepped off the chair, and the screw gave.
4. The juryman stepped off the chair, the rope slipped, and the screw was pulled nearly out.
5. A hook, size of smaller one found in the room, used, and did not give.
6. Another screw, of same size, used with same effect.
7. Experiment on last hook; did not give.
8. Experiment on plain one-and-a-half inch screw; did not give.

9. Same experiment, with same effect.

10. Tried by prosecution, on a hook similar to the one used in No. 5 hook; the hook broke.

11. By defense, one of hooks found in Jumpertz's room; it did not give.

12. By prosecution, on same hook in a different place; hook was bent down.

13. With the same hook; juror stepped from chair, and hook pulled out.

14. A two-inch screw used, and when juror stepped from the chair, it was nearly pulled out.

15. A screw found in the room was then used, and when the juror stepped off from the chair, it remained firm.

The evidence of state of mind of deceased; her tendency to suicide, and also as to her hand-writing, on the part of the prisoner:

Louisa Weglehner. Knew Sophie Werner seven years very well; was intimate with her; lived in the same house with her; I know her hand-writing; often saw her write in market book and letters. Letter purporting to be written by Sophie to Jumpertz shown her—same letter shown to Milwaukee witnesses. It is her hand, I am sure it is her hand-writing, it is the very same; I know Jumpertz since he came to this country; when he first came to New York he lived with us; he also boarded with us here in Chicago; his character was good, first rate; he got acquainted with Sophie Werner at our house; she had parted from her husband before; after he became acquainted with her, she came to our house to work; while she lived with Werner, her husband, she had a great deal of trouble; he kept another woman; the woman he kept was boss of the house, and Werner gave her all the money and control, and compelled his wife to do all the work, and to go to her for money, and told her if she didn't like it, to leave; Mrs. Werner had to do the washing for this girl; sometimes she was compelled to sleep in the same bed with Werner and the woman; she sometimes said she would go away; would go and try to get another place; one day they had much trouble, and the girl told her to go, if she did not like to stay; she said she would go, and bid me good-bye, and started; in three hours she came back; in the conversation that followed, she said a shilling's worth of laudanum will do for me; I said she was crazy; she had better go and get a place in a small family; she declined, and asked me how I would like to do so; I told her I feared she had laudanum in her pocket; she said no, and went away; I did not see her till next morning; that night some one came to our room and walked up to my husband and said, Sophie had poisoned

herself; Mr. Werner's brother, George Werner, brought the word; said she had taken something, and he believed it was poison; I saw her next morning at 9 o'clock; she came to my room and cried; she said a shilling's worth of laudanum was not enough; God did not like her; she began to vomit; one cheek was red, and the other was white; she asked me to fix her a bed, she couldn't stand; she was sick all that day, and I nursed her; she said she took laudanum; she said she felt drunk, and her husband gave her warm water; soon after this, she and her husband went out of our neighborhood, and I did not see him again until after she had separated from her husband, and was washing for her living; she came to see me, and said she had to wash for her living, and was not able to do it, and wanted to live with me, and I consented, and she came; while she lived with us, she would cry sometimes and then laugh; she was all the time in these crying and laughing fits; she would begin to cry, and then laugh and jump, and say I must not think of it; I must put it out of my mind; she cried frequently, and seemed in trouble too much; she left my house before Jumpertz did; she had been married five years; had had five children, all dead; her husband sent her to the old country from New York; while she was gone, came out to Chicago and lived with another woman; on her return she came on to him.

Frederick Weglehner. Is husband of last witness; knew Sophie Werner and know Jumpertz; has known Sophie ten or eleven years; the letter is her hand-writing; knows her hand-writing; has seen her write; relates her treatment by her husband, and the state of her mind, and attempt at suicide, the same as last witness; also, testifies to her going twice to the river to drown herself; her husband was at last indicted for adultery, and ran away; knew Jumpertz same time as last witness; his character is good; was always steady, industrious and peaceable.

William H. Eddy. Knew Sophie Werner; she worked in her husband's shop, 84 Randolph street; I had a conversation with her; it was about the time Werner was indicted for adultery; I procured indictment; she told me her troubles; said she was treated worse than a nigger; she was willing to work for decent people, but not for that whore down in her husband's shop, and sleep in the same bed with her and her husband; I can't stand it; she said she had to do all the menial work, and be treated worse than a slave; I don't think I ever saw her smile; I remarked this; she said she had no desire to live in such trouble, and there was no prospect of its being ended; I got Werner indicted, and he ran away; she did not do anything against him; she left me crying the last time I saw her, near

the court house, in the street; I thought her despair increased after her husband went away; she said she was left sick and desolate.

Isaac Shelly. Knew Sophie Werner while she lived with her husband; he had another woman; she seemed much dejected, and threatened to kill herself.

Augustus W. Goetz. I live in Milwaukee; have known Jumpertz two years; he worked for me in Milwaukee eight or nine months; his character was good; he was peaceable, industrious and steady; he lived with Sophie Werner there; he told me about their relations when I employed him, and asked me if it would make any difference with me; she once asked me to pursuade him to marry her; I spoke to him about it; he refused, said she was too old, etc.; spoke well of her; I told her he refused; she said, I cannot be mad at Henry if he does not marry me; she liked him very much.

Cross-examined. I saw Jumpertz after he was arrested, and asked him why he cut up the body; he said he could not get it into the barrel without; he said he did not know where the entrails were, as he buried them at night; I never heard anything against him before his arrest; everybody liked him.

Hiller Buchenhimer. Live in Milwaukee; knew Jumpertz since a year ago, when he came to Milwaukee; he worked for me from May to December; for me and Goetz; his character was good; when sheriff Gray and McComas came to Milwaukee, I went with them, as interpreter, to see Minna Kacher; a letter was shown her, the same one shown her here; I asked her if she could tell by the hand-writing if this is the hand-writing of Sophie Werner; she read it and said she thought it was Sophie's hand-writing; could not tell exactly; she said it looked like her hand-writing; had the appearance of it.

John Gray. I am sheriff of Cook county. [The letter purporting to be written by Sophie Werner to Jumpertz, and claimed by prosecution as a forgery, shown to witness.] I took this letter to Milwaukee; McComas went with me; we showed the letter to this old woman, (Minna Kacher); this is the same letter; it was given back to me.

John Lotz. I worked for Frazza & Ribolla in March, 1858; Jumpertz worked there one day; Jumpertz got leave to go to post-office; he went and came back with a letter in his hand; he opened and read it, and handed it to Seigletz, who said, "She wants to come and see and kiss you and afterwards die;" Jumpertz took off envelope as he came in, and threw it in the stove; I saw the stamp on the back, Milwaukee; Seigletz told him he'd better save the letter; he said, I never save any letter from her, but it might be best to save it; I went up stairs and

got him an envelope, and he put the letter into it, and put it in his pocket; this was about the first day of March; I said, what a foolish thing to write; Werner asked defendant what was the news, and while defendant and Seigletz were reading letter, a customer came in, and George had to shave him, and defendant told him he could read the letter in their room.

August Seigletz. On 1st of March, 1858, I worked for Frazza & Ribolla, barbers, in Chicago, and defendant worked there; defendant asked Frazza for leave to go to post-office after letter; went and got it; one remark in the letter was that she would come and see and kiss him once more and then kill herself; Jumpertz asked for an envelope and it was gotten; Jumpertz said he would keep the letter, for it would help him sometime if he got in trouble with her.

Cross-examined. The letter was received Monday or Tuesday, the first week in March, it might have been first or second; Jumpertz tore off envelope and put it in the stove, as he always did; all but business letters; he said the letter was from Mrs. Werner; I can't remember whether I had the letter in my ands; at this time I understood Sophie was coming to Chicago; Jumpertz said she was coming to see him and then going away; all I understood was, she would be here on some evening train; he read out of the letter that she would then go away and trouble him no more.

Frederick Becker. I publish the National Democrat; I published letters for German parties in my paper of March 1st, 1858; I published a letter for Henry Jumpertz; it was published on Tuesday, 2nd of March; it was spelled Hein. Jumpertz; we got the list of letters from post-office on Monday, the day before; it would have been published on that day if it came to the office any time in fourteen days before; the letter may have been in the office twelve or any number of days up to fourteen.

Substance of evidence as to confessions of prisoner:

Jacob Rehm. On the same evening of his arrest in my office, Bradley had conversation with the defendant in my presence, and in the presence of John C. Miller, the City Attorney; he said his name was Henry Jumpertz; came from Prussia; twenty-four years old; he stated that he was acquainted with Sophie Werner; got acquainted with her at Weglehner's; asked Mr. Bradley if he was the Judge. We told him who we were; one asked him where Sophie Werner was; he said, "I guess you know;" he said he knew Sophie Werner; she lived at Weglehner's, and came to bed with him there one night; that on Sunday he went home to his room, and found her hanging in his room; as he opened the door he found something hanging

against it, about a foot from the floor; the dinner was on the table as he went in; he sat down by the window; don't know whether he took her down first; sat by the window half to three-quarters of an hour; took her down and laid her on the bed; and there was a line or letter on the table, saying good bye; read the slip or line; laid it on the window, the wind blew it out; she hung on a cotton rope or cord, on a plain screw, with a hook same as they have in barber shops; did not know what to do, whether to see the coroner, or what to do; concluded to cut her up, for fear friends would hear of it; he took out the intestines and buried them away out on the prairie, one or two miles; cut off the hair; don't remember as he mentioned what he did with the rope; he cut her up and put her in a barrel, and kept it some eight or ten days; on the 17th, he got a dray-man to take it to depot; he said he cut her, and a little blood came, not much; I had a talk with him next morning; I told him if he could find the place where he buried the intestines, I would go with him; said he thought he could not find it. [A box of old irons, chisel, saw, case of surgical instruments, knife and letters shown to witness.] These were found in Jumpertz's room when he was arrested; it was some days after first conversation that I offered to go with defendant to find the remains; he said he would not know the place; I found two screw holes in the door of Jumpertz's room.

Cross-examined. When defendant made his confession, he seemed disposed to make a full statement; he was excited some, and spoke quick; on the first night he said he buried the intestines on the prairie, and pointed north; the next morning he said on the lake shore in the sand; I am acquainted with land north of city; the sand reaches back from lake in some places half a mile; said he buried them (the intestines) in the night, and didn't know as he could find them; I have been pretty active in this cause; went to New York, hunted up evidence, etc.

C. P. Bradley. I am a detective policeman, and have been four years; have acted with Marshal Rehm in relation to Jumpertz's case; went to No. 30, Pomeroy's block, to examine room, etc.; I, with Marshal Rehm, arrested defendant, and went with him to Marshal's office, and there heard his confession; said he was a Prussian, twenty-four years old, had worked as a barber in New York, Chicago and Milwaukee; he asked me if I was the judge; said he wanted to tell the judge all; I asked him if he had a female friend; said he had; asked him where she had gone, he said I guess you know; told how, and when and where he got acquainted with Sophie Werner; where he boarded with her, and about her having a child, etc.; that the Dutch taunted

him about his connection with her, and he went to Milwaukee; stated how long they lived there, and then he left her and came back; she wanted him to marry her, he refused; finally he wrote for her to come, and she came the fore part of March; he took her to his room; no one saw her there; on Sunday he worked in the shop till 12 o'clock M.; that when he opened the door of his room, it opened hard; he found her hanging by a cotton cord on a plain screw, which she screwed into the door herself; I was very much frightened for half an hour; first thought to go for coroner, then thought as I was a stranger, and nobody knew me, feared the disgrace, and that it would get into the papers; then thought I could dispose of the body by cutting it up into small pieces; while thinking the matter over, I saw a note on the table, that she was tired of life, forgave me, etc.; he said the paper blew out of the window; he said he took a lancet after he had taken her down, and put her on the bed to bleed her, to see if she was dead; got only a little drop of blood from the arm; I asked him why he did not call some one in; he said as he had begun to cut her up, he must go through; he said he destroyed the cord; he buried the entrails and cut her up, etc., same as stated by Rehm; went to Jumpertz's room again; found things, and among them the letter purporting to be written by Sophie Werner to Jumpertz (the same shown to Milwaukee witnesses, an interpretation of which is hereto attached); this letter was in a blank envelope with other papers on a table.

Cross-examined. Jumpertz said when he came into the room and found her hanging, he took her at once and laid her on the bed; felt bad, and hesitated what to do; went to the window and saw the paper; went to window for air; read the paper; window open; while he was hesitating, the wind blew the paper out of the window; I give the substance of what he said; I don't know whether he said he felt of her to see if there was any life before or after he took her off the bed; he tried to bleed her, to see if she was dead; this confession was before the body was returned from New York; can't say whether he said he cut one or two holes in her arm; he said he buried the entrails out on the prairie, on north side; thought he could find them if some one would go with him; he said he had destroyed all the letters she had written him, but one, that in which she said she wanted to kill Werner; told where he had sent her clothing; he had sent them to a respectable person in Massachusetts; Jumpertz did not say she hung on such a hook as is in barbers' shops; I may have said I would hang Jumpertz on that hook; I have not a deep feeling to convict him; if I said I would hang him, it was in joke.

John C. Miller. I was present at Jumpertz's confession; gave account of his name, age, history, where he worked and for whom, where, how and when he became acquainted with Sophie Werner; same as last witnesses substantially.

William Tenbroeck. Am jailor; while Jumpertz was in jail he sent for Doctor J. A. Hahn to come and see him, and I was present at this interview; Jumpertz said to the doctor, I have sent for you to see if they can tell whether she (Sophie Werner) had been poisoned so long ago; I think the Doctor said he thought not; don't remember what he said; I said they could tell if they had the stomach; Jumpertz said he had taken it out; I said they could tell if she was hung, by the mark on the neck; he said he guessed that was cut off with the head; I don't remember anything else that was said.

Dr. James A. Hahn. I knew Jumpertz as a barber before his arrest; he used to shave me; I only had one conversation with him since his arrest; it was in the jail, in presence of jailor Tenbroeck; he said he wished me to do him a favor; I told him I would do so if I could; he said they were trying to make out that Sophie Werner was poisoned, and he wanted me to be present at the examination of the body, so that he could have some one he had confidence in to do him justice, and tell the truth about it; I said I had heard the inwards were removed and we could tell nothing about it; he said he had taken out all below the partition; I then said we could tell nothing about it: this was all that was said.

Counsel for the People then offered in evidence a letter from defendant to Mrs. Eberts, and proved the letter to be in the hand-writing of Jumpertz. Defendant objected, because the letter was irrelevant and immaterial. Court overruled objection, and defendant excepted.

Prosecution then offered, and gave in evidence to the jury, a letter, purporting to be written by Sophie Werner to defendant, threatening suicide (being the same letter shown to Milwaukee witnesses, and declared by the prosecution to be a forgery.)

Prosecution then offered in evidence a receipt, signed Sophie Jumpertz, dated March 3rd, 1858, given by her to Edward Vollert, offered it as the hand-writing of Sophie Werner, the only specimen prosecution could obtain. Defendant objected, as it was offered only for purpose of comparison of hands, which was not admissible. Objection overruled, and exception taken. The receipt was admitted in evidence and placed in the hands of jury.

Prosecution then offered a piece of the genuine hand-writing of Henry Jumpertz. It is offered simply as a writing, and not on account of contents. Defendant objects, on the ground that

it can only be admitted for comparison, and for such purpose not admissible. Objection overruled, and exception taken.

LETTER OF SOPHIE WERNER.

Dear Henry: Thy letter I have received and has grieved me much my forebodings came true how unhappy I am, yes, Henry unhappy I am long as I know thee love, I will bear for I have deserved it disgraced my parents under the ground. O Henry all for thee whom I loved yes I come veiled to see thee once more then I will flee forever to renounce thee and pray for thee and weep.

O Henry thou hast taken from me of my all, my honor. I will renounce thee, no longer annoy thee, be happy. I shall find my *home* with my mother, ay that was a virtuous wife no adulteress like her child. Yes my love could do all because, thus I had never loved. Now I must atone, had I ever loved Werner so much, but it is over, avenge myself I will on him ere I die, on thee I will not avenge myself, for I indeed loved thee, but I knew it all before, thy wishes I will fulfill, one kiss yet from your lips then I will flee ever ever.

And forgive me for it if I have grieved thee. It was not my will. O, how happy was I when thou was sitting by my side. I forgot everything, sorrow and misery. Oh, good Henry, don't be angry with me, and I am not angry with thee, for I love thee. Yes, a woman who renounces the world because of a man—I forget thee, never, not even in the grave. You want to imprison me; thou art right, I do deserve it. Why did I not follow my mother's symbol, chastity? But to thee I ever gave all—my whole heart. Farewell, don't forget thy Sophie, all that I could not say when taking leave, my heart would be too heavy. I will go to Chicago, so long until I leave for Rochester. Werner must die with me, for he has caused my ruin and my mother's death. Be happy, I forgive thee everything; farewell and be happy. Thine ever true loving SOPHIE.

Thy name I don't deserve then farewell and be happy. I know not Henry who interrupted me in writing. Guess who it was. Charlie knocked at the door. I ask who is there he says I want to tell you something from Henry. I unlock the door, he came in, was drunk somewhat, and chased me about the room until 12 o'clock like a lion. Ah, ah, good friend, even that had to feel upon my heavy heart, till I fled. I deserved it. Why did I not become a wife when I loved you secretly? It was no such sin. I have also written to my sister. That dog of a man goes away to-morrow. He promised strictly to me not to tell my shame to my sister. O Henry it is hard to write husband and I not be the wife. Forgive me, I cannot do otherwise, veiled. No woman is permitted in the house. Until Wednesday, thou art and remainest my Henry. Have no care, I will fulfill faithfully all thou hast commanded. Till I have seen thee, farewell! SOPHIE.

Jumpertz was found guilty, and sentenced to be executed; and prayed this writ of error, and assigned the following errors:

First. It does not appear that the indictment was ever found or acted upon by the grand jury.

Second. The court erred in overruling the motion to quash the indictment and each count thereof.

Third. The continuance of the cause at the September term of the Common Pleas Court, 1858, was erroneous, as it does

not affirmatively appear that causes justifying a second continuance were presented to the court, by the People.

Fourth. The Circuit Court erred in not discharging the defendant at its November term, 1858.

Fifth. The Circuit Court erred in continuing the cause at the November term, 1858, in the absence of, and without the consent of the prisoner or his counsel.

Sixth. The Circuit Court erred in overruling each of the defendant's several motions for a discharge, at the January term, 1859.

Seventh. The court erred in putting the defendant upon his trial when they had no legal right to hold him in further custody on the charge for which he was indicted.

Eighth. The court erred in overruling the defendant's motion for a continuance, at the January term, 1859.

Ninth. The court erred in permitting the proof, by the prosecution, of the conversations and declarations of Sophie Werner at and shortly before her leaving Milwaukee.

Tenth. The court erred in permitting the prosecution to prove the conversations of Sophie Werner, detailing the contents of letters purporting to come from defendant.

Eleventh. The court erred in permitting other conversations of deceased to be given in evidence by the prosecution, prior to and not at or shortly before her leaving Milwaukee.

Twelfth. The court erred in overruling the defendant's several motions and each of them, to exclude from the jury the several conversations of deceased.

Thirteenth. The court erred in permitting oral evidence, to prove the letters of prisoner and deceased, without a proper foundation being laid.

Fourteenth. The court erred in allowing witness Raabe to testify as to the manner of the spelling the name "Henry," on the back of a letter put in the post-office by him, at the request of deceased, and directed to prisoner, the said letter not being present, or its non-production accounted for; and in overruling the defendant's objection to the questions calling for such testimony.

Fifteenth. The court erred in allowing the evidence of the Milwaukee witnesses, touching and detailing the conversations of deceased, to show her state of mind, before evidence had been given by defendant touching her state of mind.

Sixteenth. The court erred in each of its decisions overruling each and every of the objections made by the defendant during the trial, to the admission of evidence, as set out and preserved in the record of the cause, by bill of exceptions, etc.

Seventeenth. There was error in the introduction and exhibition to the jury, of the door other than of prisoner's room, upon which the prosecution had made experiments with hooks, etc., and as stated in the bill of exceptions.

Eighteenth. The court erred in permitting and directing the experiments on the door of the room of the prisoner to be made in the presence of the jury, as and in the manner and with the materials mentioned and set out in the record by the bill of exceptions.

Nineteenth. The court erred in permitting the letter, purporting to come from defendant to Mrs. Eberts, of Massachusetts, to be read in evidence by prosecution.

Twentieth. The court erred in permitting writing, purporting to be that of defendant, to go to the jury for the sole purpose of showing his writing to the jury, and not on account of its contents.

Twenty-first. The court erred in permitting the receipt, signed by Sophie Werner, to go to the jury.

Twenty-second. The court erred in permitting the receipt of Charles Quentin & Co., to go in evidence to the jury.

Twenty-third. The court erred in permitting Alexander Siller to give oral evidence, and, in fact, any evidence at all, of the character of the account opened with Hoffman & Gelpcke—the time it was opened—and also in allowing him to give oral evidence of the contents of the draft sold by witness to defendant.

Twenty-fourth. The court erred in giving all, and in giving each, of the instructions asked by the attorney for the People.

Twenty-fifth. The court erred in refusing to grant to the defendant a new trial, and in overruling his motion therefor.

J. Van Arman, and E. W. Mc. Comas, for Plaintiff in Error.

C. Haven, for the People.

Caton, C. J. The great length of the record and of the written arguments in this cause, together with the necessity of filing the opinion of the court at the announcement of the decision, which has to be prepared during the term, while other business is pressing upon us, prevent us from even noticing all the points which have been raised and discussed, and, most of those which are noticed, must be treated very succinctly.

The receipt signed by the deceased, and the letter written by the prisoner, for the purpose of proving, by a comparison of the hand-writing of the two, with the letter produced by the prisoner, on the trial, as having been written by the deceased, was not written by her, but was written by the prisoner, was in viola-

tion of a well-settled rule of law, and should not have been admitted. The rule that the genuineness of hand-writing cannot be proved or disproved, by allowing the jury to compare it with the hand-writing of the party, proved or admitted to be genuine, obtains in criminal as well as in civil cases. The genuineness of a promissory note could not be so proved, though the matter in controversy did not amount to five dollars. Certainly, then, where the life of a human being may depend on the result, the rule of law cannot be less strict. We shall not stop now, to discuss the propriety or reason of this rule. It is sufficient that it is well settled, and universally observed.

Nor can we approve of the exhibition to the jury, during the recess of the court, of the door, screws, hooks, etc., or the experiments made with them, in the presence of the jury, during the trial. We will not say, that in no case can experiments be made in the presence of the jury, for the purpose of illustrating some point in controversy. Such a proceeding, to say the least, is very uncommon, and should be permitted by the court with great caution. We will not say that, were this the only ground for reversing this judgment, that we would yield to it.

In opening their defense to the jury, the counsel for the prisoner had stated, that the theory of the defense was, that the deceased had committed suicide, and that they should, upon the trial, introduce proof tending to show a frame of mind in her, predisposed to that act. In view of this, the court permitted the prosecution to show her acts and declarations, on all subjects, for several months previous to her decease, for the purpose of proving that she was in a cheerful and healthful mental condition, and not predisposed to suicide. It would have been better and more regular, no doubt, for this testimony to have been reserved, till after the testimony of the prisoner on this point had been adduced. Although his counsel had stated in their opening, that they should introduce the testimony stated, and insist that the deceased died by her own hands, yet they had an undoubted right to change their minds on that subject, and adopt another line of defense, after the evidence for the prosecution had closed. It was only proper as rebutting evidence, and its proper and legitimate order, was after the testimony for the defense was closed. The minds of the jury should not be forestalled or prejudiced upon any subject, by rebutting evidence, when there was as yet no testimony upon the subject to rebut. It was the right of the defense first to occupy that field of inquiry.

That the acts and declarations of a person alleged to be insane, or predisposed to suicide, are competent to prove a contrary state of mind, is not and cannot be doubted, but then

they should be only such acts and declarations as fairly tend to prove the mental condition of the person alleged to be mentally diseased; and care should be taken by the court, that under a pretense of proving this mental condition, other acts and declarations, not fairly bearing on this point, be not admitted, for other and illegitimate purposes; and it is one of the most sacred duties of the court, to adopt every possible precaution, that the evidence thus admitted be not perverted to other purposes, by admonishing the jury, that such declarations do not in the least tend to establish the truth of any fact thus proved to have been stated by the deceased, and also by sternly rebuking any attempt, or the least approach towards it, by the counsel for the prosecution, intimating to the jury that such statements tend in the least degree to establish the truth of the facts related. Indeed, any such course would not only be an unlawful and wicked attempt upon the life of the prisoner, but would betray a consciousness of weakness in the case made against him. While, from the necessities of the case, such testimony must be admitted, the temptation is very great for counsel, in their zeal and in the excitement of the trial, to extend its influence beyond its legitimate object; and it is very difficult, if not absolutely impossible, for the jury to divest their minds of the impressions which it is calculated to make, as tending to establish the truth of the facts stated in such declarations, in spite of every effort of the court and counsel on both sides, to confine its influence within its legitimate purposes. While some of the statements of the deceased, which were sworn to by the witnesses, are no doubt justly subject to criticism, as not fairly tending to elucidate her mental condition in the regard referred to, yet it was perhaps no more so than would inevitably creep into the case, in spite of the strictest precautions on the part of the court, and without any intentional unfairness on the part of the counsel for the prosecution. While, from the character of the statements of the deceased, which were proved, we cannot divest ourselves of the apprehension that the jury were unable to divest themselves of all improper impressions, which such statements were calculated to produce on their minds, we do not think we should be called upon to grant a new trial for this cause.

The irregularities alleged in the conduct of the jury, alone remain to be considered. They are shown by the following affidavits:

"Abner Sutton, being sworn, etc., says: That he is a deputy sheriff of Cook county, and was one of the officers who had charge of the jury in said case. That at noon of the first day after the jury was empanneled, and the testimony commenced, I was directed by John Everts, another deputy sheriff, to take

one of the jury, by the name of Loomis, to his own house, to see a member of his family, who was sick. I took said Loomis, separately from the rest of the jury, from the court house, to his own house, in Edina Place, from one-half to three-fourths of a mile. When arrived at his house, he left me sitting in the parlor, and went up stairs, and was absent from me ten or fifteen minutes, or more. I did not know who was in the upper story of the house. I then accompanied said juryman back to the Sherman House, where he and I took dinner at the public table. On the next day, the same thing was done again, and the juror remained up stairs the same time as before."

"Ira Snow, being sworn, etc., says: That during the argument of said cause by counsel, one of the jurymen, by the name of Bliss, was separated from the rest of the jury, and left in the court room, while the rest of the jury went to the hotel to dinner, for half an hour or more; that affiant, as deputy sheriff, remained with said Bliss; that when the doors were opened, he put the jurymen in an adjoining room, and that a woman, purporting to be the wife of said Bliss, remained in the court room and conversed with him during the time; that he did not hear them (Bliss and the woman) speak of the case, except as to how long it would probably last; but they talked a good deal together in a whisper, which affiant did not hear and understand."

"Simeon Y. Prince, being sworn, etc., says: He is deputy sheriff of Cook county, and had charge of the jury during the trial of said case. That on the evening of the second day of the trial, at the direction of Mr. Curtis, another deputy, he accompanied one of the jurymen, named Loomis, from the court house to his own house, in Edina Place, from half to three-quarters of a mile; no one else went with us; when arrived at the house, he left me in the parlor, and went up stairs out of my sight, and remained absent about ten minutes, and then came back to me with a woman, who, I was told, was his wife; and after conversing with her ten or fifteen minutes, went back with me to the court house; on the next evening, the same thing occurred again, in the same manner. During the trial, the jury were lodged at the Sherman House (a hotel), in two different rooms, five in one, and seven in the other, in different stories of the house. On one morning, while the said trial was in progress, I accompanied the whole of the jury to the house of said Loomis, and left him there, and accompanied the balance of the jury about the distance of a block, to the house of another juryman; I there waited in front of said house while said last named juryman went in, and was gone out of my sight, in the house, some five minutes; I then went back to the house of Loomis, who was out of my sight and presence about fifteen minutes; no officer accompanied either of said jurymen."

These affidavits are uncontradicted and unexplained, except that the court states, that in consequence of sickness in his family, he permitted the juror Loomis to visit his family, nor does he state that he authorized the juror to go out of the presence and control of the officer of the court, in whose charge he was permitted to visit his sick family. Whatever strictness may have existed in former times, not only in reference to insulating the jury from the outside world, but also in depriving them of the comforts and even necessaries of life, while they had the prisoner in charge, the higher civilization and greater humanity of more modern times, permits the court, in the exercise of a cautious discretion, to provide for the jury every requisite for their comfort and convenience, compatible with a safe seclusion from extraneous influences, and even in case of urgent necessity, the court may be warranted in permitting a juror to be separated from his fellows, so far as to be permitted to visit a sick family, but in such a case, prudence requires that a special order be entered, authorizing the separation, and the juror placed in the charge of an officer of the court, specially sworn to take charge of him, and not permit him to depart from his sight or hearing, and not to converse with him, himself, nor permit him to converse with any other person about the case on trial, during the separation, and return him to his fellows so soon as the object which occasioned the separation, shall have been accomplished.

In the case before us, four of the jurors, upon six different occasions, separated from their fellows, and out of the presence or hearing of any officer of the court, were permitted to hold intercourse with strangers to the court, and the cause on trial, and there is no pretense that the court authorized or was privy to more than one of these separations, and it does not appear, nor are we to presume, that the court authorized the juror to hold intercourse with others, out of the presence or hearing of an officer of the court. No necessity or occasion for the other separations is pretended.

In *McKinney's Case*, 2 Gilm. R. 553, this court said, "The law in capital cases undoubtedly is, that from the commencement of the trial till the rendition of the verdict, the jury during all the adjournments of the court, should be placed in charge of an officer, unless it is otherwise ordered by the court by the consent of the accused, and the attorney for the People." Again, "In this case, if the jury did separate without the consent of the prisoner, it was an irregularity, and the court below would, upon the fact being established, have been bound to set aside the verdict and grant a new trial, unless such separation was the result of misapprehension, accident or mistake on the part of the jury, and under circumstances to show that

such separation could by no possibility have resulted to the prejudice of the prisoner."

This is from a case where many of the rules and absurd technicalities, in favor of the prisoner, which governed the English courts in the trials of capital cases, are swept away, as not constituting a part of the law under our criminal code, and an opinion by one of the most enlightened and humane judges that ever sat upon this bench, who, while dashing aside with a vigorous hand, but an enlightened discrimination, those senseless technicalities which the sanguinary laws of England extorted from humanity rather than from reason, lays down a rule for the government of juries, which in all times and under all governments, is absolutely indispensable to protect the accused against a whirlwind of passion and prejudice which may be raging beyond the circle which surrounds the court of justice, within which the most calm and solemn serenity and unbiased judgment should alone prevail. If ever the time shall come when juries are not kept entirely separated from, and in utter ignorance of the prejudices and cries of the public, which may call for the blood of a victim, then no man will be safe,—the innocent as well as the guilty is in danger of being tried by a public mob, and condemned, in a frenzy of excitement, where suspicion may be aroused without cause, and culminate into condemnation without reason or reflection. Human passions and prejudices, like fire, increase, rage and intensify by their likes which surround them, and with which they commingle. It is in such times as these that the least contact of the jury with this outside pressure endangers the innocent as well as the guilty. The poison distilled by public prejudice, may, by little more than a moment's exposure, be diffused through the jury room, intimidating the weak and exciting the impulsive. It may be that in this case, there was no outside excitement and no public prejudice, which could have been likely to have communicated itself to the jury on the many and protracted exposures of its different members, which are shown to have occurred. Of this we cannot and would not know anything. As one rule must govern all cases, that rule must be such as not to endanger the innocent, against whom circumstances may excite a strong suspicion and for which public clamor demands a victim. It may be that not in one case in a hundred is there an actual necessity for thus isolating the jury from the outside world, but the hundredth case demands it as much as if the necessity actually existed in every case. The law presumes, and the history of the world shows, that there may be danger of improper influences disturbing the mind of the jury, and hence there can be no

safety unless every case is so tried as to exclude all doubt from such causes.

Important as this case may be to him and to the public, yet the fate of Henry Jumpertz sinks into insignificance compared with that of the thousands of innocent men whose fate may depend upon the rule we are to fix for the conduct of jurors in capital cases. No community can be always exempt from unjust and even absurd excitements, which at the best, will infect the atmosphere of the jury room. And instances have been known where even the equilibrium of courts has been disturbed by such influences. History furnishes a lamentable instance of this in the so called Popish Plot. But fortunately such instances are very rare. Against such hazards no rule of law which may be adopted can effectually protect the innocent.

In the language of Mr. Justice Lockwood, above quoted, if from any cause there is a separation of the jury, it must be "under circumstances to show that such separation could by no possibility have resulted to the prejudice of the prisoner." What are the facts here? On six different occasions did members of this jury hold intercourse with persons we know not whom, and we are in total ignorance of the nature, character, and extent of the communications which passed at those interviews. Whether the time was spent in imbibing the prejudices which others may have felt towards the prisoner, or in sympathizing and assisting the sick and afflicted at home, we do not and cannot know. The prisoner had no means of informing us for he could not call upon the jurors to disclose what transpired, and the officer of the court, in whose charge the jurors should have continued, and upon whose fidelity and integrity the prisoner must rely, and upon whom he should be enabled to rely with the most sacred confidence,—that officer, we say, was not present to watch over and protect the interests of the prisoner. He whom the law would permit to tell of any misconduct, was not present, and hence could say nothing more than that the jurors were separated, away, and among strangers. They may have been exposed to the most fatal influences. It is not enough to say that the probabilities are that no such fatal mischief was wrought. It possibly might have been. We do not know, and cannot say that it was not. And unless we, from this bench, can tell the prisoner, that during these many interviews with, we know not whom, no harm was done him, nothing was said to his prejudice, no outside influences brought to bear against him, then we are bound to grant him a new trial. We have no warrant for saying this. We cannot so assure him, and hence we must take the other alternative, and allow another jury to pass upon his case. This record also shows, that on some

occasions, at least, some of the jurors were permitted to dine at the public table of a hotel. This cannot be sanctioned by this court, and should not be tolerated by any court.

There are many other points which have been raised by the prisoner's counsel, and discussed with great ability, and most commendable industry, but which we cannot with propriety now stop to examine. Our silence must be understood as approving of the decisions of the Circuit Court thus questioned.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to award a new trial.

Judgment reversed.

Breese, J. I dissent *in toto* from the opinion pronounced by the majority of the court in this case, and will give my reasons therefor, briefly as I may.

The case is one of great public importance, as affecting the security of life, and demands the closest scrutiny. A homicide, unexampled in the annals of any country, has been committed in our largest city, under circumstances of the greatest atrocity, and, under the ruling of the court, the guilty party may go "unwhipt of justice."

But be the guilt of the prisoner of the deepest dye, he is entitled to a fair and impartial trial, and to have the rules of evidence and principles of law properly applied to him, but to no more. He is entitled to all those safeguards, and those only, the beneficence of the law has thrown around the accused, and a full observance of all the necessary and required forms. A serious departure from them, will always justify the interposition of this court, and in a proper case, it will never be invoked in vain.

Could I, for one moment, believe the prisoner had not received a fair and impartial trial, or that the rules of evidence or the principles of law had been improperly applied and enforced, and the required forms disregarded to his prejudice, I should not hesitate to set aside the verdict rendered against him.

The majority of the court, to whose judgment I ought, perhaps, to defer, are of the opinion that such rules and principles have been violated, and they have, as they should do, set aside the verdict, and granted a new trial, and the reasons therefor have been made public. As I dissent from the opinion, it is but respectful that I should give my reasons, although it can produce no practical result. The fiat has gone forth, and the law pronounced for all future time, in like cases, which may hereafter occur.

The opinion of the court is placed mainly on the ground of admitting evidence of comparison of hand-writing, to rebut testi-

mony the prisoner introduced, and which he is supposed to have manufactured, and the separation of several of the jurors at separate times, apart from the officer, but before the case was finally committed to them, and without any proof, or well-founded suspicion even, that the prisoner was prejudiced thereby, together with a half-way objection to certain physical experiments, made with hooks and cords, in the presence of the jury.

As to the first, the court say, "The receipt signed by the deceased, and the letter written by the prisoner, for the purpose of proving, by a comparison of the hand-writing of the two, with the letter produced by the prisoner on the trial, as having been written by the deceased, was not written by her, but was written by the prisoner, was in violation of a well-settled rule of law, and should not have been admitted. The rule that the genuineness of hand-writing cannot be proved or disproved, by allowing the jury to compare it with hand-writing of the party, proved or admitted to be genuine, obtains in criminal as well as in civil cases. The genuineness of a promissory note could not be so proved, though the matter in controversy did not amount to five dollars. Certainly, then, when the life of a human being may depend on the result, the rule of law cannot be less strict. We shall not stop now to discuss the propriety or reason of the rule. It is sufficient that it is well settled, and universally observed."

I will undertake to show, and I think successfully, that the rule of evidence here treated of, is not as stated—is not "well settled," nor "universally observed," and if there be no settled rule on the subject, that the one adopted by the court is not the most reasonable and practical.

It is one of the fundamental rules of evidence, that the best evidence of which the nature of the case or the issue is susceptible, must be produced. The paper, signed by the deceased, was proved to be her hand-writing. About this, there was no dispute. The letter produced by the prisoner, as having been written by her, was introduced by himself, was important to his defense, and it was his business to prove it. No one proved it to be in the hand-writing of the deceased—there was much testimony on the point, but nothing satisfactory elicited, and it was submitted to the jury to determine from the testimony, and the genuine writing, what the probabilities were. So far as this fact was concerned, they were to weigh the evidence, and decide accordingly. Evidence of hand-writing, like all probable evidence, admits of every possible degree, from the lowest presumption to the highest moral certainty, and affects the jury accordingly. All evidence of hand-writing, except when the witness has seen the disputed document actually written, is, in its nature, comparison. It is

only the belief which a witness entertains, upon comparing the writing in question with an abstract picture in his mind, derived from some previous knowledge, and he must, upon the moment, apply that picture or examplar, to the particular writing in question.

The witness who established the hand-writing of the deceased, could refer to that paper when interrogated as to the genuineness of the letter, and he had a right to compare it in his own mind, with the genuine hand-writing, and then speak as to his belief. So had the jury a right, the genuine document being before them, to cherish or reject any belief thus created. It was a collateral matter, and though in a capital case, the jury were not required to be satisfied beyond a reasonable doubt of the truth of every collateral fact that might arise. Upon such, they could weigh the evidence, but upon the whole case, as to the guilt of the accused, they must have no doubt. The question for the jury was,—what is the probability under the evidence? Did the deceased write this letter? It was not a prosecution for forging the letter, but it was a collateral matter, introduced by the prisoner himself, to be disposed of in the same way such facts are always disposed of by courts and juries. The interest the prisoner had in the letter, was one consideration for the jury, and unless he furnished proof of its genuineness, the jury had a right to decide, from the proofs submitted, on its true character, and on the purpose for which it was introduced. It is said to be a general principle, that a witness shall not be allowed to state to a jury, the conclusion or belief of his mind, as to a piece of hand-writing being that of a particular individual, when that conclusion is made for the purpose of the issue, by means of a comparison of the disputed writing with another written specimen of the same individual, produced in court. The reason assigned for this sometimes is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance. A second reason is, that this species of evidence might cause inconvenience, by raising numerous collateral issues, and often come by surprise against the party to be affected by it.

As to the first reason, it is admitted to be too narrow for a rule of such general application.

As to the second, it may be observed, that the issue was presented by the prisoner himself, and he could not complain of surprise.

The strongest reason for rejecting such a comparison is, that the writings intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested in selecting such writings only as may

best serve his purpose; and that they are not likely, therefore, to exhibit a fair specimen of the general character of hand-writing. 2 Phil. Ev. 255. But neither of the reasons are approved by Philips, or other respectable writers on the law of evidence.

It is, certainly, an inconsistency in the rules of evidence, to allow a witness to compare, in his mind, the disputed paper, with the impression, which a slight and transient view of writings may have made upon his memory, and on the other hand, not permit the jury to compare it with writings, proved to be authentic, present in court, and open for inspection.

To this objection, which all must see is a valid one, the only answer is, that before suggested, namely, that the writings which are produced as specimens, having been selected by an interested party, to serve a present purpose, may be open to suspicion, and liable to the imputation of contrivance. Phil. Ev. 255.

This is certainly no good answer to the objection, for if they be open to suspicion and liable to the imputation of contrivance, will not the jury, with their argus eyes, and attentive ears, discover it? Why keep it from the scrutiny of a power, in which we glory—in which we repose so much confidence, and on which, courts and the profession are prone to indulge in so much adulation? Can there be any harm or danger in subjecting to the test of a jury, papers open to suspicion and obnoxious to the charge of contrivance? If this was a reason, there is constantly evidence open to the same objection. Other specimens might be exhibited by the opposite party, and means afforded for getting at the truth.

But this rule has been very considerably relaxed, as the same author tells us. Upon a question respecting the identity of hand-writing, the jury may be allowed to take other papers, which have been proved to be the hand-writing of the party whose hand-writing is disputed, provided they are a part of the proofs in the cause, and may compare them with the disputed writing, for the purpose of forming their opinion, whether the disputed writing is genuine. Ib. 256. The reason given is, that the papers being parts of the proofs in the cause, are free from all suspicion of undue selection.

Now I submit, if the paper offered in this cause, is free from the suspicion of undue selection, why should it not go to the jury for the purpose of comparison? Can it be alleged that it is tainted with this suspicion? and if it is, where is the danger of submitting it to the jury?

It is said to be an established qualification of this last rule, that documents irrelevant to the issues on the record, are not to be received in evidence on a trial, for the mere purpose of

enabling a jury to institute such a comparison. But the circumstances of this case, show no such state of facts. The question was, is the letter produced by the prisoner, purporting to have been written by the deceased, her genuine hand-writing? No witness proved it was—some one or more thought it resembled her hand-writing. But before the question of the letter had been distinctly presented, the receipt signed by the deceased had been introduced in evidence, by the prosecution. It was not admitted, as alleged in the opinion of the court, for the mere purpose of instituting a comparison of hands, but as a part of the *res gesta.*

A portion of the criminative evidence against the prisoner, consisted in the alleged fact, that the deceased brought with her to the prisoner's room, a considerable amount of money, which was actually deposited to the prisoner's credit, the day after she reached his room, and but three days before her death. To aid the jury in determining whether the amount so brought by her, corresponded with the credit at the bank, the receipt in question, for money paid to the deceased a day or two before, became pertinent and competent evidence.

It was admitted, as a part of the evidence of the witness who had paid her the money, and being in her hand-writing, was the most authoritative evidence of the fact. If the question, touching the genuineness of the letter, had not been raised at all, this receipt would have been introduced to the jury, as part of the *res gesta*, and for a legitimate purpose. When the question of the genuineness of the letter was subsequently raised, *then* it was, that the witnesses were asked, if the disputed letter was in the same hand-writing. And every witness examined on this point, was an expert. It is, therefore, apparent that this evidence is supported by authority. 2 Phil. Ev. 256.

But I insist, that it was admissible, on the clearest principles of reason and authority, for the purpose of instituting a comparison of hands, by experts, and that it was not necessary that the evidence should have been in the case, for any purpose except that of making the comparison.

It has been already stated, that a witness who testifies on the subject of hand-writing, gives, at best, but the result of a mental comparison, made by him, of the disputed writing with that which he has seen, and the impression of which remains on his memory. What difference could it make, if this comparison was carried on in the mind, which the rules of evidence allow, or actually made in the presence of the court and jury? Is speaking from an impression made on the mind, more convincing, more worthy of regard and belief, than a present conviction, produced by actual comparison?

Starkie says, (2 Stark. Ev. 516), the most satisfactory reason for excluding comparison of hands is, that if such comparison was allowed, it would open the door to the admission of a great deal of collateral evidence, which might go to a very inconvenient length.

This reason does not seem to me, either powerful or convincing. The examination is always in the power of the court to be arrested, when proceeding to an inconvenient length. But the reason does not apply here, for the genuineness of one single document only, was in question, and that produced by the prisoner himself. Starkie, however, leans in favor of the evidence.

In *Allesbrook* v. *Roach*, 1 Esp. R. 351, sittings after the term at Winchester, before Lord Kenyon, that distinguished judge said, on the comparison of hands: "Some judges have doubted of the policy of that rule of evidence, respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis, the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have been always inclined to admit it, and shall do so in this case."

A distinction seems to be taken by the learned judge, when a *witness* is called to speak from comparison of hands. He is held not to be admissible, (ib. *Stranger* v. *Searle*, 14, per Lord Kenyon,) but the jury can be allowed to make the comparison, and no good reason has ever been assigned, or can be assigned against it. The jury want evidence to satisfy them of the probable truth of a fact, and if the best evidence of which the case or the issue is susceptible is produced, the requirement of the law is fulfilled.

In more recent English cases the doctrine is thus laid down—as I have already stated—that the court or jury may compare two documents together, when properly in evidence, and from that comparison, form a judgment upon the genuineness of the hand-writing. 4 Phil. Ev., Cowen and Hill's notes, part 2, page 478. This being so, why is it not as reasonable, when a doubtful paper is sought to be made evidence, that the opposite party should show by a genuine paper, and by comparison of the disputed paper with it, that the probability is against its genuineness. The evidence may not be conclusive by any means, yet it affords the jury some *data* on which they can make up a satisfactory opinion for themselves.

I am of the opinion, that were the paper the ground of the action, as upon an indictment for forging it, the evidence would be admissible, although in criminal prosecutions of that nature, the jury must be satisfied beyond a reasonable doubt of the truth of the forgery. They cannot in such case weigh the evidence

and find their verdict on probabilities. But the purposes of the proof in this case were wholly different. The question was, is this letter the genuine letter of the deceased. This is met by an exhibition and proof of her genuine hand-writing, and by the testimony of witnesses who fail to identify the letter, some of whom, on comparison, condemn it. They are submitted to the jury for the purpose of satisfying them on that point, and they condemn it. The theory of the prosecution was, that the letter was a forgery got up by the prisoner, in anticipation of the occasion, and the prosecution were entitled to use all the means at their command to raise the presumption that it was a forgery, and none were more proper than by the production of a genuine paper, and comparing the forged one with it.

The rule on this subject is by no means uniform in the several States of the Union.

In Pennsylvania, in the case of *Mc Corkle* v. *Binns*, 5 Binney, 349, after evidence was given in support of a writing, it was permitted to corroborate by comparison with an acknowledged writing of the party. In *Farmers' Bank of Lancaster* v. *Whitehill*, 10 Serg. and Rawle, 112, the court in discussing the reasons above given, for the rule, consider them all unsound and unsatisfactory. That court says, it is more satisfactory to submit a genuine paper, as a standard, and let the jury compare that with the paper in question, and judge of the similitude, than the evidence continually received of allowing a witness who has seen the party write once to compare the disputed paper with the feeble impression and transient view the writing may have made upon his memory. This is by no means so well calculated to ascertain the truth, the object of all evidence, as to suffer the jury to compare the paper with writings proved to be authentic present in court and open for inspection.

The court cites the case of *Osborne* v. *Hosier*, 6 Modern, 147, where one of the subscribing witnesses on the issue of *non est factum*, gave full evidence of sealing and delivery. The other swore it was very like his hand, but not his. The reputation of both was good, and Holt, C. J., ordered them to write their names, and thereupon left it to the jury, who found for the plaintiff. See also *Baker* v. *Haines*, 6 Wharton, 284. On an indictment for forgery, especially where the writing is found in the prisoner's possession, comparison of hands may be permitted. *Pennsylvania* v. *McKee*, Addison's Rep. 33.

In North Carolina, comparison of hands is admissible as a circumstance in aid of doubtful proof, but *per se*, and without other proof, it is not. *Bowman* v. *Plunkett*, 2 McCord, 518.

In New Hampshire, the doctrine of the Pennsylvania courts is established. *Myers* v. *Toscan*, 3 N. H. R. 47. So in Massa-

chusetts. *Hall* v. *Huse*, 10 Mass. R. 39; *Homer* v. *Wallis*, 11 Mass. R. 308.

In Kentucky, it is held that such proof is inadmissible except in the case of ancient writings, and in aid in corroboration of other proof. But alone, and without other proof, the general rule is not to admit it. *Woodward* v. *Spiller*, 1 Dana, 179.

In Maine, it is held admissible. Hammond's case, 2 Greenl. R. 33. So in Connecticut. *The State* v. *Nettleton*, for forgery, 1 Root, 308; and in *Lyon* v. *Lyman*, 9 Conn. R. 55; and no distinction is made between civil and criminal cases. And in Pennsylvania. *Commonwealth* v. *Smith*, 6 Serg. and Rawle, 571. And so in Rhode Island. *Freelove* v. *Fenner*, 2 Gallison, 170.

In Louisiana, the doctrine on this subject rests on their code of practice, and proof by comparison is allowed. In 2 McNally's Evidence, 394, it is said that in proving the hand-writing of a defendant, there is no distinction between that which is legal evidence in a civil action, and that which is legal evidence in a criminal prosecution. The rule adopted by this court, then, cannot be said to be "universally observed."

But this review of authorities was unnecessary, inasmuch as this court, in the case of *Pate* v. *The People*, 3 Gilm. R. 659, declared the rule to be as I have stated it.

That was an indictment for forging a receipt, and a contract for the conveyance of a tract of land. On the trial, one Phillips, an expert, who had never seen the party write, was called to give his opinion upon the papers produced, whether they had been altered or not from the originals.

The first error assigned was in receiving the testimony of Phillips. Treat, J., in delivering the opinion of the court, says, "A bare reference to the testimony which he gave and the object for which it was introduced, will clearly show there was no valid objection to it. Randall the prosecuting witness testified that the receipt and contract described in the indictment, were never executed by him, and he proceeded to point out instances wherein the style of writing and spelling differed from his own. For the purpose of contradicting him, the prisoner introduced other papers, written and signed by Randall, which corresponded in these particulars with the documents alleged to be forged. The prosecution then had the undoubted right to rebut this testimony and sustain Randall. A legitimate way of doing it was by showing that the papers introduced by the prisoner and which by the evidence had been traced to his possession previous to the trial, were originally written as stated by Randall, but had since been made to resemble the forged writings by alterations and erasures. Phillips was placed on the stand for the purpose of examining them critically,

and then expressing his opinion to the jury, whether there had been such erasures or alterations. His conclusion was that erasures had been made in the particular instances pointed out by Randall. It had been the business of the witness for many years, as an officer of a bank, to examine papers with a view of detecting alterations and erasures, and ascertaining spurious from genuine writings and signatures. He was therefore a person skilled in the matters concerning which he was called to give testimony, and as such, was competent to express his opinion to the jury.

"It was insisted on the argument, that the question whether there had been erasures, was one to be determined by the jury on an inspection of the papers, without the aid of other testimony. It can hardly be supposed that the jurors were as competent to form a correct opinion on the subject, as a witness peculiarly qualified by years of practical experience. Erasures might be easily discovered and pointed out by such a witness, which would otherwise escape the observation of men unaccustomed to detecting them. The court was right in allowing the minds of the jury to be enlightened by the opinion of a witness possessing this superior knowledge."

This ruling, I submit, covers the whole ground for which I contend. Here is comparison of hands by an *expert* who had never seen either party write, and it was right and proper that the minds of the jury should be "enlightened" by his opinion.

Upon the other point of physical experiments having been made in view of the jury, in the absence of the court, and also in the presence of the court, I am well satisfied there was no impropriety in it. The great object of testimony is to get at facts, and it matters not by what avenue they reach the mind of a jury, whether by the eye or the ear. The experiments involved no question of science or skill, and the jury might as well see them with their own eyes, as to have a detail of them by witnesses when made out of their sight. About the propriety of this mode of getting facts there is no question. *Vaughn* v. *The State of Mississippi*, 3 Smead & Mar. R. 555; *Colt* v. *The People*, 3 Hill R. 437, note (a), and other cases referred to on the argument. Such experiments, properly conducted, afford evidence of the most satisfactory and conclusive nature.

As to the irregularities in permitting several of the jurors, each one by himself, to separate from their fellows for a few minutes, it may be admitted, it was irregular so to do, and the officer should be punished for suffering it. But such separation, under the circumstances detailed in the record ought not to be held as vitiating the verdict. There should be some proof,

some reasonable suspicion at least, that such separation was to the prejudice of the prisoner.

The case of *The State* v. *John Tilghman*, on trial for murder, reported in 11 Iredell N. C. R. 513, is a very strong case to show that very great irregularities on the part of a jury, are not compulsory on the court to set aside a verdict, and tho' going perhaps too far, furnishes strong evidence of the unwillingness to disturb a verdict.

In *Smith* v. *Thompson*, 1 Cowen R. 221, where two jurors, after the jury retired to consider of their verdict, separated from their fellows, and were gone some hours, but returned and joined in the verdict, the court refused to set aside the verdict, there appearing to have been no probability of abuse. In all the cases I have examined, and they are numerous it is settled, that in order to set aside a verdict on the ground of the separation of the jury, there must be some suspicion of abuse. See *Beebe* v. *The People*, 5 Hill R. 32.

There is not the slightest imputation upon any one of the jurors who separated in this case. In passing their houses, in company with the sheriff some one or more went in, and were out again immediately. This was before the trial closed. They had not retired to consider of their verdict. Under such circumstances in the absence of all proof, or suspicion even, that the prisoner was prejudiced in any way by it, to set aside a verdict, after a fair trial seems to me going much too far.

How is it that the greatest criminals are treated with the greatest lenity and every inference indulged in their favor? The answer is it is *in favorem vitae*, but has that sentiment any influence over the remorseless murderer? Why should this court say, in such a case as this is, that it is within the reach of possibility the separating jurors, in the few brief moments they were absent from their fellows, *may* have been tampered with, or otherwise prejudiced against the prisoner? Is it right, is it a demand of justice, that courts should fly to such *possibilities*. The apprehensions of popular excitement, demanding its victim, are all imaginary. The day of popish, and all other plots of a kindred character, have long since passed away. Trials for witchcraft and sorcery, where victims were yielded up to popular clamor, marked an uneducated and superstitious age. They are with the past, never to be revived in the clear sun-light of advanced education, and the highest civilization. Our history furnishes no instance, since these dark days, where an accused person, under a formal trial, has been taken from the courts, and victimized by the people, or his conviction obtained by the demands of an excited populace.

If there was any reason on the earth to suspect that the prisoner had not been fairly treated by the separating jurors, that they had talked about his case, or received improper or any impressions in regard to it, or that he had not a fair trial, I should be the last one to insist upon the verdict. But there being no pretense of this sort and a fair trial had, he is entitled only to strict justice.

In a murder case in Connecticut, *The State* v. *Babcock*, 1 Conn. R. 401, the court say a judgment will not be arrested, merely because the jury, after the cause was committed to them, separated before they had agreed upon a verdict.

I can find but one case in the books, where *mere* separation of the jury has been held sufficient cause for setting aside a verdict, either in a civil or a criminal case. That case is *The Commonwealth* v. *Mc Caul*, 1 Virginia Cases, 271, where the court go the length of saying that the court should guard against the *possibility* of abuse by setting aside the verdict if any of the jury depart from the control of the officers. In England, where great strictness is observed the decisions are uniform, that though the jury separate, if there be no further abuse, this shall not vitiate the verdict, though it would be a contempt of the court if contrary to their instructions, and would be punished as such. In the case of *The People* v. *Douglas*, 4 Cowen, 34, the whole doctrine is fully examined. In that case it was shown, that two of the jurors ate cakes and drank spirituous liquors, and talked about the trial, and *for these reasons*, not for the *separation alone*, the verdict was set aside.

There is not a scintilla of evidence, going to show or to raise a suspicion, that any one of these jurors ate or drank or talked about the case, or had any intercourse with any person where such conversation would be likely to take place. Nothing of the kind is pretended or shown, and as the separation occurred before the case was finally committed to them, it is going further than I think the court should go, to hold it such an irregularity as to vitiate the verdict.

A bare possibility that the jurors separating might have been tampered with, or improperly influenced has never before in any court, except the solitary case of *Mc Caul*, been held sufficient to set aside a verdict. The books will be searched in vain for such a case. Mere separation, before the case is finally committed to the jury, unaccompanied with proof of exposure to improper influences, or just suspicion thereof, I repeat, has never until now, been held to vitiate a verdict.

Should such a criminal escape, the justice of the State might be well impeached. "*Judex damnatur, cum nocens absolvitur.*"

There is not in my judgment a single prominent fact in this case, consistent with the innocence of the prisoner, but

> "In law, no plea so tainted or corrupt,
> But, being seasoned with a gracious voice,
> Obscures the show of evil."

His counsel, who have managed this case with signal ability, have argued his innocence, as it was their duty to do. There is in every mind, a strong tendency to weave for itself a theory out of the minute incidents surrounding a transaction, itself shrouded in some mystery, and to bend everything to its support; it is not strange therefore, that able and enlightened counsel, having been assured of the fact itself by their client as he desires to establish it, should find in everything, a tendency to prove their theory true. As a judge, and disinterested, I can discover nothing on a careful examination of the evidence, on which to base their theory. Could I do so, and did I believe the prisoner had not a fair and impartial trial, I would not hesitate to award him another trial. I believe he has had a fair and impartial trial, and I further believe, that no rule of evidence, or principle of law, has been improperly determined against him; and therefore I think the verdict should stand.

Judgment reversed.

Theodore F. Cook *et al.*, Appellants, *v.* Alexander H. Heald *et al.*, Appellees.

APPEAL FROM COOK.

Whoever attempts to enforce a mechanics' lien, must bring himself within the terms of the statute, by showing that the original contract required the work to be done, and the money to be paid therefor, within the times severally fixed by the statute for those purposes. These times must be determined when the contract is first entered into, and not by subsequent changes and alterations of it.

The petition should aver that the times for delivery, performance, and payment, are within the several periods named by the statute, and these averments must be proved, so that the court may know that the conditions required by the statute have been complied with.

A petition which fails to aver when the work was completed, is bad—a contract which does not specify a time within which the work is to be completed and the money is to be paid, is defective.

The appellees, Alexander H. Heald and Levi H. Waterhouse, on the 9th February, 1857, filed in the Circuit Court of Cook

county, a petition for a mechanics' lien, setting forth that on or about the 26th June, 1856, they being mechanics, Theodore F. Cook entered into an agreement in writing, with them, (which, with the specifications therein alluded to, are attached to and form part of said petition,) whereby they agreed, in consideration of the payments to be made by said Cook, to build, finish and complete, in a workmanlike manner, to the satisfaction of William W. Boyington, superintendent, the masonry work of a pressed brick front dwelling, to be erected on Wabash Avenue, according to said contract and specifications, and the said Cook thereby agreed to pay them for the work so to be done and materials so to be furnished, $2,781, as the work should advance on estimates, fifteen per cent. to be reserved until work done, and certificate of superintendent that they were entitled to it; Cook reserved right to alter and modify, and in case of alteration, to pay for extra work and labor thereby occasioned; that about 1st July, 1857, they commenced to work and furnish materials under said contract, and also did and furnished extra work, labor and materials, at the request of said Cook, to $151.20; that all the work under the contract, and the extra work had been finished and approved by said William W. Boyington, by his certificate in writing, which is annexed to petition; that the lot of land upon which the said pressed brick front dwelling was to be erected by them by terms of said agreement, is the 25 feet front and rear, off the south side of sub-lot 1, lot 4, block 22, Canal Trustees' subdivision of fractional section 15, town 39, range 14, 3 P. M., in the city of Chicago, and State of Illinois; that $1,850 had been paid them on contract, and $100 on extra work, balance due them, of $982.70; that said T. F. Cook purchased the said premises of H. H. Husted, who gave said Cook an agreement in writing, whereby, in consideration of certain payments to be made, he agreed to execute a deed of said premises to said Cook; that a part of the purchase money had been paid, and a part still undue and unpaid; that Isaac Cook and the rest of the appellants, except Burgess, claim to have some interest or lien upon said premises.

Wherefore, they pray that said last named parties and Theodore F. Cook, be made parties defendant, and that a summons might issue to them to appear and answer, as required by the statute; for judgment against T. F. Cook for the amount due, with interest, which might be a lien upon the premises and dwelling-house, to the whole value of the dwelling-house, and to the extent of the interest of Cook, in said land, at the time of making said contract for mason work and materials, and that a sale of said right and interest might be ordered, and the proceeds thereof applied to the discharge of said judgment, accord-

ing to the statute, and that said defendants last above named, might be barred and foreclosed of and from all claim and interest in and to said premises, and for further and other relief, etc.

Time. Owner to give possession of the ground on or before the 1st day of May, 1856; contractor must agree to build the walls and chimneys ready for the roof, on or before August 1st, 1856, and fully complete the plastering of the building within thirty days after the same is declared by the superintendent ready for lathing, and must complete the whole job of masonry within thirty days. Payments to be made on the work as might thereafter be agreed.

Articles of agreement, made June 26th, 1856, between Heald and Waterhouse, of the first part, and Theodore Cook of second part; in consideration of the payment thereafter to be made to them by Cook, Heald and Waterhouse, agree to build, finish and complete in a careful, skillful and workmanlike manner, to the satisfaction of William W. Boyington, superintendent, and by and at the times mentioned in the foregoing specifications, the masonry work of a pressed brick front dwelling-house, to be erected as aforesaid according to the foregoing specifications, and plans and drawings therein referred to; and Cook, in consideration of their doing work and furnishing materials therefor, according to the contract, and to the satisfaction of William W. Boyington, and at the times mentioned in the specifications, agrees to pay them $2,781, as the work advances, upon the estimates of the superintendent, reserving fifteen per cent. until contract completed.

CERTIFICATE OF ARCHITECT.

Theodore F. Cook,

To Heald & Waterhouse, *Dr.*

To Building House, as per contract	$2,781.00
" Extra Stone Work in foundation	7.50
" " Work altering Breast and Furnace	10.00
" 5,300 Brick in Cistern, *a* $9. per M	47.70
" 7 bbls. Rosendale Cement, *a* $4. per bbl	28.00
" 5½ " Illinois " 2.25 "	12.38
" 9½ days Masons on Cistern, 2.75 per day	26.12
" 12 " Laborers " 1.50 "	18.00
" ½ " Teaming " 3.00 "	1.50
	$2,930.20

Across the face of this bill of items is written:

"I hereby certify that the within bill of extra work was done according to order, and I hereby certify to and approve the same, including the contract.

WM. W. BOYINGTON, *Superintendent.*"

Isaac Cook, made a party respondent to the bill, filed his demurrer to the petition, and for cause, shows that the said complainant hath not in and by said bill, set forth when the money to be paid under said contract, was due, or to be paid thereunder, nor that the same was due at the filing of said bill, according to the terms of said contract; nor but that the same was payable six months and upwards, prior to the filing of said bill; neither does it appear but that the time of completing the contract was not extended for a longer period than three years from the time of making the contract for the said building; nor does it appear what time the work was done and completed, and that the complainant hath not made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

This demurrer to petition was overruled by the court.

There were divers pleadings of the parties made defendants, which are not necessarily connected with the opinion of the court, and are therefore omitted. There was a trial upon the petition, before MANNIERE, Judge, and a jury, and a verdict and decree for the complainants, directing a sale of the premises, and a distribution of the proceeds. From this decree, an appeal was taken by the respondents. Among other errors assigned, were the following:

That the court overruled the demurrer of Isaac Cook to the bill.

That the petition is defective in not alleging when the work was done—when the contract required it to be done—in not alleging that the work was to be completed within three years from making of contract, and in other respects.

That the court rendered a decree for complainant, and directed a sale of said premises.

W. T. BURGESS, for Appellants.

E. AND A. VAN BUREN, SHUMWAY, WAITE & TOWNE, and A. INGALLS, for Appellees.

WALKER, J. It is insisted that the petition, and contract upon which it is based, are insufficient to authorize a decree of the sale of the premises, to satisfy the claim of petitioners, because they do not specify any time within which the materials were to be furnished, and the labor performed. The first section of the eighth division of the "Chancery Code," (Scates' Comp. 156,) provides that, "Any person who shall by contract with the owner of any piece of land, or town lot, furnish labor or materials for erecting or repairing any building, or the appurtenances

of any building, on such land or lot, shall have a lien upon the whole tract of land or town lot, in the manner herein provided, for the amount due to him for such labor or materials." The second section extends the lien to work and labor performed, and materials furnished under the contract provided for in the first section, whether of the kind or quality of work, or amount to be paid, be specified or not: "*Provided*, that the time of completing the contract shall not be extended for a longer period than three years, nor the time of payment beyond the period of one year from the period stipulated for the completion thereof."

By the twenty-fourth section, the person holding such lien is prohibited from enforcing it, against or to the prejudice of any other creditor, or any incumbrance, unless suit is instituted within six months after the last payment for labor or materials shall have become payable. The third section provides, that when the money due for such labor or materials shall be unpaid, the lien may be enforced by filing a bill or petition in the Circuit Court of the county in which the land or lot shall be situated; and upon a hearing, to obtain an order for the sale of the same, and to have the proceeds applied in discharge of the lien. The fourth section requires that the petition shall contain a brief statement of the contract upon which it is founded, the amount due thereon, with a description of the premises subject to the lien, together with all other facts and circumstances material to a full understanding of the rights of the parties. The second section limits the time of the performance of the contract to three years, and the payment for the labor and materials to one year from the time of its completion. This provision obviously requires that the time for its performance and the payment of the money shall be determined at the time when the contract is entered into, and not by alterations and changes which may be made in the agreement after it is entered into. And if there be no time fixed and agreed upon in the contract for the performance of the labor or furnishing the materials, within three years from its execution, and for the payment within one year from the completion of the labor or furnishing the materials, a lien would not attach. The lien is given by statute, and is in derogation of the common law, and is opposed to common right, and should be strictly construed. The remedy is cumulative to the ordinary remedy given by the common law, and as it is a privilege enjoyed by one class of community, above that of all others, to be available, the party seeking to enforce it should bring himself within the terms of the statute. The courts are not justifiable in extending its provisions beyond the cases provided for in the act, and if those provisions are not

sufficiently comprehensive, the legislature alone have the power to apply the correction.

Again, the petition should have averred a time when the contract was to be performed by the agreement, and the time when the money was to be paid, within the times severally limited by the act, as these facts are material to a proper understanding, by the court, of the rights of the parties. *Logan* v. *Dunlap*, 3 Scam. R. 189; *Muller* v. *Smith*, 3 ib. 543. And on the hearing, these allegations should be proved as averred, to entitle the party to a decree. Unless they are alleged, the other parties are not apprized of the ground of recovery, and the court is unable to determine whether the labor was performed, the materials furnished, or the money was to be paid within the time prescribed, and whether the proceeding is commenced within six months after the last payment has become due.

In this case there is no allegation in the petition of a time fixed by the agreement when this work was to be performed, and that this suit was instituted within six months after the last payment became due. The petition alleges that the work was commenced on the first of July, 1856, and had been completed before suit was instituted. The petition was filed, and summons issued in February, following. The payments were to be made as the work progressed, reserving fifteen per cent. of the amount until its completion and acceptance by the architect, when the remainder was to be paid. The petition fails to aver when the work was completed, and the court could not judicially take notice, that it was impossible to have been completed within thirty days after its commencement. If the contract was performed and the work accepted by the first day of August, 1856, then this suit was not instituted within six months after the last payment fell due, and the petitioners would have no right to enforce their lien against the creditors and incumbrancers who are made parties to this proceeding. Nor does it appear, from the evidence, at what time the work was completed, nor does the contract specify any time for its completion. The petition and agreement, read in evidence, each appear to be insufficient to show the petitioners entitled to the decree.

We deem it unnecessary to examine the other assignment of errors in the case. But, for the errors already considered, the decree of the court below must be reversed and the cause remanded.

Judgment reversed.

Theodore F. Cook *et al.*, Appellants, *v.* Henry Vreeland, Appellee.

APPEAL FROM COOK.

Where an agreement, upon which a mechanics' lien is sought to be enforced, does not specify the time within which the work is to be completed, or within which the money is to be paid for the work done, or materials furnished, a decree will not be granted.

The time so specified, must be the periods limited by the statute, and these periods must be fixed when the contract is first entered into, and cannot be extended by a subsequent contract.

To cut off creditors and incumbrancers, the proceeding to enforce the lien must be commenced within six months after the money shall become due and payable. It might be that if a time were fixed for completing the work, and no time for paying the money, that an implication would be raised that the payment should be made when the labor should be performed; but the time for completing the work must be specified, or the lien will not attach.

The appellee, Vreeland, on the 9th February, 1857, filed a petition in the Cook Circuit Court, for a mechanics' lien; setting forth that on or about the 1st day of June, 1856, the petitioner being a mechanic, Theodore F. Cook entered into an agreement with him in writing; that by the said agreement, he agreed with said Cook, in consideration of the payments to be made by said Cook, to build, finish and complete, in a careful, skillful and workmanlike manner, and furnish materials for the same, to the full and complete satisfaction of Wm. W. Boyington, or assistant superintendent, the carpenter's work of a four-story dwelling-house, to be erected on Wabash Avenue, according to said contract; that Cook, in and by said contract, agreed to pay him for said work and materials, $3,400, as the work should progress, on estimates of architect, reserving fifteen per cent. until work completed, provided that the architect should certify that he was entitled to payment for partial or complete performance. The said Cook reserving the privilege to alter or modify the work to be done. That on or about the 1st day of June, 1856, he commenced the prosecution of the work, and furnishing materials, in conformity with said contract, and had then completed the same according to the same, and had done extra work, at request of T. F. Cook, to the value of $45; that all of the contract and extra work had been approved of by said Boyington, and he had given a certificate thereof, according to said contract; that the lot of land on which the said dwelling was to be and is erected, is the twenty-five feet front and rear, off the side of Sub-Lot 1, of Lot No. 4, in Block 22, in the Canal Trustees' subdivision of Frac. Sec. 15, T. 39, R. 14, 3 P. M., being in the city of Chicago, and State of Illinois; that on or about the 1st September, 1856, he made a verbal contract with said Theodore

F. Cook, whereby, in consideration of the payments to be made by said Cook, he agreed with him to furnish the material for, and do the carpenter work on a barn, to be erected on said premises, and the said Cook agreed to pay him therefor, what it should reasonably be worth; that on that day he commenced furnishing materials and doing the carpenter's work on said barn, and has entirely completed the same, and that the said carpenter's work and materials are reasonably worth $376.45; that of the said sum of $3,445, due on the contract and extra work for the dwelling, said T. F. Cook had paid him $1,200, leaving a balance of $2,245; that of the said sum of $376.45, there had been paid, by said Cook, $128, leaving in the aggregate, due $2,493. That said Cook purchased said real estate, of one Harrison H. Husted, who gave him an agreement in writing to convey the same to him upon the making of certain payments; that a part of the purchase money has been paid, and a part is due and unpaid; that Isaac Cook, Horatio N. Heald, Wilson Mettler, Jacob D. Dibble, Ira C. Barber, Henry P. Brewster, Charles J. Hoyt, Charles H. Stillwell, Francis H. Benson, Joel Gurley, Dudley H. Farlan, William Jones, Milton S. Patrick, Strong Wadsworth, Louis J. Hitz, Henry A. Ballentine, Francis A. Hoffman, and Otto Gelpcke, claim to have some interest or lien upon said premises, but he is not advised of the nature thereof; he prays that they, and said T. F. Cook, may be summoned to answer the petition.

Prayer for judgment against Cook, for the amount due him as aforesaid, that such judgment be a lien upon the premises, with the dwelling-house and barn thereon, to the whole value of the dwelling and barn, and to the extent of his interest in the lot of land, at the time of making the said contract for said work and materials. That a sale of such right, estate, and interest, may be ordered, and the proceeds of such sale be applied to the discharge of said judgment, according to the statute; and that the defendants be forever barred and foreclosed of all claim and interest in the premises, to the prejudice or injury of the petitioner; and for further and other relief.

There is no time given, when the work is to be commenced, nor when finished.

Articles of agreement, to which the specifications are attached:

These Articles of Agreement, Made and entered into this 1st day of June, A. D. 1856, between Henry Vreeland of the first part, building carpenter, of the city of Chicago, and Theodore F. Cook, of the same place, of the second part,

Witnesseth, that the said Henry Vreeland, his executors, administrators and assigns, for and in consideration of the payment hereinafter to be made to him, by the said T. F. Cook, or his executors, doth on his part, contract and agree to build, finish and complete, in a careful, skillful and workmanlike manner, to the full and

complete satisfaction of Wm. W. Boyington, or assistant superintendent, and by and at the times mentioned in the foregoing specifications, the carpenter work of a four-story pressed brick building, to be erected on Wabash avenue, as aforesaid, so as fully to carry out the designs of said work, as it is set forth in the foregoing specifications, and the plans and drawings therein specially referred to, said specifications and plans and drawings, being hereby declared part and parcel of this contract.

And the said Theo. F. Cook, or his executors, administrators, or assigns, for and in consideration of the said Henry Vreeland, furnish materials, fully and faithfully executing the aforesaid work, so as fully to carry out the design for the same, as set forth by the specifications, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of said Wm. W. Boyington, or his assistant superintendent as aforesaid, and at the time mentioned in the foregoing specifications, doth hereby agree to pay the said Henry Vreeland, the sum of three thousand four hundred dollars, as the work progresses; the superintendent is to make out estimates of the work and materials furnished and inwrought into the building, and said T. F. Cook is to pay said estimates, reserving fifteen per cent. thereof until the whole contract is completed as aforesaid; provided the said superintendent shall certify in writing that he is entitled thereto.

In witness whereof, the parties hereto have set their hands the day and year first above written.

HENRY VREELAND.
T. F. COOK.

Certificate of Boyington, the architect, at the foot of bill of items:

Chicago, January 13*th*, 1857.

I hereby certify that this bill is a reasonable charge for work and materials furnished for Mr. Cook's barn, the amount of which is in addition to the contract for the house. The price herein named for the contract on house is correct, and the work and materials are as good as called for in the contract, and I do hereby approve and accept the same.

WM. W. BOYINGTON, *Superintendent.*

Isaac Cook filed the following demurrer to the bill:

This defendant, by protestation, etc., demurs to the petition, and for cause, shows that the said complainant hath not in and by said bill, set forth when the money to be paid under said contract, was due, or to be paid thereunder, nor that the same was due at the filing of said bill, according to the terms of said contract; nor but that the same was payable six months and upwards, prior to the filing of said bill; neither does it appear but that the time of completing the contract was not extended for a longer period than three years from the time of making the contract for the said building; nor does it appear at what time the work was done and completed, and that the complainant hath not made or stated such a case as doth or ought to entitle him to any such discovery or relief, as is thereby sought and prayed for, from or against this defendant.

Petition of James McGraw, filed April 1, 1857, sets forth that Henry Vreeland, on 9th January, 1857, filed a petition against the defendants above named, recites the substantial parts of Vreeland's petition, which it alleges is still pending; and in pursuance of the statute in such case made and provided, for the purpose of being made a party in that suit, further shows: that on or about the 1st October, 1856, he, McGraw, entered into a contract with said Theodore F. Cook, to do and perform on said house certain work and labor, and furnish materials therefor, to wit: 362 feet of stucco cornice, to be paid for at the rate of 50 cents per foot, $181; and 194 feet of stucco cornice, at 62½ cents per foot; 95 feet of same, at 68¾ cents per foot; 74 feet of panel work, at 37½ cents per foot; in all, $395.39; and said work was to be done, and said materials furnished, within three years from the making of said contract; that immediately upon making said contract, he commenced said work; on the 1st day of November, 1856, he fully completed the same, and was then and is now entitled to be paid said sum therefor. Yet the said Cook, although often requested, had not paid the same. That by reason of his said contract, with said Cook, to do said work, and furnish said materials, and having so done and performed the same, as aforesaid, he had a lien upon the interest of said Cook in said premises, for payment thereof, which might be established by the court, at the same time and of the same force and validity as that claimed by said Vreeland.

Prayer that he might be made a party to said Vreeland's suit; that the amount due him for said work and materials, might be ascertained under the order of the court, and established upon the estate and interest of said Cook in said premises, and as prior and better lien than that of any of the other persons named as defendants in said original petition, and for further relief.

Demurrer to petition of Vreeland, by Isaac Cook, was overruled by the court.

April 29, 1857. Leave was given to plaintiff, to file supplemental bill, making William T. Burgess party defendant.

Upon which supplemental bill is indorsed the appearance of said Burgess to it, who, in his answer, sets up that he purchased the land, under a mortgage from T. F. Cook to Isaac Cook, under a decree, the proceedings to foreclose said mortgage having been commenced before the proceedings to enforce the mechanic's lien.

At January term, 1858, of the Cook Circuit Court, before MANNIERE, Judge, there was a trial by jury, and a decree in favor of Vreeland, against the premises in question, from which this appeal was taken.

There were pleadings by others of the parties who were made defendants below, but these are not involved in the present decision.

Among the errors assigned are the following:

That the court overruled the demurrer of Isaac Cook to the bill.

That the petition is defective in not alleging when the work was done—when the contract required it to be done—in not alleging that the work was to be completed within three years from making of contract.

That the court rendered a decree for complainant, and directed a sale of said premises.

That the court directed the said liens mentioned in its decree to be paid before paying said Burgess.

That the court did not hold the proceedings and decree in the mortgage foreclosure suit, to be a bar to the said suits.

W. T. Burgess, for Appellant.

E. Van Buren, H. F. Waite, and G. A. Ingalls, for Appellees.

Walker, J. The agreement upon which this proceeding is based contains no specification as to the time when the work was to be completed by the contractor, or when the money was to be paid by the owner for the labor on this building, or the materials furnished for its erection. These are indispensable by the provisions of the statute to entitle the party to the benefit of the statutory lien. Both of these are required by the eighth division of the chancery code. Scates' Comp. 157. The second section of which provides that, "The lien shall extend to all work done, and materials furnished under the provisions of the contract, whether the kind or quality of the work, or the amount to be paid, be specified or not: *Provided*, that the time of completing the contract shall not be extended for a longer period than three years, nor the time of payment beyond the period of one year from the time stipulated for the completion thereof." The obvious intention of the legislature was to dispense with precision in the contract, as to the kind of work to be performed and as to the specific amount to be paid, but to require the contract to fix and limit a time when the work should be completed and the money should be paid. And if by the terms of the contract the work was to be performed within three years from the entering into the contract, and the money was to be paid, by the express or implied agreement under which it was to be performed, within one year after its comple-

tion, then, and not till then, could the creditor, as between himself and the other party, avail himself of the benefit of the time. This section evidently refers to the making and entering into the contract, when it prohibits the extension of the time for completing the work to three years, and the time of payment to one year after its completion. There cannot be anything else referred to but the contract, and that, we think, is the time fixed when the contract is first entered into by the parties, and not to a mere permission to complete the work after the expiration of the time, or an extension of the time for payment beyond the period first agreed upon.

But the twenty-fourth section makes an alteration of the time for the institution of proceedings to make the lien available, where there are other liens upon the property. It is this: "No creditor shall be allowed to enforce the lien created by the provisions of this chapter, as against, or to the prejudice of any other creditor or any incumbrance, unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due and payable." This provision leaves the second section in force, except so far as it limits the time for instituting suit in case of creditors and incumbrances. It in no way changes the necessity of stipulating for the completion of the work and the payment of the money by a time to be specified by the agreement. It might be that if no time was fixed for the completion of the work, and nothing was said about when the money should be paid, that the law would imply a promise to pay when the labor shall be performed. But in such a case the lien could not attach unless the contract provided a time within which the work was to be completed. The law could not imply any time for its completion, and that must be left to express contract between the parties.

In the contract, upon which this suit is based, no time is specified for the completion of the work, and the payment of the money, and was for that reason insufficient to create a lien under the statute. And the petition contained no such averments and was therefore defective.

The court below, therefore, erred in decreeing the sale of the property to satisfy the appellee's claim, and it must be reversed and the cause remanded.

Decree reversed.

THEODORE F. COOK *et al.*, Appellants, *v.* PETER ROFINOT *et al.*, Appellees.

APPEAL FROM COOK.

A mechanics' lien will not be sustained, for materials furnished, unless the petition specifies the time when the materials were to be furnished, and paid for, under the agreement.

THIS case presents much the same pleadings and facts, as the two preceding ones, and therefore need not be fully stated.

W. T. BURGESS, for Appellants.

E. VAN BUREN, SHUMWAY, WAITE & TOWNE, and G. A. INGALLS, for Appellees.

WALKER, J. The petition in this case, alleges that by verbal agreement, petitioners furnished pressed brick, and other materials, for the front of a building, erected by appellant, for which he was to pay them $650. That by the agreement, they were to receive pay as the work progressed, except fifteen per cent., which was to be reserved till the work should be completed. That they performed their contract according to its terms. That a portion of the money was paid, but that a balance of $241.50, was due and unpaid at the institution of the suit. Upon the hearing, the court below rendered a decree in favor of appellees. From that decree, appellant brings the case to this court, and asks its reversal.

This petition is wholly insufficient. It fails to aver that any time was agreed upon, within which the materials were to be furnished, or when the money was to become due and payable, under the contract. These questions have been settled in the preceding cases of *Cook* v. *Heald et al.*, and *Cook* v. *Vreeland*, at the present term of this court, and we regard it unnecessary to again discuss them.

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

Decree reversed.

John Turbitt, Plaintiff in Error, *v.* Margaret Turbitt, Defendant in Error.

ERROR TO TAZEWELL.

Austerity of temper, sallies of passion, or abusive language, do not constitute such extreme and repeated cruelty within the statute, as to authorize a decree of divorce.

This was a writ of error from a decree of the Circuit Court of Tazewell county, granting a divorce of the parties. There was a trial by jury, before Harriott, Judge, at April term, 1858, of the Tazewell Circuit Court.

Margaret Turbitt filed her bill, alleging marriage in 1855, and that her husband, John Turbitt, was guilty of extreme and repeated cruelty to her, by not providing her with a sufficient maintenance suitable to their condition, he being worth from thirty to fifty thousand dollars. That he left her for days and weeks together, without sufficient food or the means of procuring it. That she was delivered of a child; that three days before its birth, he left her and was absent ten days, leaving her wholly unprovided with medical attendance or other help, dependent on the charity of her neighbors. That he has used actual force and violence towards her, without any reasonable excuse (no circumstances being stated). That the parsimoniousness and neglect, etc., had rendered her miserable, etc. The answer of John Turbitt denied the charges in the complaint, and on his part made divers complaints of the conduct of Margaret, etc. The testimony being quite voluminous, is not set out.

H. Grove, for Plaintiff in Error.

R. S. Blackwell, and A. L. Davison, for Defendant in Error.

Walker, J. It has been repeatedly held by this court, that austerity of temper, sallies of passion, or the use of abusive language, do not constitute extreme and repeated cruelty within our statute. This is regarded as the settled law, not only in this State, but it is believed to be in the various States of the Union, and in Great Britain, where cruelty is the ground relied upon.

The facts of this case only show the use of improper language by plaintiff in error to complainant, that he was absent at the time of her confinement, and he may not have provided articles for the use of his table as abundantly as his means would

have justified. But the evidence shows, that he had credit with grocers and traders, who furnished such articles, and no restriction was placed upon her right to procure them at her pleasure. And it was no great hardship for her to purchase them in his absence, as she resided in the city where they could be procured of those merchants.

The evidence shows that on one occasion, plaintiff in error threatened to throw complainant down the stairs, but what the circumstances were, which led to it, are not shown. It may have been provoked by her, and whether so or not, she did not seem to apprehend personal violence, and we do not see that there is any danger, or that she is menaced to such a degree that it renders cohabitation unsafe.

By the repeated decisions of this court, the eighth section of the act does not authorize a divorce on the facts proved in this case. We are unable to perceive any grounds for granting a divorce in the case, and the decree of the court below must be reversed, and the cause remanded.

Decree reversed.

Jerome Daniels, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO BUREAU.

The public may acquire the right to the use of land as a highway, by dedication, by use in the nature of prescription, or by condemnation, and the use of it, and the repairing of it by the public authorities establishes the existence of the road.

The use of land for a highway, for the period of twenty years, is sufficient to establish the existence of the highway.

The fact of dedication, upon a conflict of testimony, is left for the jury, and their finding will not usually be disturbed.

This case was an indictment against the plaintiff in error for obstructing a public highway, leading from Princeton to Green River, in said county, on the 11th May, 1857. The defendant was convicted at the April term, 1858, of the Circuit Court of said county, Ballou, Judge, presiding, to reverse which judgment this writ of error is prosecuted.

On the trial of the cause, the People introduced proof tending to show that a road was surveyed and staked out at the place obstructed, running westerly from Princeton to Green River, in said county, in 1844: also proof tending to show that said road, at that place, had been traveled since that time until

the same was obstructed by the defendant in the spring of 1857, and that said alleged road has been worked and recognized by the proper road authorities as a road, ever since 1844, until the spring of 1857: also, proof tending to show that said road had been traveled, at the place in question, for more than twenty years prior to the time of obstructing the same, as charged in the indictment: and, also, proof tending to show that a road had been dedicated to the public by the owners of the land, at the place in question; and the defendant introduced evidence tending to prove that said road was not so traveled, and that there was no such dedication. The defendant then introduced the county clerk of said county, and asked him if he had searched the records of his office, and whether he could find any record of a road leading from Princeton to Green River, in said county, or of any other road where the obstructions were proved to have been placed by the defendant; and he replied that he had so searched, and could find no record of any road at the place where said obstructions were, but stated that he found the orders of the County Commissioners' Court, showing the location of a road at a point a little distant from the place of obstruction. These orders and a plat were offered in evidence.

The defendant moved the court to exclude from the jury the said orders, report and plat, and each of them, which the court refused to do, but permitted the same to go to the jury, and the defendant excepted.

The defendant then introduced the county surveyor of said county, and other proof tending to show that the road described in said report, according to the minutes and survey in said report, did not go to the place where the obstructions were placed and maintained by the defendant, but went some distance south of such place; and the prosecution introduced evidence tending to prove that the road platted, in case it ended at Allen's field, as mentioned in the plat, would pass over the place obstructed, and the defendant introduced evidence tending to show to the contrary.

The court then gave the following instructions to the jury on behalf of the People:

1st. If the jury believe, from the evidence, that a public road has been used by the public over the place of obstruction in question, for twenty years without interruptions, and that the owners of the land acquiesced therein, the law presumes a dedication of the ground upon which the road runs, to the use of the public, for such purpose.

2nd. If the jury believe, from the evidence, that a public road was laid out over the place in question in 1844, that it was used by the public as such until the spring of 1857, that during

said time it was worked and kept in repair by the proper public authorities, and that the owner or owners of the land assented to such use and keeping in repair, then it is a legal highway, and the jury may infer the assent of the owner or owners of the land from their acquiescence, if they did acquiesce.

3rd. If the jury believe, from the evidence, that a public road was laid out over the place of obstruction in question, that it was used and traveled by the public as such, and that it was recognized and kept in repair as such by the public authorities, then proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway.

4th. If the prosecution has, by such proof as is mentioned in the 3rd instruction, raised the legal presumption therein mentioned, then if such presumption is not rebutted, a highway is proved.

Defendant's qualification to People's 3rd and 4th instructions: That if the jury believe that the acts and proceedings in laying out such road, introduced in evidence to the jury, are invalid and void, that then such presumption has been rebutted.

5th. If there is any discrepancy between the courses and distances, and the monuments mentioned in the survey of the road in question, the monuments must control.

To the giving of each of which, the defendant then and there objected, but the court overruled his objections and read said instructions to the jury, and the defendant excepted.

The defendant, before said foregoing 5th instruction was read to the jury, asked the court to give the following qualification to it:

"That a monument whose location cannot be determined by the field notes, cannot control field notes in the report, as the location of the road must be determined from the report and surveys, and not by anything outside of the report and survey."

Which the court refused to do, and the defendant excepted.

The defendant further asked the court to give the following instructions to the jury:

3. "That if a road has been used and traveled, and used by the public as a highway, and is recognized and kept in repair as such, by the proper authorities, proof of these facts furnish a legal presumption that such road is a public highway, but it is only a presumption, and is subject to be rebutted, and if it is shown that there is no legal record of such road, then the presumption that such highway is a laid out road, under the laws of this State, has been rebutted; unless it have been proved that such road was laid out by the proper legal authorities, prior to the date of an act entitled 'An Act concerning Public Roads,' approved February 20, 1841."

11. "That the field notes and plat of the laying out of the road in contention, must govern as to the location of said road, and if the place where the same was obstructed by the said defendant, was not within the bounds of said road as designated by the plat and field notes, then the said defendant is not guilty of obstructing said laid out highway."

13. "That if the jury are satisfied by the evidence of the county surveyor, that the minutes of the laid out road, as they actually read, would not establish such road, where the obstructions were placed, then said defendant is not guilty of obstructing such road, although such obstructions were where said road was surveyed and staked through by the viewers, who laid out such road, as their report and record must govern as to the location of such highway."

Which the court refused to do, and the defendant excepted, and the jury found the defendant guilty, and the defendant moved the court for a new trial in said cause, and the court overruled said motion.

PETERS & FARWELL, for Plaintiff in Error.

W. BUSHNELL, for the People.

WALKER, J. The public may acquire the right to use land for a public highway, by dedication, by user in the nature of prescription, or by condemnation in the manner prescribed by the statute. But whether the right be acquired by one or another of these modes, is immaterial. Evidence of an express grant or dedication by the owner of the soil, and an acceptance by the public, and its use by travel as a highway, and repairs made by the proper authorities, establishes its existence, and the right of the public to its use. Starkie, in his work on evidence, vol. 2, p. 665, says, "Evidence to prove a public highway, consists, usually in showing that the public have used and enjoyed the road; and their actual occupation of it without interruption, for a considerable space of time, affords a strong presumption of a right to use it, and a much shorter possession will suffice to indicate a right in the public, than to show that a private person has a title to the estate of which he is possessed." Actual adverse open and uninterrupted possession of land by a person, claiming title for the period of twenty years, confers the right to hold and enjoy the possession, against the true owner. Then it follows that a user by the public of a road, as a public highway, for that period, is abundantly sufficient to create the right. In this case, there was evidence of use of this road by the public,

for the period of over twenty years, and the jury were justified by the evidence, in finding that it was a public highway.

Again, there was evidence tending to establish a dedication of the road to the public, by the owner, and although there may have been conflicting testimony, yet it was the province of the jury to reconcile it, if they could, and if unable to do so, then to give weight to that portion of it which they believed to be entitled to credit. They have in this case given the weight to that, tending to establish the dedication, and in doing so, they were justified by the evidence, and we see no reason for disturbing their verdict.

We think the evidence fully justified the finding of the jury, either upon a user, or a dedication, and that the court below did right in sustaining the verdict.

No error is perceived, either to the giving or refusing the instructions in the case, and no error appearing in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

In the matter of the Sale of the Real Estate of John M. Guernsey, deceased.

ERROR TO GRUNDY.

Where a mother, in conjunction with the guardian of infants, presents a claim for their nurture, which is allowed, and proceeds thereupon to have the real estate of the deceased father sold, and parcelled out, to the mother, in fraud of the children, the whole proceeding, even upon the motion of a stranger, may be set aside, and held void—and all participators in the transaction rebuked.

It is the duty of a guardian to contest such a claim, and he is an incompetent witness to establish it.

It is the duty of the Probate Court, where injustice is attempted upon orphans, to protect them, and to refuse an allowance where application is made to sell their inheritance.

Error will lie from an order approving or disapproving the report of a guardian empowered to sell the land of his ward.

At the August term, 1856, of the County Court of Grundy county, E. P. Seely was duly appointed guardian of the persons and property of Frank Guernsey and John M. Guernsey, infant heirs of John M. Guernsey, late of said county, deceased.

At September term, 1856, E. P. Seely, guardian of Frank Guernsey and John M. Guernsey, minors, filed his petition, setting forth that he is the guardian of said minors, duly appointed by the County Court of Grundy county; that there is no per-

sonal property in his hands belonging to said minors and never was, and that said minors were never the owners of any personal property; that they are the owners, in fee simple, subject to the dower of Eliza Guernsey, of lot two, in block two, in Chapin's Addition to the town of Morris, in said county of Grundy; that said Frank Guernsey is indebted to said Eliza Guernsey in the sum of four hundred and sixteen dollars, for boarding, clothing, etc., as will appear by the records of said County Court when sitting as a court of probate, and that the said John M. Guernsey is indebted to the said Eliza Guernsey in the sum of four hundred and seven dollars, for boarding, clothing, etc., as will appear by the records of said County Court when sitting as a court of probate; that due notice of the present application had been given; and prayed for the sale of said lot.

Whereupon at said term of said court it was ordered that said guardian sell said lot of land, or so much thereof as will sell to advantage, and in such divisions as will insure the best price, at public auction, at the door of the court house in said county, on the following terms, to wit: One-fourth down at the time of sale, one-fourth in six months, with interest; one-fourth in twelve months, with interest, and one-fourth in eighteen months, with interest; and that notice of sale be given by posting at least six written or printed notices in six of the most public places of said county, at least twenty days previous to said sale; and to secure the purchase money, for which a credit may be given, by mortgage or mortgages on the piece or parcel of said lot sold, and to execute to the purchaser or purchasers of said lot, or any piece or parcel thereof, a deed or deeds for the same, and make report thereof to this court at the next term.

The report of the guardian was filed December 9th, 1856, and sworn to by him, and thereupon a motion was made by guardian for confirmation.

The report by the guardian sets forth that on the sixth day of October, A. D. 1856, he exposed a part of said lot, in subdivisions, at door of court house in said county, for sale at public vendue, and at such sale, James N. Reading bid for twenty feet, to be taken off of east side of said lot, the sum of two hundred and thirty-five dollars, and the same was struck off and sold to him for that price; and that at said sale, and at said time and place, he sold the middle third part of said lot, being twenty feet in width on the street, and that at such sale, James N. Reading and William T. Hopkins bid for said last mentioned twenty feet of said lot, the sum of two hundred and twenty dollars, and the same was struck off and sold to them at that price, they being the highest and best bidders therefor; that

on the 12th day of September, A. D. 1856, he posted six written notices, giving notice of said sale, in six of the most public places in said county, and which said time of posting was more than twenty days previous to said sale, which notice is set out in the opinion of the court.

That he had received from J. N. Reading, the one-fourth of the purchase money for said twenty feet taken off the east side of said lot, and from James N. Reading and William T. Hopkins, one-fourth of the purchase money for said middle third of said lot, and that to secure the balance of the purchase money due on said lots, he took from said parties mortgages thereon; that he had executed to said J. N. Reading a deed for said east twenty feet, and to said Reading and Hopkins a deed for said middle third.

On the affidavit of John Skinner, neither the guardian nor purchaser or purchasers being present or informed of any proceedings to be had in reference to the setting aside of said sale, and no person appearing for said guardian or either of said purchasers, nor they or either of them being informed of any objection to said report or confirmation of said sale, the court being satisfied that said real estate, for some cause, did not bring such price as the same was worth, at the time of said sale, refused to approve or confirm said sale, and ordered the same to be set aside.

And now come the said Reading and Hopkins, as well for themselves as for the said J. N. Reading and for the said E. P. Seely, guardian as aforesaid, and assign the following errors upon the record:

1. Because said County Court refused to confirm the said sale, made by said guardian.

2. Because said court permitted the officious intermeddling of a stranger to the record and to all of the proceedings, having no interest therein, and not being bound for any costs, and having obtained no leave to interfere, and not appearing as guardian *ad litem*, or next friend to said infants, or showing any interest or liability in the same.

3. Because said court set aside said sale.

4. Because it was error in said court to take any action in said cause, other than confirming said sale, without notice to said guardian and purchasers.

5. Because of many other manifest errors, uncertainties and insufficiencies in the proceedings of said County Court.

6. Because neither the guardian nor either of the purchasers had notice of, or was present when the proceedings before the said County Court were had, when said sale was set aside.

READING & HOPKINS, for Plaintiffs in Error.

S. HARRIS, for Defendants in Error.

BREESE, J. The record in this case, discloses these facts:

On the 6th of August, 1856, Eliza Guernsey, the widow of J. M. Guernsey, mother of Frank then aged ten years, and of John M. then seven past, applied to the judge of the County Court of Grundy county, to appoint E. P. Seely their guardian, and represented to the court that all the property they had, was a town lot in the town of Morris.

The judge granted the application at once, and on the same day appointed E. P. Seely their guardian, who executed the required bond.

On the next day, August 7th, Eliza Guernsey, by Seely and Bougher, her attorneys, filed the following claim against "said estate":

"*John M. Guernsey* DR. to *Eliza Guernsey:*

To boarding and clothing from September 28th, 1848, to July 20th, 1856—407 weeks, *a* $1.50 per week, $610.00

Frank Guernsey DR. to *Eliza Guernsey:*

To boarding and clothing from July 13th, 1848, to July 13th, 1856—416 weeks, *a* $1.50 per week, $624.00"

This account "was duly attested by an affidavit of E. P. Seely, guardian as aforesaid."

"The court having carefully considered the matter, orders: That said claims be allowed, after deducting fifty cents per week, viz: at one dollar per week, as follows:

For board and clothing of John M. Guernsey,	$407.00
For board and clothing of Frank Guernsey, -	416.00
	$823.00"

This allowance being made, Seely, as guardian, at the next September term, presented his petition to that court, setting forth his appointment as guardian; that there was no personal property in his hands belonging to the said minors, and never was, that they were never the owners of any personal property; that they are the owners in fee, subject to the dower of their mother, Eliza Guernsey, of lot 2, in block 2, in Chapin's Addition to the town of Morris, in that county; that Frank Guernsey is indebted to said Eliza Guernsey in the sum of four hundred and sixteen dollars, for boarding, clothing, etc., as appears by the records of the County Court, and that John M. is indebted

to the said Eliza, four hundred and seven dollars for the same, and that due notice of this application had been given, and praying for the sale of the lot.

Whereupon at said term of said court it was ordered "that said guardian sell said lot of land, or so much thereof as will sell to advantage and in such divisions as will insure the best price, at public auction, at the door of the court house in said county, on the following terms, to wit: One-fourth down at the time of sale; one-fourth in six months, with interest; one-fourth in twelve months, with interest, and one-fourth in eighteen months, with interest, and that notice of sale be given by posting at least six written or printed notices in six of the most public places of said county, at least twenty days previous to said sale, and to secure the purchase money for which a credit may be given, by mortgage or mortgages on the piece or parcel of said lot sold, and to execute to the purchaser or purchasers of said lot, or any piece or parcel thereof, a deed or deeds for the same, and make report thereof to this court at the next term."

The report of the sale by the guardian was filed December 9th, 1856, and thereupon he moved for confirmation of the sale.

The report sets forth that on the 6th day of October, A. D. 1856, he exposed a part of said lot, in subdivisions, at the door of the court house in said county, for sale at public vendue, and at such sale, James N. Reading bid for twenty feet, to be taken off of the east side of said lot, the sum of two hundred and thirty-five dollars, and the same was struck off and sold to him for that price, he being the highest and best bidder therefor, and that was the highest and best price bid for the same; and that at said sale, and at said time and place, he sold the middle third part of said lot, being twenty feet in width on the street, and that at such sale, James N. Reading and William T. Hopkins, bid for said last mentioned twenty feet of said lot, the sum of two hundred and twenty dollars, and the same was struck off and sold to them at that price, they being the highest and best bidders therefor, and that was the highest price bid for the same; that on the 12th day of September, A. D. 1856, he posted six written notices, giving notice of the sale, in six of the most public places in the county, and which time of posting was more than twenty days previous to the sale. The notice was as follows:

"GUARDIAN'S SALE.—Notice is hereby given, that as the guardian of Frank Guernsey and John M. Guernsey, and by virtue of an order of the County Court of the county of Grundy, and State of Illinois, I shall, on the 6th day of October, A. D. 1856, between the hours of ten o'clock A. M. and four o'clock P. M., proceed to sell, in subdivisions, at the door of the court house in said county, at public vendue, lot No. 2, in block No. 2, in Chapin's Addition to the town of Morris,

in said county. The terms of sale will be, one-fourth in hand, and one-fourth in six months, and one-fourth in twelve months, and one-fourth in eighteen months, with interest on the back payments, and the back payments to be secured on the lot, or parcel of lot purchased. E. P. SEELY, *Guardian.*

Morris, September 12th, 1856.

And he further reported, that "Eliza Guernsey had a dower in said lot, and that she chose to retain a part of the lot as her dower therein, and that she executed quit-claim deeds for two-thirds of said lot to the purchasers thereof, whose names are stated aforesaid, and that in consequence, he sold but two-thirds of said lot, permitting the widow to retain the one-third of said lot which she had the right to do; and said guardian would further make report, that after said sale he received from said J. N. Reading, the one-fourth of the purchase money for the twenty feet taken off the east side of the lot, and from James N. Reading and William T. Hopkins, one-fourth of the purchase money for the middle third of said lot, and that to secure the balance of the purchase money for the east twenty feet of said lot, he took from Reading a mortgage thereon, and that to secure the balance of the purchase money on the middle third, he took from J. N. Reading and Wm. T. Hopkins a mortgage thereon; that he had executed to J. N. Reading a deed for the east twenty feet, and to Reading and Hopkins a deed for the middle third."

Pending this motion, John Skinner, a person in no way related to the children, or having any personal interest in the proceedings, in the absence of the guardian and the purchasers, and without any knowledge on their part, that there would be objections made to the confirmation, presented an affidavit to the court, of one John Skinner, swearing to no important fact, but full of his impressions and conjectures, that there was improper conduct on the part of the guardian, as interested in the purchase, and that the property was sold for much less than its then value, and that said sale was not held at the door of the court house, etc.

On considering this report and affidavit of Skinner, the court refused to confirm the sale, and entered an order for a re-sale of the east two-thirds, on six weeks notice, to be published in the Grundy County Herald, besides posting, and to insert in the notice, "that the widow will sign her right of dower, in said east two-thirds of said lot."

The purchasers, Reading and Hopkins, and Seely, the guardian, bring the case here, by writ of error, and assign the following errors:

1. Because the County Court refused to confirm the sale made by the guardian.

2. Because the court permitted the officious intermeddling of a stranger to the record and to all of the proceedings, having no interest therein, and not being bound for any costs, and having obtained no leave to interfere, and not appearing as guardian *ad litem*, or next friend to the infants, or showing any interest or liability in the same.

3. Because the court set aside the sale.

4. Because it was error in the court, to take any action in the cause, other than confirming the sale, without notice to the guardian and purchasers.

5. Because of many other manifest errors, uncertainties and insufficiencies, in the proceedings of the County Court.

6. Because neither the guardian nor either of the purchasers, had notice of or was present, when the proceedings before the County Court were had, when the sale was set aside.

A preliminary objection is made, that no appeal or writ of error will lie from an order, approving or disapproving the report of a guardian, empowered to sell the land of his wards.

It is held in *Ayers* v. *Baumgarten*, 15 Ill. R. 446, that a decision, approving or disapproving a guardian's report, may be assigned for error.

As to the first error assigned, whether the court erred or not, in refusing to confirm the sale, depends upon the facts stated above, and they seem to us fully to justify the court in its refusal. Disposing of this assignment of error, disposes of the whole case. The whole thing has a bad appearance, and does not commend itself to the favorable consideration of this court. The account presented by the mother, and which Seely, the guardian, attested by his oath, and which the court allowed, bears on its face the strongest indications of being unjust, and not proper to be allowed, and which the guardian should, strenuously, have contended against.

We think the files of Courts of Probate may be searched in vain, for a parallel to the account the mother exhibited against her children, and which the guardian, who ought to have resisted its allowance, attested by his affidavit, as though it was just. From the dates given, John was a posthumous child, born on the 28th September, 1848, and by the account as presented, sworn to by the guardian, and allowed by the court, he is charged, not it is true, whilst *en ventre sa mere*, but as soon as he saw the light, for the sustenance he drew from his mother's breast, and at the rate, as charged and sworn to by the guardian, of one dollar and fifty cents per week, and as allowed by the court, one dollar per week. Frank is charged from the death of his father, July 13, 1848, at the same rate. He was then about two years of age, and the accommodating guardian swears

this is all just and correct. This guardian, instead of resisting the claim against his wards, did, by himself and partner in the practice of the law, as the attorney of the mother, present the claim for allowance, and became a witness against them to substantiate it. This the judge knew, and under the circumstances, his suspicions ought to have been excited that all was not right. The guardian should not have been allowed to testify in the case; he should have defended against the claim, and the court should not have allowed it, under the proof. It is unjust on its face, and though "attested" by a man who was neglecting one of the highest trusts which can be committed to a man, that fact cannot relieve it from this charge.

Here was a great wrong at the start, and subsequent proceedings but augmented it. This is abundantly shown, by the conduct of the guardian in making the sale, and by his report thereon. For a knowledge of his conduct in this regard we do not consider the affidavit of John Skinner, a mere volunteer, having no interest in the proceedings, though it doubtless contributed to the decision of the judge in refusing to confirm the sale. And this is one of the main objections now made, that this affidavit was received.

It is not unusual, we believe, for all courts to hear and receive the statements or affidavit of one claiming to speak or act as *amicus curiæ*—so to suggest to the court as that it may not be led unconsciously into error, and where there may seem to be collusion between parties, by which another party may be injured, or for any cause, which the court is at liberty to recognize as proper for the interference of such person. In all such cases, if the parties immediately interested are not present, it would be but right that they should be informed of this interference, and time given them to resist or explain, by affidavit or otherwise, and the parties in this case should have been notified, to enable them to file counter affidavits.

The affidavit of Skinner does not state, in positive terms, any wrong or illegal act done by the guardian in the sale, or in any of his proceedings to that end. It is full of his impressions, and calculated to have the effect, as it did have, to induce the judge to examine more closely into this matter than he chose to do, when he allowed the unjust account, and passed the order to sell the lots to pay it. The affidavit of itself was not sufficient to prevent a confirmation of the sale, but it was sufficient to attract the attention of the judge to the report itself, which carries on its face its own condemnation.

The report shows that this guardian, clothed only with the power to sell the entire lot, in parcels, took upon himself to determine that the widow was entitled to dower in it, and then

constituting himself a commissioner, he set off and allotted to her the west third of the lot, having first privately obtained her relinquishment of dower to the east two-thirds. Our statute, section 18, title Dower, does not authorize the guardian to set off the dower. If the heir does not do it, she must sue for it. This fact was not given to the public by the notice of sale, and was known only, we are to presume, to the mother and guardian, and the bidders, who are the plaintiffs in error here.

This was such an omission as to render the sale void. The bidders were not on equal grounds; certain ones knew it; the public at large did not. The knowledge of that fact would have added greatly to the value of the portion sold. If the guardian intended to act fairly, why was not the public notified that the widow had released her interest, and that there were no dower rights existing against the property? Why did the guardian give the widow one-third of the whole property? What right had he to do so? This, of itself, was sufficient to set aside the proceedings, without regarding Skinner's affidavit. We have not given to that any weight in arriving at our decision.

The case shows injustice on its face at its inception, and errors in proceeding on the part of the guardian fully justifying the county court in refusing to confirm the sale, leaving wholly out of view anything contained in Skinner's affidavit. The purchasers under this sale may have intended no wrong; indeed we will admit they did not intend any, yet for the errors and misconduct of the guardian, they may have to suffer. We cannot aid them. We affirm the judgment of the County Court in refusing to confirm the sale, and reverse the order directing a re-sale.

Judgment affirmed.

Thomas D. Robertson *et al.*, Appellants, *v.* The City of Rockford, and The Kenosha, Rockford and Rock Island Railroad Company, Appellees.

APPEAL FROM WINNEBAGO.

The constitutional prohibition against lending credit, to aid in the construction of railways, applies to the State, but not to counties or cities.

The limitation in the charter of the city of Rockford, as to the extent to which the credit of the city may be loaned, is removed, by the provision in the sixth section of the charter, incorporating the Kenosha and Rockford Railroad Company.

Municipal corporations are at the control of the legislature, and their charters may be enlarged or diminished, by an act incorporating a railway company.

All the powers vested in railroad corporations, will, upon their consolidation, be conferred upon and united in the company taking the name of the consolidated company.

The manner in which this transcript was prepared by the circuit clerk, commended.

THE complainants' bill shows, that the complainants are residents and tax-payers of the city of Rockford, in the county of Winnebago, that the assessed value of the property upon which they contribute to the taxes of said city, exceeds in the aggregate $200,000, and that the aggregate amount of city taxes paid by them, exceeds the sum of $3,000 annually, as near as they could estimate the same.

That said city is an incorporated city, under an act of incorporation of the State, entitled "An Act to amend the charter of the city of Rockford," approved March 4th, 1854, and that said act contains all the corporate powers of said city, to its authorities and officers; and that all the powers of borrowing money, possessed by said city and its corporate authorities, are contained in the 97th section of said act.

That the 97th section is, in words and figures, as follows: "The Common Council shall also have power to borrow money on the credit of the city, but no sum or sums of money shall be so borrowed at a greater rate of interest than twelve per cent. for the year; nor shall the interest on the aggregate of all the sums to be borrowed, exceed one-half of the tax assessed upon real estate in the city, for the general expenses of the city."

That by the 96th section of the same act, power is given to the Common Council of said city, to levy and collect taxes upon all property, real and personal, within said city, for the purpose of defraying the general expenses of the city, not exceeding five mills on the dollar, of said property.

That the whole amount of the assessed value of the real estate in said city, subject to assessment, according to the last assessment, is about $1,200,000. At five mills on the dollar, only about $6,000 can be raised on real estate, for the general expenses of the city.

That the Common Council had borrowed not less than $30,000, and complainants believe from the best information they can get, had borrowed more than $40,000; that the interest on the money borrowed was not less than $3,000 or $4,000, and more than one-half of the sum the Common Council were authorized to raise for the general expenses of said city, by the aforesaid act; and that the money borrowed by the said city, is more than they were authorized to borrow by the said 97th section.

That a railroad company, by the name of the Kenosha and Rockford Railroad Company, had been incorporated and organized, with power to build a railroad from Kenosha, in Wisconsin,

to Rockford aforesaid; said company was incorporated by act of the legislature of Illinois, May 20th, 1857; and that since the incorporation of said company, they had performed a portion of the work to be done on said railroad.

That the 6th, 7th, and 8th sections of said act, incorporating said company, gave divers towns, counties and cities, near or on the line of said railroad, power to take stock in, or loan their credit to said company, as follows:

"SEC. 6. The several counties, cities, incorporated villages, and towns, through or near which, said railroad shall be located, are hereby authorized to subscribe to the capital stock in, or severally to lend their credits to the corporation hereby created, for the purpose of aiding in the construction of said road; provided that no such subscription or loan shall be made until the same shall be voted for, as hereinafter provided.

"SEC. 7. Whenever one hundred voters of any such county, shall make a written application to the county clerk of such county, or twenty-five voters of any such city, incorporated village, or town, shall make such application to the clerk thereof, requiring an election by the legal voters of such county, city, village or town, to determine whether such subscription or loan shall be made, specifying in such application, the amount, and whether to be subscribed or loaned, such clerk shall file such application in his office, and immediately give notice, as required by law, for an election, to be held by the legal voters of said county, city, village or town. Such election shall be held, and conducted in all respects, and the returns thereof made, as in cases of annual elections.

"SEC. 8. If a majority of the voters, voting at any such election, shall be in favor of such subscription or loan, then such county, city, or incorporated village or town, by its proper corporate authority shall subscribe or loan said corporation the amount as specified in section seven (7), and shall issue to said corporation their bonds for such amount, drawing ten per cent. interest per annum, and payable in not less than ten, or more than twenty years."

That on August 23rd, 1858, more than twenty-five voters of the city of Rockford, pretending to act under the above three sections of the Kenosha and Rockford Railroad Company's charter, applied to the clerk of said city, to call an election in said city, at which the legal voters thereof should vote on a proposition to loan the credit of said city, to the amount of $50,000, to the Kenosha, Rockford and Rock Island Railroad Company, which application was in writing, and is as follows:

"To L. W. BURNHAM, Esq., Clerk of the city of Rockford:

"The undersigned, legal voters of the city of Rockford, would

hereby make application, in accordance with the provisions of section seven, of an act to incorporate the Kenosha and Rockford Railroad Company, approved January 20th, 1857, and ask that an election be held, as directed in said act, to determine whether said city will loan to the Kenosha, Rockford and Rock Island Railroad Company, second division, the sum of fifty thousand dollars, in ten per cent. bonds, running ten years." Dated, Rockford, Ills., August 18th, 1858. (Signed by 163 persons.)

That the city clerk, on the 24th of August, filed the application, and immediately caused notice to be published in the papers of said city, calling an election, for the electors to vote on said proposition, Sept. 2nd, 1858.

The said notice of election, is as follows:

"SPECIAL ELECTION.

"In accordance with a petition, signed by a large number of citizens of the city of Rockford, I hereby call a special election of the legal voters of said city, to be holden on Thursday, the second day of September, 1858, at 10 o'clock A. M., to vote in accordance with section seven, of an act to incorporate the Kenosha and Rockford Railroad Company, approved January 20th, 1857, to determine whether the said city of Rockford will loan to the Kenosha, Rockford and Rock Island Railroad Company, second division, the sum of fifty thousand dollars, in ten per cent. bonds, running ten years; provided the said road leaves as collateral security, with the said city, fifty-five thousand dollars of the first mortgage bonds of said railroad, the road agreeing to pay the interest on the said bonds, annually. The election will be held within the several wards of the city, as follows:" etc.

That an election was held in pursuance of the notice, and a majority of the votes cast, were in favor of a loan of the credit of the city, as asked for.

That petition, notice of election, and vote, was upon the question, whether the city would lend its credit to the Kenosha, Rockford and Rock Island Railroad Company; that the above recited sections only authorized such loan to the Kenosha and Rockford Railroad Company, (a different corporation), and that the said election conferred no authority on the city to loan its credit to the company named in the petition and notice; that the Kenosha and Rockford Railroad Company were authorized to build a road from Kenosha to Rockford, while the Kenosha, Rockford and Rock Island Company were authorized to build a road from Kenosha to the city of Rock Island, and was formed by the consolidation of the Kenosha and Rockford Company, with another company.

That they had been advised that the authority of the city of

Rockford, to loan its credit to the Kenosha and Rockford Railroad Company, was subject to the limitation in the 97th section of the city charter, limiting said city in its right to borrow money; that the city, before said election, had exhausted its powers to borrow money, and for that reason, could not loan its credit, nor issue its bonds in the mode proposed, and that said election conferred no power on the city to do so.

That the Common Council will, unless restrained, issue said bonds; that no mode is provided for distinguishing these bonds from the other bonds of the city; that, although the bonds would be void in the hands of the company, or its assignees with notice, it was probable that they would be not void in the hands of *bona fide* holders, and even if void, to resist payment might be an act of repudiation, so detrimental to the reputation of said city, that it might be for the interest of the city to pay them, although they might be utterly void.

That the proposed road is not needed by the public; will not probably be profitable; will not pay more than running expenses; and that in all probability, the city will be obliged to pay the whole amount of principal and interest of the said bonds.

That the attempt to lend the credit of the city to said railroad, is an attempt to raise money by taxation for the benefit of a private corporation, and therefore an attempt to appropriate the private property of complainants and other persons, to private purposes without compensation, and therefore a violation of the constitution; that the provisions in said act, authorizing a loan of credit to said corporation, are repugnant to the constitution and void.

That complainants believe, that if the bonds should be issued, the effect would be very injurious to the interests of the city, imposing a heavy debt upon it, and thereby preventing it from borrowing money for ordinary purposes of improvement, by giving the city a bad name, as deeply in debt and subject to enormous taxes, and in that way preventing desirable persons from becoming citizens.

That if the city should be compelled to pay said bonds, the complainants would be required, as they are now assessed, to pay more than five hundred dollars annually towards the interest, and a larger amount for the principal, which would not amount to less than twenty dollars to each complainant annually, and would be for some of them much larger.

That said bill is filed as well on the behalf of complainants as on behalf of other tax-payers of said city.

That the authorities of said city, and directors of said railroad, are determined to issue the bonds of said city to the Ke-

nosha, Rockford and Rock Island Railroad Company, to the amount of $50,000; and that the said company will negotiate and put the same in circulation unless enjoined, by which great injury may be done.

Prayer of the bill that City and Common Council may be enjoined from issuing the bonds to the said railroad company, and for other and further relief.

Joint and several answer of City and Kenosha, Rockford and Rock Island Railroad Company, admits that complainants are residents and tax-payers of said city of Rockford; do not know the assessed value of the property of said city, are informed that the whole assessed value of the property of said city is between $1,700,000 and $1,800,000.

Admit that Rockford is an incorporated city under the act mentioned in the bill, and refer to it as a public act.

Admit the incorporation of the Kenosha and Rockford Railroad Company, as stated in the bill; also, admit the application for the election, as therein stated; and that an election was held as therein stated.

Admit that the application was made for a loan of credit to the Kenosha, Rockford and Rock Island Railroad Company, under the provisions of the act to incorporate the Kenosha and Rockford Railroad Company, passed January 20th, 1857, which they refer to as a public act; but say that, by virtue of the provisions of said act, and an act incorporating the Rockford and Mississippi Railroad Company, passed January 28th, 1857, the two roads became consolidated, and on such consolidation assumed the name of the Kenosha, Rockford and Rock Island Railroad Company, and by such name were entitled to all the privileges that belonged to the Kenosha and Rockford Railroad Company.

Insist that the powers in the two railroads charters above mentioned to loan their credit, passed to the consolidated company.

Say that the road is not yet completed, but insist that it soon will be, and that the avails of the bonds to be issued will be used in the completion of part of said road, extending from said city twenty-six miles east; and that a bond has been filed guaranteeing to the city such application; also, insist that said road when completed will be a profitable road; and deny that the city of Rockford can in any event suffer any injury by the issue of said bonds.

Admit that the Common Council has exhausted all its power to borrow money, conferred upon it by the 97th section of its charter, but insist that the limitation in that section only applies to the power of the city to borrow money for the purpose of

ordinary municipal government, and does not operate to limit their issue of bonds to the said railroad company.

This case was heard on bill and answer, and a final decree made in it at the September term, 1858, of court below, dismissing the bill.

Sanford and Robertson, two of said complainants, appeal, and assign for error,

1st. That the court erred in dismissing complainants' bill.

2nd. That the decree should have been for the complainants, and not for defendants.

WIGHT & SAWYER, for Appellants.

J. MARSH, for Appellees.

WALKER, J. The appellants urge the reversal of the decree in this cause, upon the grounds that cities and counties are prevented, by a constitutional prohibition, from lending their credit, to aid in the construction of railroads. This court, in the case of *Prettyman* v. *Supervisors of Tazewell County*, 19 Ill. R. 406, held that the constitutional restriction relied upon, only applies to, and prohibits the State from giving its credit to, or in aid of, any individual, association or incorporation, and does not apply to or embrace cities and counties, within the restriction. We see no reason requiring that the construction then adopted should be overruled, and are still disposed to adhere to that decision. That case is decisive of this question, and we deem it unnecessary to again discuss it.

It is likewise urged that the city is prohibited from issuing these bonds by the provisions of its charter. The act incorporating the city of Rockford, contains a provision limiting the power of the city to borrow money, to an amount, the interest on which, shall not exceed half of the tax which shall be levied upon the real estate of the city, assessed for its general expenses. It is urged that the interest on the bonds proposed to be issued, and on sums already borrowed, would exceed the limit fixed by the charter of the city. The city charter took effect and went into operation, on the fourth day of March, 1854. But by an act of the legislature, incorporating the Kenosha and Rockford Railroad Company, which was adopted the 20th January, 1857, (Private Laws, 16, sec. 6,) it is provided "that the several counties, cities, incorporated villages and towns, through or near which said railroad shall be located, are hereby authorized to subscribe to the capital stock in, or severally to lend their credit to, the incorporation hereby created, for the purpose of aiding in the construction of said road: *Provided*, That no such sub-

scription or loan shall be made, until the same shall be voted as hereinafter provided." It is conceded that the city of Rockford, although not named in terms, is embraced in the provisions of this section; and no question is made as to the regularity of the vote to lend these bonds to the railroad company. There is no reason perceived, why this does not remove the restriction contained in the charter, and fully authorize the city to lend its credit to the railroad, when sanctioned by a vote of the citizens. This, as are all such municipal corporations, is dependent upon the legislative will for their existence, as well as all power exercised by them, and their corporate powers may be increased or contracted by the legislature, at will. And the enlargement of this power may be given, by an act not professing, in terms, to amend their charter, but may be as effectually done, in an act incorporating a railroad company. This provision, contained in the railroad charter is the last expressed will of the legislature, and must be held to be binding.

It was also urged that the act authorized the city to subscribe to the Kenosha and Rockford Railroad Company, but not to the Kenosha, Rockford and Rock Island Railroad Company. At the same session of the legislature, an act was adopted, incorporating the Rockford and Mississippi Railroad Company, and gave to counties, cities, incorporated villages and towns, through or near to which it should be located, the same power to subscribe stock in, or lend their credit to aid in its construction, as was given by the charter of the Kenosha and Rockford Railroad Company. It is also conceded, that the city of Rockford is embraced in the provisions of the charter of this last named company.

The acts incorporating these companies, contain a provision that each of them shall have the power to unite its road, in whole or in part, with any other railroad or railroads then constructed, or which might be afterwards constructed, connecting with the same. And to grant power to such road, to construct and use any portion of the line of road, upon such terms as may be agreed between them, and also to consolidate their capital stock with the capital stock of any such railroad company, with which they shall intersect, and to have power to place the road and its capital stock, when thus consolidated, under the control of a joint board of directors. Under these provisions, the Kenosha and Rockford Railroad and the Rockford and Mississippi Railroad, became consolidated, and no objection is urged against the manner in which it was accomplished, and we shall therefore regard it as regular. Then, when thus united and consolidated, under the name of the Kenosha, Rockford and Rock Island Railroad Company, had the city of Rockford the

power to lend its credit to aid in its construction? The power was given the city to lend its credit to aid in the construction of each of these roads, before they became consolidated, and their charters authorized the consolidation. And an act of 28th February, 1854, (Scates' Comp. 951,) authorizes all railroad companies then organized, or which might become organized, to consolidate their property and stock with each other. And the 2nd section of this act confers on such companies, when consolidated, all of the rights which each company previously had, under its charter. It then follows, that as each of these companies had the power to receive these bonds, as a loan of the city credit, before the consolidation was effected, that they still have the same right.

When the legislature by the same act which conferred the power on the city to lend its credit to each of these companies, also empowered them to consolidate their roads, it must have been intended that the power of the city, might be exercised after such consolidation, as effectually as before that event occurred. Otherwise, it may be reasonably supposed, that some limitation of the power would have been adopted. The object of conferring the power on the city to lend its credit to the company, was to aid in its construction, and the same necessity existed after as before the consolidation. The condition is not that the city may lend its credit before a consolidation is effected, but it is to the road which the legislature was then incorporating, which contemplated its existence as a consolidated company. After the consolidation, it was still the company created by these acts. We are therefore of the opinion that the city is authorized to make, and the road to receive this loan of bonds, in the manner proposed, and that there was no error in the decree dissolving the injunction, and dismissing complainants' bill.

We have heretofore, with great reluctance, felt ourselves compelled to notice the insufficient and negligent manner in which transcripts of records in numerous instances have been returned by clerks of the Circuit Courts, into this court. In many instances there exists on the part of clerks a singular degree of carelessness in making transcripts of records. They frequently abound in fly leaves, large open spaces between paragraphs, and are barely legible, and with many interlineations and erasures. But it affords us pleasure to say that in this case the transcript is neatly made—is written in a plain legible hand—is free from blots, erasures and interlineations, and the other imperfections referred to; and it is creditable to the clerk who transcribed it, and will compare most favorably with any filed in this court.

Decree affirmed.

Dennis W. Dawley, Appellant, *v.* Benjamin P. Van Court, Appellee.

APPEAL FROM BUREAU.

Imperfections and irregularities in any part of the chain, by which color of title is derived, will not alone be regarded as evidence of a want of good faith.

Payment of taxes and color of title must be coincident in fact and person, to secure the benefit of the second section of the limitation act of 2nd March, 1839. Payment of taxes by a person not holding the color of title, will be unavailing

If it appears that A. and B. paid taxes on land from 1845 to 1855, the presumption will be that they paid jointly, and not each for himself. And if B. had not any color of title, then A. would have paid on one undivided half of the land, and would bring himself within the limitation act to that extent.

One who holds color of title to the undivided half of a tract of land, but pays taxes on the whole tract, may have the benefit of the statute for the part of which he has color of title, but no farther. And so of the payment of taxes due on a part of a tract, where the payer has color of title to the whole; the payer may have the benefit of the limitation for the part for which he has paid.

This was an action of ejectment, brought by Van Court, in the Bureau Circuit Court, at the January term, 1857, to recover the possession of the south-east quarter of section 1, town 15 north, range 13 east, in Bureau county.

The declaration and notice are in the usual form.

At the September term, 1857, the defendant filed his plea, and a trial was had by the court, and a finding and judgment for the plaintiff, and the defendant took an order for a new trial under the statute.

At the January term, 1858, by the agreement of the parties, a jury was waived, and the cause was submitted for trial to Judge Ballou, who found for the plaintiff. The defendant moved for a new trial, which motion was overruled, and judgment entered for plaintiff, and a writ of possession awarded. The defendant prayed this appeal.

The bill of exceptions shows that the plaintiff introduced, 1st, an exemplification of a patent from the United States to James Patrick, for the land in controversy; 2nd, a regular chain of conveyances from the patentee to the plaintiff; and rested his case.

The defendant introduced, 1st, a deed or patent from the auditor of public accounts of the State of Illinois, to Aaron E. May, reciting that the clerk of the County Commissioners' Court of Bureau county, did, on September 1, 1845, at Princeton, in conformity with the requisitions of an act entitled "An Act regulating the assessment and collection of the 'public revenue,'" approved March 3rd, 1845, sell the land in controversy, (which had been forfeited to the State for the non-payment of

the taxes, etc., for 1839,) to Aaron E. May, for $7.81, and conveying the land in controversy to said A. E. May. This deed bears date March 18, 1846, and was filed for record August 20th, 1846.

2nd. A warrantee deed from Aaron E. May, conveying the premises to James C. May, before the commencement of the suit.

3rd. The defendant then proved that he was the tenant of James C. May, and held possession of the premises under him.

4th. The defendant proved that James C. May and Aaron E. May had paid all taxes on the land every year from 1845 to 1855, inclusive; and then rested his case.

The plaintiff then introduced the record of the tax sale of Bureau county, for the taxes of 1839, being,

1st. A report of Cyrus Langworthy, collector, dated March 17, 1840, showing the land in controversy to be delinquent, and the tax thereon $2.40, costs, 06.

2nd. A certificate of the publication of notice.

3rd. The record of a judgment for taxes in the Circuit Court of Bureau county, at the March term, 1840.

4th. The return of the collector.

It was admitted that defendant was in possession, at and before the commencement of the suit, and had been for three years.

The court found the issues for the plaintiff, and rendered judgment, and defendant excepted.

The errors assigned are:

1st. That the court erred in finding for plaintiff below.

2nd. The court erred in rendering judgment for plaintiff below.

3rd. The court erred in overruling appellant's motion for a new trial.

4th. And in rendering the judgment in manner aforesaid.

George W. Stipp, and W. H. L. Wallace, for Appellant.

Peters & Farwell, for Appellee.

Walker, J. On the trial of this cause in the Circuit Court, the appellee read in evidence a regularly connected title from the United States Government, sufficient to authorize a recovery of the premises in controversy, unless his action is barred by the statute of limitations. The land had been offered for sale in 1840, for the taxes of 1839, and for the want of bidders was stricken off to the State. It was sold to Aaron E. May, in September, 1845, for the non-payment of these taxes, upon which sale the auditor executed to him a deed on the 18th of

March, 1846, which was introduced in evidence by appellant. Also a deed of conveyance by Aaron E. May to James C. May, the date of which is not given in the bill of exceptions. And appellant proved that he was tenant of, and held possession of the premises under James C. May. The bill of exceptions also contains this statement, "Defendant proved that the said James C. May and Aaron E. May had paid all taxes upon the said premises every year from the year 1845 to the year 1855 inclusive." It was admitted on the trial, that the defendant was then in possession and had been for only the three years previous to the trial. The appellee also introduced the collector's notice, report of delinquent taxes, the judgment and precept for the sale for taxes in 1840, to show irregularities in those proceedings, and to charge a want of good faith in the holders of the color of title. Upon this evidence the court, which tried the case found for appellee and rendered judgment against appellant, from which he appeals to this court.

This court has repeatedly held that imperfections and irregularities in any part of the chain by which color of title is derived, will not of itself be urged as evidence of a want of good faith, by the holder of such color. Those decisions are, we think, based upon a true construction of the act of March 2, 1839, and we see no reason requiring a departure from that construction, and we therefore deem it unnecessary to again discuss that question in this case.

The question is presented by this record, whether the holders of the color of title have paid all taxes legally assessed upon the land for the period of seven successive years, under such color, in the manner required by the statute. We have held in the case of *Dunlap* v. *Daugherty*, 20 Ill. R. 397, in giving a construction to the second section of this act, that payment of taxes and color of title must unite and concur in the same person, at the time when the payment is made, to be available under its provisions. That the payment of the taxes by a person not holding the color of title, was not in accordance with its provisions, and could not be relied upon to bar a recovery. The language of this section, in terms requires the holder of the color to make the payment, for the limited period, to be availing. And when possession of the premises is dispensed with, during the period of limitation, and the color of title is not required to be recorded, and there is not even a requirement that the tax payer's name shall be entered upon the collector's books at the time the taxes are paid, or that the holder of the color of title shall do any other act tending to give notice, either actual or constructive, to the holder of the better title, of an adverse claim by the tax payer, we feel that courts

should at least require persons relying upon the benefits of this section, to show that they have conformed to its provisions. They are so liberal and easy of performance as to require no enlargement, or its protection to be extended beyond the class of cases provided for by its terms. If the holder of the color of title may have his unrecorded deeds, and his tax receipts in his pocket, and his name not appearing on the collector's books as having paid the taxes, and if from his advantage of residence near the collector, and by superior activity he can prevent the owner of the better title from being the first to pay, for any one of the seven years, the owner may not know, against whom to institute legal proceedings to test his rights. And he would have no alternative but to reduce the land to possession, to prevent its being lost by the limitation. When a bar to a recovery may be thus easily obtained, it would be calculated to work great injustice to permit the holder to appropriate the payment made by a stranger to the title, acting without any authority from him, and not for his use, as a sufficient payment to defeat a recovery. Such could not have been the intention of the legislature by the adoption of this section.

The bill of exceptions states that Aaron and James May paid all the taxes on the premises every year, from 1845 to 1855, inclusive. This language can bear no other construction than that those taxes were paid by them jointly. And there is no evidence that the half of the taxes paid by James during the time Aaron was the holder of the color were paid for his use, nor that the payments made by Aaron while James held it, were made for his. Then there was during this whole period, a payment of one-half of the taxes assessed, by a person not having color of title to the land, while the other half of the taxes were paid by the holder of such color. The payment and color then united in the person making the payments, at the time they were made, to the extent only of an undivided half of the land. The holder of the color of title then by paying all the taxes upon the undivided half of the premises in controversy, for the period of limitation, has brought himself within the provisions of the second section, and is entitled to its protection, and may invoke its aid to the extent of an undivided half of the premises. That a person holding color of title to an entire tract, and paying taxes for the limited period, on a specific portion of the tract, would be entitled to the protection of the statute to the extent of such payment, there can be no doubt. If the holder of color of title to an undivided portion of a tract of land, were to pay all the taxes assessed upon the whole tract for the full period of limitation, such payment would create a statutory bar to the extent of the interest held by such color of

title, and no further. And for the same reason, when a person holds color for an entire tract, and pays taxes on an undivided portion of the tract, he is entitled to the protection of the statutory bar to the extent of his payment. Because he has color of title to the whole tract, he is not compelled to assert his rights to the whole by paying taxes upon it. He may, if he choose, assert or abandon his rights to all or any portion of it. The Circuit Court therefore erred in rendering judgment in favor of the plaintiff below for the recovery of the entire tract. Nor could he, under the decisions of this court, recover an undivided interest under a declaration claiming the entire tract; but to do so, there must be an appropriate count adapted to the interest claimed. *Ballance* v. *Rankin*, 12 Ill. R. 420.

It is urged that the land was not vacant during the period of seven years when the taxes were paid, and for that reason the statute did not operate to create a bar to a recovery. The objection is not sustained by the record, and even if it were, it is believed to be without force. The bill of exceptions shows that all taxes were paid every year, from 1845 to 1855, inclusive. The color of title united with the payment of one-half of the taxes after the 18th day of March, 1846, and the seven years fully elapsed on the 18th day of March, 1853, over four years before the trial, and the evidence shows the premises had only been in possession for three years previous to the trial. Possession was then taken in 1854, and after the seven years of payment of taxes on half of the land, united with the color of title, had become complete. So it is perceived this objection does not really exist.

The judgment of the Circuit Court is reversed, and the cause remanded, with leave to amend the declaration.

Judgment reversed.

City of Pekin, Plaintiff in Error, *v.* Jacob Smelzel, Defendant in Error.

ERROR TO TAZEWELL.

A city charter like that of the city of Pekin, which authorizes the passage of ordinances to restrain or prohibit the sale of intoxicating drinks, supposes that the usual means by penalty will be resorted to. The passage of an ordinance which declares that liquor shall not be sold, is not within the spirit of the charter.

An ordinance prohibiting the sale of beer is not repugnant to the general laws of the State; beer of some kinds being intoxicating drinks.

Cities may exercise powers by ordinance, regulating the sale of intoxicating drinks beyond those authorized by the general laws of the State. Greater penalties may be allowed.

THIS cause was an appeal to the Circuit Court, from the police magistrate of the city of Pekin, on a complaint for selling beer in a less quantity than one gallon, without license.

Upon the trial of this cause, the plaintiff offered in evidence the following ordinance:

"AN ORDINANCE entitled an ordinance for licensing the vending, by retail, of spirituous or malt liquors:

"SECTION 1. *Be it ordained by the City Council of the City of Pekin*, That from and after the passage of this ordinance, the city council may grant licenses to any person or persons to retail vinous, spirituous and malt liquors, in said city, on the following conditions, to wit:

"The applicant or applicants shall set forth in writing the building, room or place intended to be occupied by him or them, and pay to the treasurer of the city of Pekin for the license granted, the sum of one hundred dollars, and shall execute a bond to the city of Pekin, with one or more securities to be approved by the city council, conditioned that the said applicant or applicants will keep an orderly house; that he or they will not permit any unlawful gaming or riotous conduct therein; that he or they will not keep open or permit his or their grocery to be kept open, or sell therein any spirituous, vinous or malt liquors, on a Sabbath day, or after eleven o'clock at night; and that he or they will observe all laws or ordinances now in force, or that may hereafter be in force, regulating the sale of vinous, spirituous and malt liquors.

"SEC. 2. Licenses granted to keep groceries or sell beer shall not authorize the person or persons obtaining the license to vend or sell vinous spirituous or malt liquors in more than one place or house, and every license shall describe the house and place intended to be occupied; and each license shall also contain a condition that any violation of this ordinance by the person or persons to whom the license is granted, shall cause an immediate forfeiture of all rights and privileges granted by said license, which shall, from and after the conviction of the party or parties for a violation of this ordinance, be absolutely void; and all the parties therein named shall thereafter be alike liable as though no license had been ever granted.

"SEC. 3. Every person or company of persons not having a legal license to keep a grocery or sell beer, who shall barter, sell, exchange, or otherwise dispose of, for his or their gain or benefit, any vinous, spirituous, mixed or malt liquors, in less quantity than one gallon, within said city, to any person or per-

sons whatever, or shall permit the same to be done on his or their premises or elsewhere, for his or their gain or benefit, shall forfeit and pay to said city not less than ten and not exceeding twenty-five dollars for each offense, together with the costs of suit.

"SEC. 4. From and after the passage of this ordinance, no person or persons shall keep a common ill-governed and disorderly house, or permit unlawful gaming or riotous or disorderly conduct therein, or keep open his or their grocery or beer house, or permit the same to be kept open, or spirituous or malt liquors to be sold or given away, on the Sabbath day, or after eleven o'clock in the evening of any day of the week, or shall sell or give away any vinous or spirituous or malt liquors (in the absence of their parents or guardians,) to any person or persons under 18 years of age, or permit any such person or persons under the age of 18 years to loiter about or frequent his or their grocery or beer house; and any person or persons who shall violate any of the provisions of this ordinance, shall forfeit and pay said city the sum of not less than ten or more than twenty dollars and costs of suit.

"SEC. 5. All licenses granted under this ordinance shall be signed by the mayor, countersigned by the clerk, and have the seal of the city affixed thereto, and shall be for the term of one year only, and at a specified place, and not be assignable; and in all cases of application for license to keep grocery or sell beer by less quantity than one gallon, the city council may grant or reject the same in their discretion.

"SEC. 6. All forfeitures and penalties incurred under this ordinance, may be prosecuted for and recovered by action of debt, or otherwise, before the police magistrate of the city of Pekin, on information under oath as in other cases, provided the officers of the city shall in no case be required to file information except on their personal knowledge; and any person knowing of, or having good reason to believe there has been any violation of any ordinance of the city, by any person whomsoever, shall give immediate information to the police magistrate in due form.

"SEC. 7. That nothing in this ordinance shall be so construed as to prevent druggists from selling spirituous or vinous liquors, in good faith for medical purposes, in less quantity than one gallon.

"SEC. 8. All ordinances, and parts of ordinances coming in conflict with this ordinance, shall be, and the same are hereby repealed; and from and after the passage of this ordinance, it shall be unlawful to keep in store, sell, or give away any vinous, spirituous or malt liquors in greater quantities than one gallon,

for any purpose, by any persons, or at any place in the city of Pekin, belonging to or in the possession of the person so keeping or trafficing in said spirituous liquors. And provided, further, that nothing herein contained shall in any way affect any action, prosecution, suit or proceeding, by virtue of any ordinance in said city, against any person whatever."

And proved that same had been duly published in a newspaper published in said city, as required by the charter; and also proved that the same was signed by persons who were then mayor and clerk of said city; and that the seal thereto attached was the seal of said city; to the reading of which ordinance in evidence the defendant objected, for the reason that it was inconsistent with the laws of this State, and that the city council had no authority to pass the same; which objections were sustained by the court, and the ordinance excluded from the jury; to which the plaintiff at the time excepted.

The error assigned is, that the court erred in refusing to allow the ordinance to be read to the jury.

The city of Pekin is incorporated and acting under the acts of the legislature incorporating the cities of Quincy and Springfield. See Private Laws of 1851, page 12.

The 23rd section of the fifth article of the act incorporating the city of Quincy, is as follows:

"To tax, restrain, prohibit, and suppress tippling houses, dram shops, gaming houses, bawdy and other disorderly houses."

The 41st section of the same act is as follows:

"The city council shall have power to make all ordinances, which shall be necessary and proper, for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to, or inconsistent with, the constitution of the United States or of this State."

The act of June 19th, 1852, (Laws of 1852, page 41,) gives the city of Pekin power to pass ordinances, not inconsistent with the laws of this State, to suppress and restrain the sale of intoxicating liquors. By the general act of 1849, the city may declare what shall be considered a nuisance.

James Roberts, for Plaintiff in Error.

A. L. Davison, for Defendant in Error.

Walker, J. It is objected that by the charter, the city had no power to prohibit the sale of beer. The amendatory act of the charter of the city, adopted 19th June, 1852, Session Laws, 41, provides, "That the city of Pekin shall have power and authority to enact and pass ordinances, not inconsistent with the

laws of this State, to suppress and restrain the sale of intoxicating liquors, tippling houses and dram shops." The charter of the city, as it was originally adopted, conferred the power to tax, restrain, prohibit and suppress tippling houses, and dram shops, by ordinance. The only limitation upon this power is found in the amendatory act, which requires that such ordinance shall not be inconsistent with the laws of the State. That some kinds of beer is intoxicating, is conceded, and was not controverted on the argument, and being such, the city, by the express authority given by the charter, may pass all needful and proper ordinances to prohibit or restrain its sale within the corporate limits. The power to suppress, regulate and restrain, necessarily embraces the authority to adopt the usual means, employed for such purpose. The merely adopting an ordinance which declares that liquor shall not be sold, without imposing any penalty for its non-observance, would not tend in the slightest degree to accomplish the end sought. The imposition of a fine for the breach of such ordinances, is the means usually authorized by the legislature, and none are more proper, and such was doubtless intended to be employed, when this power was conferred by the legislature. The latter clause of the 3rd section of the amendatory act of the city charter is this, "and all fines, forfeitures and penalties, that may be assessed and collected from any person or persons, within the city of Pekin, for the violation of any ordinances of the city of Pekin, passed or that may be hereafter passed, for the suppression of dram shops, or tippling houses, in the said city of Pekin, shall accrue to and be paid into the treasury of the said city of Pekin." This provision leaves it free from doubt that penalties by way of fine, was the mode intended to compel an observance of ordinances, restraining, prohibiting and regulating the sale of intoxicating liquors, dram shops and tippling houses, and that the city by ordinance might impose them.

It is urged that, as the sale of beer is not prohibited, or declared to be an offense by the general laws of the State, that any ordinance of the city, prohibiting its sale, is repugnant to or inconsistent with the general laws of the State, and is therefore unauthorized and void. If this be true, the city would have no power to adopt any ordinance prohibiting any act but those forbidden by the general laws, nor would they have the power to adopt any other language than that employed by the legislature, in defining an offense. The limitation upon the power to adopt ordinances on this subject, is that the city "shall have power and authority to enact and pass ordinances, not inconsistent with the laws of this State," and this language confers the power to adopt all proper and usual

means for the purpose, not prohibited by the general laws. Any ordinance adopted for the purpose, which provided means that were prohibited by the constitution and laws, would be void. The very object of granting this power to the city, was to enable it more effectually to regulate its police affairs, than could be done under the general laws; and it was intended to confer powers upon the city, to suppress disorders, that were not prohibited by general enactments. The sale of beer, is neither expressly licensed or prohibited by the legislature, and if it is a nuisance in populous cities or tends to produce disorderly conduct amongst those who frequent such places, the cities clearly have the power granted them to restrain and repress the evil, and in doing so, they do not, by imposing a fine for its sale, violate the laws of the State.

It was again urged that the city had no power to impose a fine of more than ten dollars for a breach of ordinance regulating the sale of intoxicating liquor, that being the penalty imposed for a violation of the general laws prohibiting the sale of spirituous liquor in a less quantity than a gallon. This position, we think, is not tenable. The power to impose the fine is given by the charter, and it is not in terms limited. In the case of *Goddard* v. *Jacksonville*, 15 Ill. R. 589, a fine of twenty dollars was imposed in each of two cases for a violation of an ordinance declaring the sale of liquor a nuisance, and the ordinance was held valid. This court again recognize the validity of the same ordinance in the case of *The Town of Jacksonville* v. *Holland et al.*, 19 Ill. R. 271. And following these decisions in the case of *Pendegrast* v. *The City of Peru*, 20 Ill. R. 51, a recovery under an ordinance which prohibited the sale of wine, brandy, rum, gin, whisky, beer, ale, porter or other vinous, spirituous, malt or fermented liquors, without a license, and imposing a fine of not less than twenty-five dollars nor exceeding one hundred dollars, was sustained. And it is for the reason that the legislature has conferred the power, and when such power is given and has not been taken away or afterward prohibited, it is not inconsistent with the laws of the State. If after the grant of such power, the city was prohibited from its exercise, or authority was conferred by act of the legislature to perform such an act, then the ordinance would be inconsistent with or repugnant to the general law. The amount of such penalties is limited by the State constitution, article 13, section 10, from exceeding one hundred dollars, in all cases when the proceeding is not by indictment.

The court below erred in not admitting the city ordinance,

and the judgment of that court must be reversed and the cause remanded.

Judgment reversed.

BREESE, J. I do not concur in holding that beer is an intoxicating liquor in the sense employed by the legislature.

PATRICK HALLIGAN, Plaintiff in Error, *v.* THOMAS J. WADE, Defendant in Error.

ERROR TO LASALLE.

An eviction in fact or in effect, which renders the premises useless, may prevent a recovery of rent.

Where an eviction is by another than the landlord, under paramount title, the rent is discharged. But an eviction of only a part of the premises, by a stranger, will authorize an apportionment of the rent; but if the eviction is by the landlord, and the tenant is kept out of possession, the whole rent will be discharged.

If a railroad company should enter into the possession of a part of the premises leased, by permission of the landlord, it would amount to an eviction of that part; although the company was not justified by taking the possession.

The renting of a reserved part of the same premises, to another, for purposes that destroy their usefulness to the tenant, upon whom the distress is levied, will amount to an eviction, whether the purposes for which they are rented, are lawful or unlawful.

THIS was a distress for rent. There was a trial by jury in the Circuit Court of LaSalle, at the February term, 1858. There was a verdict for defendant, HOLLISTER, Judge, presiding.

The evidence of the plaintiff consisted of a lease in writing by Patrick Halligan to Samuel Brown and Richard Lownsberry, of the United States Hotel and outhouses, excepting the three stores and the room occupied by the Freemasons and Sons of Temperance, for the term of five years, from October 1, 1850, at $650 a year for the first two years, and $750 each year for the last three years, payable quarterly in advance; and when the room occupied by the Freemasons and Sons of Temperance, should be given up to Brown and Lownsberry, their rent was to be increased $50 a year—making $800 a year during the last three years after this was done.

An agreement in writing between Halligan and the defendant, dated January 19th, 1853, that in settlement of all claims and demands for repairs which Wade claimed Halligan should make on the City Hotel, (the name had been changed,) Wade should retain sixty dollars from the rent then due. Wade agreed to

pay the balance of the rent on demand, Wade to have the privilege of terminating the lease, by Halligan to Brown and Lownsberry, and by them sold to Wade, in one year, by giving three months' notice. Wade to pay rent during the time he occupied, at the rate and in the manner prescribed in the lease from Halligan to Brown and Lownsberry.

Thomas P. Halligan testified, that Wade went into possession in the winter of 1851–2, and that he occupied till the 11th day of September, 1853. While Wade occupied the house, the name was changed to that of the City Hotel. Wade got possession of the room occupied by the Freemasons and Sons of Temperance, in October, 1852. Wade had paid rent at $200 a quarter since then, and on the 1st day of July, there being only $15 of back rent due, the witness demanded the quarter's rent due on that day, and Wade declined to pay it, and soon after this, proceeding was instituted to collect it.

There were on the first floor four rooms. One was the office or bar-room of the hotel, and liquors were sold there at retail by Wade. The other three were stores, and occupied during the time Wade was there, for various purposes. Owen Judge occupied one for a grocery store, where a general assortment of groceries were sold, and among other things, liquor was sold there. Judge also had a bake oven out of doors, and baked bread, which was sold in the room he occupied. This establishment continued all the time that Wade occupied the premises, and was there before Wade went into possession. Another room was occupied by one Birkel, for a saloon or eating house, where oysters and other eatables were sold, also liquors, beer, cigars, etc., at retail. Birkel went into possession in February, 1853, and continued till Wade went out. In the other room below, there was in 1852 a tin shop, where tin and sheet iron ware were manufactured and sold. In 1852, Wade remonstrated with the plaintiff, the father of witness, about the noise occasioned by the manufacture of the tin and iron, and father procured another place on another lot where the articles were made, which when made were sold in the store. The manufacture of these articles was carried on in the store for about two weeks only. The business carried on in the store was as orderly as that kind of business usually is. The order in Birkel's saloon, and in the grocery of Judge, was about the same as in Wade's bar-room. The plaintiff here rested his case.

The evidence for the defendant was substantially as follows: One *Bosley* testified, that he and Caldwell bought Wade out. That Wade left in August, 1853, in the fore part of the month. Wade had assigned his lease to us. Halligan said he could not recognize the lease, but afterwards said if he could get his rent

regularly in advance, he did not care who occupied it. I think we paid the rent from the time we went in. We paid after the time we took the house, and paid no back rent, but paid rent quarterly in advance. Over the east store the front part was occupied by Wade as a family room, the back part as a reading room. Next to Wade's room was the ladies' parlor. Under this was the tin shop, used both for sale and manufacture of tin and sheet iron. The dining room was over both the west stores. The tin shop was not plastered. It was a loose ceiling. There was a bakery there. Oven on the outside of the house, immediately against the hotel. That they used a machine for pounding crackers. There was liquor sold by the glass, by Judge. In dining room could hear an ordinary conversation in the saloon below. Body of the barn a very good one. Stone barn, dirt floor, very wet, caused I think by railroad cutting off part of barn. In no condition to receive animals. Road cut off about eight feet on north-west corner, and run about half way down side. They had to put in a floor before I could use it. Kept the hotel over nine months, and went out 1st of July. Paid $200 a quarter—$600 in all. Paid on the first day of the month. Don't think we paid Wade anything for the assignment of the lease. Tin shop was there about three months in 1852, and while Wade was there. I went in immediately on Wade's going out. Wade kept a bar in the office.

Zimri Lewis testified, that when they were pounding iron in the tin shop, you could hardly hear in the reading room and ladies' sitting room. Has heard the noise as far as the upper story. The building and furniture were calculated for a first rate hotel. The noises in the tin shop would be a great damage to a hotel. The barn was dry and in good condition before the railroad cut off the corner; after that, it was a perfect mud hole. Birkel's grocery was a low drinking saloon. Very noisy. I was there twice when they came out late at nights, hallooing "bloody murder." It was a place where a noisy drinking crowd were in the habit of assembling. There was gambling there. The whole was a damage to the hotel. If the rent of the hotel, with the barn as good as before it was cut off, and without these disturbances, was worth $800 a year, with the disturbances and with the barn out of order, it was worth about $300. Was there when the barn was being taken off. Halligan was there assisting. Wade kept a bar in the office. I was shot in the bar-room once. The shot was through a door, and hit me in the breast. The person who shot was crazy, I suppose, from taking opium. Wade did not sell opium. I never was in Wade's when there was any shouting and hallooing. He kept a quiet, respectable bar. There was much noise and hair pull-

ing in the saloon. Wade objected to Halligan taking down the barn. Barn was cut off in 1852. Wade occupied in 1853. Halligan was there taking down the barn himself, and continued till Wade objected. He took off two double stalls west. The taking off part of the barn, let the water in on the floor. It would be better to pay $100 a month than not have the barn in connection with a hotel of that kind. I would not keep a hotel with that tin shop and grocery, and no good barn. I don't mean that the rent of the barn is worth $100 a month, but it would draw $100 a month to the house.

John Hoffman testified, that he had been engaged in keeping a public house in Peru. Many persons came from Wade's and stopped with me, saying they could not stay there, there was so much noise. The making of stove pipe and tin ware would injure a hotel very much. I carried on tin and sheet iron manufacture myself 11 years. It cannot be carried on as that was, without injuring a hotel. The saloons, carried on as they were, would injure the business of a hotel materially. I would not have kept the house under the circumstances Wade did, with those saloons on both sides of him. A tavern barn is about as necessary as the kitchen. It was a good barn before the corner was cut off. It was in a bad condition afterwards. The water came in very much. A barn like that was first, ought to bring $100 a month custom to the house.

Theron D. Brewster testified, that he was one of the directors of the Chicago and Rock Island Railroad Company, and agent for procuring the right of way; that the engineer made the lines on the barn, and then Halligan and I went and examined it, and he was to take down the barn and put it back on the line for $400; and if he did not do so by a certain day, the company were to take it down themselves. He did not do it. I directed the contractor in the employment of the company to take it down, and he did so. I paid the $400 and took a receipt. The conversation with Halligan, and the taking down the barn, was in the spring of 1853. The lot was not assessed to my knowledge. There may have been conversation about the assessment, but I do not recollect it.

The plaintiff then introduced *Thomas Halligan*, who testified that the barn was situated on lot six, in block sixteen, in the town of Peru, and then introduced the following petition, order of the judge and award, which, so far as relates to that lot, are set out at length in the record.

The petition, signed by the attorneys of the road and addressed to the judge of the Circuit Court, sets forth that the following described town lots are required for the right of way, to wit:

No. 128. Also that portion of lot twelve in block sixteen, in the town of Peru, (here follows the description,) belonging to George B. Willis.

No. 138. Also that portion of lot six, in block sixteen, in the town of Peru, lying north of a line drawn from a point on the west line of said lot, eighteen feet from the north-west corner, to a point on the east line of said lot, three feet from the north-east corner, belonging to Patrick Halligan.

Pursuant to the prayer of the petition, on the 15th of December, 1852, and it appearing that due notice had been given, commissioners were appointed, by an order of the judge, to fix the compensation and assess the damages to be paid to the parties interested, for the right of way, for the town lots and parts of town lots in the said petition mentioned and particularly described.

The award of the commissioners awards to Patrick Halligan for all that part of lot six, in block sixteen, in the town of Peru, described in said petition and numbered on the margin thereof 138, the sum of four hundred dollars for the right of way and materials for the construction of said road.

It is certified in the award that sundry persons, and among them Halligan, appeared before the commissioners.

The plaintiff requested the court to give the following instructions in writing:

1st. That although the plaintiff, Halligan, may, during the time that the hotel was occupied by the defendant, Wade, and before the quarter's rent, due July 1st, 1853, become due, have rented the three stores under said hotel, and in the same building, to other tenants, and although one of said stores may have been used by the occupant, as a place for the making and selling of bread and groceries, also for the sale of liquor, by retail, and another of said stores may have been used as a saloon, in which oysters, and other eatables, and liquor by retail, were sold, and another of said stores may have been used as a place of business, for the manufacture and sale of tin ware and stoves; and although said business, though carried on properly, or by reason of its being carried on in an improper and disorderly manner, by said other tenants, may have operated to annoy and disturb said Wade, in the occupation of the hotel, yet, if the said Wade continued to occupy said hotel, until the said quarter's rent became due, and was occupying the same when said rent became due, such annoyance and disturbance would not excuse the said Wade from his liability to pay said quarter's rent, nor would he be entitled to any deduction.

2nd. If, after the said hotel and appurtenances were let by said Halligan to said Wade, and before said quarter's rent, due

July 1, 1853, became due, the Chicago and Rock Island Railroad Company caused the said Halligan's damages to be assessed therefor, and afterwards, in order to make a track for said road, took down a portion of the barn, on said leased premises, said railroad company did not thereby acquire the right of way as to said Wade, and said railroad company is liable to said Wade, for the injury done him, unless his damages have been assessed and paid by said railroad company—and the fact that said railroad company, under such circumstances, took down a part of said barn, though with Halligan's consent, is no reason why said Wade should not pay said quarter's rent to said Halligan; and if the disturbances of said Wade, in his said possession of said leased premises, were only those mentioned in the first and second instructions above, the jury should allow the quarter's rent, due July 1st, 1853.

3rd. If the jury allow said quarter's rent, they should also allow interest at the rate of six per cent. per annum thereon, from the first day of July, A. D. 1853, till the present time.

4th. Even though the Chicago and Rock Island Railroad Company may, for the purpose of making a track for their road, have taken down a part of the barn on the leased premises, this alone would not entitle the defendant to a deduction on his rent —nor would he be entitled to such deduction, if the railroad company, claiming and having the right to make a track for their road, did make it, and Halligan, knowing they were making it, acquiesced in its being made, or at the request of the railroad company, assisted in taking down and removing a portion of the barn.

5th. If the business in the stores, under the hotel, was a business which might be lawfully carried on in them, and the defendant did not leave the premises rented to him, but actually remained in possession of them, till the rent became due, then, although he may have been disturbed by said business, the jury should make no deduction from his rent, on account of such disturbance—and the jury are instructed, that the business transacted in said stores, was not unlawful in its character.

6th. If, after the disturbances mentioned in the 1st and 2nd instructions, the defendant, Wade, continued to remain in the possession of the leased premises, and after said disturbances occurred, paid rent for said premises, he would not, by reason of said disturbances, be entitled to a deduction on his rent.

7th. Although the jury may believe, from the evidence, that the defendant, Wade, may have assigned his lease to Bosley, and left the premises before the quarter, commencing on the first day of July, A. D. 1853, had ended, he should not, for this

reason alone, be excused from the payment of any portion of the rent for the full quarter.

8th. If the defendant, Wade, instead of surrendering the possession of said premises to Halligan, after the disturbances in the first and second instructions mentioned, without the consent of Halligan, sold or gave his interest in the lease, to Bosley, and let Bosley into possession of the premises under him, he is not entitled, in law, by reason of said disturbances, to any deduction on the rent, which had before that time become due from him to Halligan.

9th. The fact that Halligan leased premises of his own, other than those occupied by the defendant, to other tenants, who carried on a business which was lawful, although such lawful business may have annoyed and disturbed the defendant, Wade, in the quiet enjoyment of his premises, would not excuse Wade from the payment of any portion of his rent, unless Halligan intended, when he leased such other premises, to disturb Wade, or unless the business, if properly conducted, would necessarily disturb Wade, nor even then, unless the disturbance rendered the premises occupied by Wade wholly valueless.

10th. If the jury believe, from the evidence, that in order to make a track or way for the railroad of the Chicago and Rock Island Railroad Company, it was required that a portion of the barn should be taken down, and if, in 1852, and after the tenancy under the lease commenced, the damages occasioned thereby to Halligan were appraised by commissioners appointed by the judge of the Circuit Court, at four hundred dollars, and if, in 1853, it was agreed between Brewster, acting for said company, and Halligan that Halligan should, in consideration of four hundred dollars, take down the portion of the barn necessary, himself, and if Halligan commenced to take down the stalls in the barn, and at the request of Wade, desisted, and put back the stalls, and the company afterwards took down part of the barn, without objection on the part of Halligan, and against the consent of Wade, these facts would not entitle the defendant to any deduction on his rent.

11th. If, under the petition and award, $400 were awarded to Halligan, for the right of way, and this sum was afterwards paid to Halligan, and accepted by him, this would entitle the Rock Island Railroad Company to the right of way across the Halligan lot, as to him, and a taking of the part of the lot under these circumstances, by the company, for their road, though Halligan did not object to the taking, would not excuse Wade from the payment of rent.

The court refused to give the first and eleventh instructions, and modified the second, so as to make it read as follows:

2nd. "If, after the said hotel and appurtenances were let by said Halligan to said Wade, and before said quarter's rent, due July 1st, 1853, became due, the Chicago and Rock Island Railroad Company caused the said Halligan's damages to be assessed therefor, and afterwards, in order to make a track for the said road, took down a portion of the barn, on said leased premises, said railroad company did not thereby acquire the right of way, as to said Wade, and said railroad company is liable to said Wade, for the injury done him, unless his damages have been assessed and paid by said railroad company—and the fact that said company, under such circumstances, took down a part of said barn, is no reason why said Wade should not pay said quarter's rent to said Halligan—and if the disturbances of the said Wade, in his said possession of said leased premises, were only those mentioned in this instruction, the jury should allow the quarter's rent, due July 1st, 1853."

Gave the fourth instruction as asked, and modified the fifth by adding at the end of it, these words: "This is the law, unless the jury believe that such disturbance destroyed the beneficial enjoyment of the leased premises."

Modified the sixth, so as to make it read as follows:

6th. "If, after the disturbances mentioned in the second instruction, the defendant, Wade, continued to remain in the possession of the leased premises, and after said disturbances occurred, paid rent for said premises, he would not by reason of said disturbances, be entitled to a deduction on his rent."

Gave the seventh—modified the eighth, by erasing the word "first," and changing the word "instructions" to "instruction" —modified the ninth by striking out the words "rendered the premises occupied by Wade, wholly valueless," and inserting in lieu thereof, the words "destroyed the beneficial use by Wade, of the premises"—modified the tenth, by striking out the words "objection on the part," and inserting in lieu thereof, the words "the consent," and refused the eleventh.

The defendant requested the court to instruct the jury, as follows:

1st. If Halligan rented the premises in question, to Wade, under the leases read in evidence, and if, after Wade took possession of them, under such renting, Halligan sold a substantial and valuable portion of said premises to the railroad company, and put said company in the actual possession thereof, thereby turning Wade out of possession of that portion of the premises, and if said company has ever since held the actual, exclusive possession thereof, under said sale, then Halligan has no right to recover rent for any portion of the premises so rented to Wade,

from the time that Wade was so turned out of possession of a portion of the same.

2nd. The proceedings offered in evidence, do not show any legal condemnation of any portion of lot six (6), in block sixteen (16), in Peru, for railroad purposes, and the railroad company acquired no right to take possession of the land in question, or any portion thereof, by virtue of such proceedings.

3rd. If the jury believe, from the evidence, that Halligan rented a hotel to Wade, and afterwards rented the rooms under said hotel for such purposes, that Wade was necessarily disturbed in his quiet and peaceable possession of said premises, by the business carried on in said stores, with the consent of the plaintiff, then the jury should deduct from the rent of said premises, the amount that the rent was worth less, by reason of such disturbance.

4th. Under the lease which has been given in evidence, the law will imply covenants against such acts of the landlord as destroy the beneficial enjoyment of the lease, and if, after Wade took possession of the premises in question, under such lease, Halligan did do acts that destroyed the beneficial enjoyment, he cannot recover of Wade, the rent for the premises, for the time Wade was so disturbed.

5th. If the premises were leased by Halligan to Wade, to be used as a hotel, and if, after such leasing, Halligan did such acts as destroyed the beneficial enjoyment, by Wade, of said premises, for the purposes for which they were leased, Halligan thereby forfeited his right to collect rent of Wade, for the time Wade was so disturbed in the enjoyment of the premises.

6th. If Halligan rented the premises in question to Wade, to be kept as a hotel, and afterwards rented the stores under said hotel, to be used in business, which, if carried on, as it lawfully might be, and as such business ordinarily was conducted in that place, would necessarily destroy the beneficial use of said premises, by Wade, and said business was carried on in the ordinary way of doing such business, and did thereby deprive Wade of the beneficial use of said premises as a hotel, then Halligan cannot recover rent for said premises, during such disturbance.

The court refused the third, and gave all the others.

The jury found for the defendant; the plaintiff moved for a new trial; the court overruled the motion, and plaintiff excepted.

The errors assigned, are:

1st. The court erred in giving defendant's instructions, and each of them.

2nd. The court erred in refusing plaintiff's instructions, and each of them, and in qualifying them, and each of them.

3rd. The verdict and judgment were against the law and evidence.

4th. The court erred in overruling motion for new trial.

Leland & Leland, for Plaintiff in Error.

Glover & Cook, for Defendant in Error.

Walker, J. When this case was before this court on a former trial, it was laid down as a general and well settled rule, "that an eviction, in fact or in effect, which destroys and renders the premises useless, may be set up in defense against a recovery of rent; and this extends to such acts of disturbance as effect the same thing." The first instruction asked by plaintiff was based upon the supposition that even if it was true that an eviction of a portion of the premises, and such other acts had been done by plaintiff as had the effect of an eviction of the whole, nevertheless if defendant was in the possession of the demised premises when the rent became due, he would be liable for its payment. In this case it appears from the evidence that the rent was due quarterly, and payable in advance. The demand was made, and this proceeding instituted for the recovery of a quarter's advance rent, which was payable by the terms of the lease, on the first of July, 1853, and this proceeding was instituted within that month. The plaintiff received about half of the rent for this quarter, of Caldwell, who succeeded the defendant in the possession of the premises, and there can be no question that defendant was entitled to a deduction to the extent of this payment. Plaintiff could have no right to collect the same rent from defendant, and also from Caldwell. This instruction was calculated to mislead the jury, and was therefore properly refused.

An eviction may be occasioned either by the landlord himself, by entering without title, or by a third person under paramount title. When the eviction is of the whole of the demised premises, under paramount title, such eviction has the effect to discharge the rent. But an eviction of only a part of the premises, if by a stranger, the rent will be apportioned, but if by the landlord himself and the tenant is kept out of possession of that part, the whole rent will be discharged. 3 Kent, 464; 1 Saund. R. 204, note 2; 1 Ld. Ray. 370. The evidence shows that plaintiff sold a portion of the demised premises to the railroad company, and by his permission, agreement and consent, the road entered into the possession of that portion before this rent became due by the terms of the lease, and they deprived defendant of its use and occupancy. Now if this

were true, the plaintiff was not entitled to recover, as his first instruction asserted. The modification to his second instruction presented the law as it was applicable to the evidence, and it embraced the legal proposition contained in the eleventh, and presented it as clearly and fully as amended in the eleventh, and no error is perceived in substituting that which was given for the second, nor in refusing the eleventh.

There was no evidence that the assessment of damages was ever approved by the Circuit Court, and if this had been done, that would only operate upon the right of Halligan, and Wade would still have a right to compensation for the injury to his right of possession under the lease. And until his damages were assessed and paid, the railroad could not enter upon the premises, nor could the landlord put them into possession without evicting his tenant of that portion of the demised premises. Nor would the consent and authority of the landlord that the road might, enter into the premises, justify them in taking possession, and if it was taken in consequence of the landlord's authority and consent, he would be responsible for the act, and it would operate as an eviction of that portion. The arrangement between the road and plaintiff only passed the title of plaintiff, subject to the lease to defendant, and until the right of defendant was extinguished, or he consented to the entry it was unwarranted by the law.

If plaintiff by depriving defendant of this portion of the demised premises, and by leasing the reserved portions, for purposes, that rendered them useless for the business for which defendant rented them, he would be thereby discharged from paying rent. And the evidence tended strongly to show that such was the case, and this was a fact for the finding of a jury, and justified the giving the instructions announcing that principle. It was insisted on the argument that a distinction existed between leasing the reserved portions of the premises for lawful or unlawful purposes. And that as these leases were made for the purposes of carrying on lawful pursuits, the law gave defendant no right to complain. But it is believed that such a distinction does not exist. Suppose in this case the landlord had converted the rooms under this hotel into pig stys and horse and cattle stables, can any one doubt that such an act would have been equally destructive to the business of the tenant as would almost any species of unlawful business that could be tolerated in any city, and yet they would be appropriated to lawful purposes. And it may be and doubtless was equally destructive to the business of keeping a hotel, that those rooms were appropriated to the keeping of a low, noisy, and disorderly liquor saloon, and a tin shop. We think the evi-

dence justified the jury in finding that there was such an eviction, or what had the effect of such an eviction as released the defendant from the payment of this rent. No objection is perceived either to the giving, refusing, or modifying the instructions asked by either party, and from a careful examination of the record we think the evidence justified the verdict.

The judgment of the court below must be affirmed.

Judgment affirmed.

James Morgan *et al.*, Appellants, *v.* William B. Herrick, Administrator, etc., and Thornton Herrick, a minor, who sues by his next friend, William B. Herrick.

APPEAL FROM COOK.

On a contract for a sale of land, upon which land was a nursery, to be conducted as a partnership transaction—a decree will be made for a conveyance under the contract, although there may be arrears due under the nursery agreement, and so also if taxes have been paid by a co-tenant for the same land, the contract of sale not being made to depend upon such conditions.

In equity, time is not necessarily deemed of the essence of a contract; but it may be so made, and then, unless peculiar circumstances have intervened, it will be considered and treated as of the essence. But in judging from the language of a contract, the intention of the parties will be considered.

Where time is of essential importance, if the contracting party dies leaving an infant heir, laches, as a general rule, will not be imputed to the infant; but such facts may furnish an excuse to prevent a strict performance of the contract, and consequent loss to the heir.

A question of heirship, though alleged in the bill and not denied in the answer, must be proved.

A tender of an amount due upon a contract, will, if not complained of as insufficient at the time, be held good—although it may not be adequate to cover taxes or a partnership liability growing out of a nursery concern—the party need only tender the amount of principal and interest due on the land contract—the other matters being subordinate to the sale.

Though a court of equity might make a decree for a conveyance depend upon the payment of or refunding of taxes, it would not deny a party his rights altogether.

Each co-tenant is equally bound to keep the taxes paid, and one who pays all taxes, can only claim to be reimbursed with interest.

This was a bill in chancery, filed by the appellees, in the Cook Circuit Court, on the 24th day of September, A. D. 1853, for the specific performance of a contract for the conveyance of certain real estate.

The bill sets forth in substance, that on the 9th day of May, A. D. 1848, one Joseph E. Sheffield was the owner in fee of certain tracts or parcels of land situate in the county of Cook,

and described as follows, viz: The Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situated on the Clybourne farm, and bounded on the south by Clybourne Avenue, on the north by Asylum Place, on the east by the Racine Road, and on the south by Southport Avenue, etc. That the said Sheffield on same day, made a contract in writing with one Martin Lewis and one William Whitney, by which he, the said Joseph E. Sheffield, sold to the said Martin Lewis and William Whitney, upon certain terms and conditions therein mentioned, each an equal undivided fourth part of said premises.

The contract with Whitney is substantially as follows:

Joseph E. Sheffield, of the city of New Haven, in the State of Connecticut, by Wm. B. Ogden, his attorney in fact, of the first part, and William Whitney, of the city of Chicago, in the State of Illinois, thus agree:

Said Joseph E. Sheffield agrees to sell said William Whitney the equal undivided fourth part of the "Sheffield Nursery," situate on the Clybourne farm, and near to the corporate limits of the city of Chicago, containing fifty acres of ground.

Said Joseph E. Sheffield also agrees to sell said William Whitney an undivided fourth part of a strip of land forty feet in width, and extending from Clybourne Avenue to the channel of the north branch of the Chicago river, etc.

Said Joseph E. Sheffield also agrees to sell said William Whitney the equal undivided fourth part of all the improvements, tools, trees, plants, flowers, etc., contained in and belonging to said nursery on the first day of April, 1848. For all which said William Whitney agrees to pay said Joseph E. Sheffield the sum of two thousand dollars, and interest, in manner following, to wit: five hundred dollars on the execution of this contract, two hundred and fifty dollars on the first day of June, 1849, two hundred and fifty dollars on the first day of June, 1850, two hundred and fifty dollars on the first day of June, 1851, two hundred and fifty dollars on the first day of June, 1852, and five hundred dollars on the first day of June, 1853, together with interest at the rate of six per cent. per annum on the whole sum remaining unpaid thereon, payable annually on the 1st June in each year.

The expenses incurred by said Joseph E. Sheffield, through Ogden and Jones, or otherwise, for and on account of said nursery, and since the first day of April last, provided the expenses for the month of April shall not exceed two hundred and sixty dollars, exclusive of cost of horses, wagons and harness, said Whitney is to pay the undivided one-fourth part of, to said Joseph E. Sheffield, and said nursery is to be conducted hereafter, during the pleasure of the parties in interest, as stipulated in a

certain agreement, bearing even date herewith, and executed by the said Joseph E. Sheffield, by said Martin Lewis and William Whitney.

On full payment being made by said William Whitney to said Joseph E. Sheffield, of the money and interest herein agreed to be paid, the said Joseph E. Sheffield, his heirs or assigns, shall convey, or cause to be conveyed, to said Whitney, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, or said Whitney may, at any time after making the first payment hereon, demand a deed thereof, upon executing a bond and mortgage in return thereof, and paying the expenses of said mortgage; said Whitney to pay the one-fourth part of all the taxes and assessments on the premises herein agreed to be conveyed to him subsequent to the date of these articles.

That on the same day the same parties entered into a further contract in relation to the use and occupation of said premises, which is as follows:

Whereas, The said Joseph E. Sheffield has this day sold the said Martin Lewis and the said William Whitney, each one equal undivided fourth of the Sheffield Nursery, so called, and near to the corporate limits of the city of Chicago, as by reference to the said agreement of sale will more fully appear; now, therefore, it is agreed between the parties hereto owning said premises, in the proportion of one-half as the property of the said Sheffield, and one-fourth part, each belonging to the said Lewis and Whitney, that the nursery business and also a fruit and flower garden shall be conducted thereon, during the pleasure of the parties hereto, for joint accounts, profits and loss, in proportion to their interests therein, under the following conditions and regulations:

The said Lewis shall have the direction and superintendence of the same. Said Martin Lewis shall occupy the house on the premises, now occupied by John Goode, and shall remove his family into it as soon as he can conveniently remove them thereon from New York, and as soon as said John Goode can conveniently remove therefrom. Besides house rent and the use of fruit and vegetables for his family from the garden, the said Martin Lewis shall be paid a salary of four hundred dollars per annum, out of the business of said nursery, and from the joint funds thereof, during the continuance of this agreement, said salary to commence on his return from New York, and upon his taking full charge of said nursery, and devoting his time, service and labor therein.

In case of the boarding of apprentices, laborers or others engaged in or about the nursery, by said Lewis, a proper allowance shall be made to the nursery company from the price of

board, in consideration of house rent and vegetables supplied by the nursery.

All additions of property since the 1st of April, 1848, inclusive, and all expenses for labor, seeds, tools, plants or otherwise, for account of said nursery, since that period, are to be paid for by the parties hereto, in proportion to their interest therein.

In case said Sheffield shall elect to substitute Ogden and Jones, as owners or partners with said Lewis and Whitney, in the conduct and management of said nursery, for profit or loss, it is agreed that he may do so.

The business of the said company shall be conducted under the name and style and firm of Lewis, Whitney & Co.

That on the 19th day of October, A. D. 1849, the said Whitney and the said Josiah B. Herrick, entered into a contract in writing, by which said Whitney agreed to sell to said Herrick one equal undivided one-eighth part of said premises, being the one-half of said Whitney's interest therein, which contract was as follows:

William Whitney, of the city of Chicago, State of Illinois, of the first part, and Josiah B. Herrick, of same above mentioned city and State, of the second part, thus agree:

Said William Whitney agrees to sell the said Josiah B. Herrick, one equal undivided half of his interest, being one-eighth of the Sheffield Nursery, so called, and near the corporate limits of the city of Chicago, situate on Clybourne farm, so called, and bounded as follows, to wit: and describing it as containing fifty acres of ground.

Said William Whitney also agrees to sell said Josiah B. Herrick, an undivided eighth part of a strip of land, forty feet in width, and extending from Clybourne Avenue to the channel of the north branch of the Chicago river, etc.

Said Whitney also agrees to sell said Herrick, the equal undivided eighth part of all the improvements, tools, trees, plants, flowers, horses, wagons, etc., contained in and belonging to said nursery, together with the full orders made for nursery stock up to the 19th day of October, 1849.

For all of which said Herrick agrees to pay the said Whitney the sum of two thousand and five dollars, and interest in manner following, to wit: thirteen hundred and eighty dollars on the execution of this contract, one hundred and twenty-five dollars on the first day of June, 1850, one hundred and twenty-five dollars on the first day of June, 1851, one hundred and twenty-five dollars on the first day of June, 1852, and two hundred and fifty dollars on the first day of June, 1853, together with interest at the rate of six per cent. per annum on the

whole sum remaining unpaid thereon, payable annually on the first of June in each year.

Said nursery is to be conducted hereafter during the pleasure of the parties in interest, as stipulated in a certain agreement, bearing even date herewith, and executed in a form and manner after an agreement made by Joseph E. Sheffield, Martin Lewis and William Whitney, hereinbefore recited.

On full payment being made by Josiah B. Herrick to said Whitney, of the money and interest herein agreed to be paid, the said Whitney, his heirs or assigns, shall convey, or cause to be conveyed to said Josiah B. Herrick, his heirs or assigns, by a good and sufficient deed, the premises hereinbefore named, or said Josiah B. Herrick may at any time, after making the first payment hereon, demand a deed thereof, upon executing a bond and mortgage in return therefor, and paying the expenses of said mortgage.

Said Josiah B. Herrick to pay one-eighth part of all the taxes and assessments on the premises herein agreed to be conveyed to him, subsequent to the date of these articles.

Chicago, Oct. 19, 1849.

That in and by said last mentioned contract, it was agreed that said Herrick should pay to said Whitney, the sum of $2,005, and interest, in manner following: $1,380 on the execution of the contract; $125 on the 1st day of June, 1850; $125 on the 1st day of June, 1851; $125 on the 1st day of June, 1852; and $250 on the 1st day of June, 1853, together with interest, at the rate of six per cent. per annum, on the whole sum remaining unpaid thereon, payable annually on the first day of June in each year.

That it was further stipulated, that upon full payment being made, said Whitney should convey to Herrick by a good and sufficient deed, and that said Herrick might at any time after making the first payment thereon, demand a deed thereof upon executing a bond and mortgage in return therefor, and paying the expenses of said mortgage.

That said Josiah B. Herrick, on the 20th day of October, A. D. 1849, paid to Whitney the said sum of $1,380, the amount of the first payment. That afterwards, the precise day being unknown to the complainants, said Josiah B. Herrick paid to said Whitney the sum of $125, and the interest on the whole amount due on said contract, on the first day of June, A. D. 1850.

That on the 14th day of July, A. D. 1850, said Josiah B. Herrick died intestate, leaving said Thornton Herrick his only child and heir at law.

That William B. Herrick was duly appointed the administrator on the estate of said Josiah B. Herrick, on the 15th January, A. D. 1851.

That afterwards, the said W. B. Herrick, administrator, paid to said Whitney the further sum of $90, to be applied in payment of moneys due on said contract.

That afterwards, the said Whitney conveyed to James Morgan and Thomas Morgan, (the appellants) all said Whitney's right, title and interest in said premises, under said contracts.

That the said appellants before and at the time of the said conveyance, severally had notice of the equitable rights of the said Herrick, and of all the foregoing facts.

That the terms of said contract, between Sheffield and Whitney and Lewis, having been fully performed on the part of Whitney, the said Sheffield and wife, by deed dated January 20, 1853, conveyed and confirmed unto said Morgans the said premises, first described in said contract.

That on the first day of June, 1853, William B. Herrick, by his agent and attorney, tendered to James Morgan the sum of $595.44, being the sum of money then due for principal and interest on said contract, and then and there requested of said James Morgan, that he and said Thomas Morgan would execute to said Thornton Herrick, a deed of one undivided eighth of said premises, which they refused to do.

The bill sought an answer under oath from the defendants.

Prayer, that the said William Whitney, James Morgan and Thomas Morgan, may be decreed specifically to perform the said agreement between said Herrick and said Whitney, and to make a good and marketable title to said premises, the said complainants being ready and willing, and hereby offering specifically to perform said contract on their part.

The defendant Whitney did not answer, nor was any default entered against him.

The said James Morgan filed his answer to said bill on the 22nd November, 1853.

The answer admits that Sheffield was the owner of the premises in question; admits that a contract was made between Sheffield and Whitney, and between Sheffield and Lewis, on the 9th of May, 1848, for the conveyance to each, of the one-fourth part of said premises, but denies that there was any such joint contract as described in said bill.

Admits the contract relating to the nursery business.

Admits the contract between Whitney and Josiah B. Herrick, of October 19, 1849.

Admits that Herrick did, on the 20th October, 1849, pay to

Whitney the sum of $1,380, the first payment on said contract. Also the sum of $125, and the interest on the whole amount due up to the first of June, 1850, which payment was made July 15, 1850.

States that the defendants have no knowledge or information in relation to the death of the said Herrick, or in regard to the said Thornton Herrick being the only heir of said Josiah B. Herrick, except from the statements in the bill. Admits that W. B. Herrick was appointed administrator of said Josiah B. Herrick.

Admits that William B. Herrick paid to said Whitney the sum of $90, to be applied in payment of moneys due upon said contract, and that said payment was made July 15th, 1850, and that at same time, said Herrick made a payment of $125 upon said contract, but the respondents claim that the said sum of $90 was expressly paid by said W. B. Herrick on account of the share of the said Josiah B. Herrick's estate for and on account of the expenses of carrying on and maintaining the said Sheffield Nursery, and not upon the purchase money for said land.

Admits that on the 2nd day of April, 1852, said Whitney conveyed and assigned, for a good and valuable consideration, all his interest in said premises, under and by virtue of said contracts of purchase, to the said appellants.

In response to the charge that the said appellants had notice of the rights and equities of the said complainant, the answer sets forth that the said purchase of Whitney was made under the following circumstances, viz.:

That on or about the 1st of April, 1852, said Whitney applied to said James Morgan to purchase his interest in said premises, alleging that he, Whitney, had failed to make his payments, and fulfill and perform said contract, and that he was wholly unable to make said payments, and that William B. Ogden, as the attorney of said Sheffield, refused to grant any longer or further extension of the payments, and was determined to and would declare the contract between said Sheffield and said Whitney forfeited, unless all the payments and advances, then due and owing, and which had been for a long time due and owing on said contract, were paid, and said Whitney further asserting that the said complainant, W. B. Herrick, had been repeatedly solicited and requested by the said Whitney to fulfill and comply with the terms of said contract of said Josiah B. Herrick with said Whitney, and that the said complainants had neglected to comply with the terms thereof, and that said Whitney was unable to fulfill and comply with the said contract, on

account of the failure of said Josiah B. Herrick, and of the complainants, to fulfill and comply with the said agreement between the said Herrick and said Whitney; that he, Whitney, had applied to several persons to purchase the said interest, and could not procure a purchaser; and under these statements and representations, the said James Morgan, on behalf of himself and said Thomas Morgan, made the purchase aforesaid of the said Whitney's right, title and interest in the said contract.

That at the time of said purchase, the said Morgans had to pay and did pay to W. B. Ogden, as attorney in fact for said Sheffield, on account of said contract with Whitney, the sum of $898.64 in cash, on account of the amount due by said Whitney, by virtue of said contract, for taxes, payments and interests; also the further sum of $1,000 in cash to said Whitney, for said interest, and assumed the payments and obligations of said contract, and that he paid the full value of said property at the time of said purchase.

That at the time of the said purchase, the said complainants, as the representatives of said Josiah B. Herrick, had frequently neglected to comply with and fulfill the terms and conditions of the said contract between said Herrick and Whitney, and had failed to make the payments for taxes and assessments, under and by virtue of said contract, although frequently applied to by said Whitney; and avers that the said contract between the said Herrick and the said Whitney was forfeited by such neglect.

That the defendant, James Morgan, since the purchase, and up to the time of forfeiting the contract, has frequently applied to the said W. B. Herrick to pay the amount due for Josiah B. Herrick, on said contracts, and stated to him that although said Morgan considered the contract forfeited, yet that the said Morgans were still ready and willing, and offered to consider the contract still in full force, and to execute the same, provided the complainants would pay to them the amount due, and that the complainants wholly neglected to pay said amount, and comply with said contract, and to pay their proportion of the taxes, assessments and payments.

That in May, 1852, said James Morgan presented an account to said W. B. Herrick, as administrator of said J. B. Herrick, of the amount due on said contract, in pursuance of a previous understanding with said W. B. Herrick, that he would apply to the County Court for leave to sell said interest of said Herrick, in said property, and said Morgan offered to file said account as an account against the estate of said Herrick, and repeatedly

solicited said Herrick to procure a sale of said interest, which he neglected to do.

That in October, 1852, said W. B. Herrick agreed to pay the share of said Herrick in certain improvements required for said Nursery business, and afterwards refused to pay, in consequence of which the Morgans had to pay and did pay the sum of $125 due, for said Herrick.

That the said James Morgan notified the said W. B. Herrick repeatedly, that unless the said back payments, assessments and taxes, due and owing by the estate of the said Josiah B. Herrick, were paid, that they should declare the contract between said Whitney and said Herrick forfeited.

That the said Morgans having wholly failed in all endeavors to procure any adjustment, and been repeatedly deceived by said W. B. Herrick, and having been compelled to advance moneys on account of said nursery, and to pay taxes and assessments on said property, without ever having received one dollar from either of the complainants since the said purchase of said premises, and the said complainants never having made any payment on said contract, or in any way or manner attempted to fulfill the terms and conditions of said contract, the said James Morgan did, in behalf of himself and the said Thomas Morgan, in the month of October, 1852, declare the said contract between the said Whitney and said Josiah B. Herrick to be forfeited for the repeated non-fulfillment of the terms and conditions of said contract.

That said W. B. Herrick had been repeatedly applied to by said Whitney to fulfill said contracts before the sale of said premises to said Morgans, and had neglected so to do since the payment of $125, and $90, in July, 1851.

Admits that the Morgans fulfilled the contract between Whitney and Sheffield; that Sheffield executed a deed of the premises to said James and Thomas Morgan, excepting the last described tract in said contract, which had been forfeited to said Sheffield by the said parties not having constructed the canal according to agreement.

Admits a tender by W. B. Herrick, June, 1, 1853, of $593.44; but denies that the same was the sum of money due on said contract.

States that defendants have no recollection of any demand of a deed, and leaves complainants to make proof of it.

Avers that the said James and Thomas Morgan and Whitney have paid the assessments and taxes due and owing and payable on the part of said Herrick, and that Herrick in his lifetime, and his representatives since his death, neglected to

pay these, and that they were required by the contract to pay these.

Charges that complainants had no intention to fulfill said contract, until the late rapid and extraordinary rise in value of real estate in Chicago and vicinity, had rendered the said property desirable as a speculation.

The answer of Thomas Morgan is the same in substance as that of James Morgan.

By an amended answer, filed by leave of court, October 23rd, 1857, James Morgan states that at the time of their purchase the interest claimed by said Whitney in said premises, and all right of said Whitney under said contract with Sheffield, had been forfeited by the default of Whitney in not paying the amount required by said contract at the time specified therein. That said Whitney never paid the interest due, or the taxes, and that at the time of said Morgan's purchase, April 2nd, 1852, there was due, owing and unpaid on said contract between Whitney and Sheffield, the following sums of money, viz: $250, due June 1st, 1850; $250, due June 1st, 1851; together with taxes and the annual interest, amounting in the whole to the sum of $830.49, portions of which sum had been in arrear more than three years.

That the said James Morgan tendered to said Ogden, attorney of Sheffield, on April 7, 1852, the amount due on the contract, provided he would give them a deed upon payment of the balance due on said contract, which Ogden refused to do, and claimed that as the contract had been forfeited by Whitney, he had no longer any right to demand a deed of said premises, and said Ogden would not execute said deed unless said Morgans would pay him, in addition to the amount required by the contract, the further sum of $67.10; that the said Morgans were obliged to pay and did pay said sum of $67.10, in addition to the sum of $831.54 in arrear on the contract, making in all $898.64, in order to obtain any title to said premises from said Sheffield.

The allowance of this amended answer was excepted to by complainants.

It was admitted as a fact in the case, that Thornton Herrick was an infant of seven or eight years of age.

It was proved by the deposition of William B. Ogden, a witness for defendants, that as the attorney in fact of Joseph E. Sheffield, he made the contract with Whitney, of April 2, 1852.

That said Whitney had made the following payments on said contract: $500 in June 21, 1848, due May 9, 1848; $100 in September 5th, 1849, due June 1st, 1849; $100 in September

6th, 1849, due June 1st, 1849; $50 in November 5th, 1849, due June 1st, 1849.

That said Whitney never paid any interest on the purchase money, or any taxes on the land, although required to do both by the contract.

That in April 2, 1852, when the Morgans purchased, there was past due and owing on said contract, the following sums: $250, due June 1, 1850; $250, due June 1, 1851; interest on purchase money at rate of 6 per cent., amounting to $312.90; taxes for 1848, amounting to $3.59; taxes for 1849, amounting to $4.36; taxes for 1850, $7.35; with interest thereon, amounting in the whole to the sum of $830.49; which was the amount in arrear on said contract, by said Whitney, at the time of said Morgan's purchase.

That payment had been frequently demanded of said Whitney, and he had failed to make the same and declared his inability so to do on account of Herrick's failure to pay him.

That on the 7th April, 1852, the said James Morgan offered to pay the amount then past due and owing on said contract, which witness, as attorney of Sheffield, refused to receive, unless he paid a further sum of $67.10, over the amount due; for the reason, that as Whitney had neglected to make the payments when due and comply with the contract, the same was at his option forfeited, and that he was unwilling to lay out of the use of the money without some additional consideration over and above six per cent. interest.

That said James Morgan was obliged to pay, and did then pay, to him the sum of $898.64, and which was $67.10 over and above the amount due on the contract, as an additional consideration, to be reinstated in the contract.

April 7, 1852, said Morgan paid,	$285.84
May 31, 1853, " " "	530.00
	$715.84

That on the 17th of January, 1853, he (Ogden), as attorney of Sheffield, executed a full warranty deed to the said Morgans.

That the said premises were worth in April, 1852, $250 to $350, per acre; June 1, 1853, from $500 to $700, per acre, and the present value (1857) $2,000 to $2,500, per acre.

That the value of Herrick's one-eighth interest in June, 1851, was from $900 to $1,200; on the 1st June, 1853, it was $3,200 to $4,000; and the present value $12,000 to $15,000.

No evidence was offered of the death of Josiah B. Herrick, or that Thornton Herrick was heir of said Josiah B. Herrick, or that he left no other heirs.

An interlocutory decree was rendered November 7, 1851, sustaining the right of the complainant to a specific performance, and ordering that the cause be referred to a master, to take proofs of the sums of money paid out and advanced by the said Morgans, on account of the interest claimed by said complainants to protect and carry on the Sheffield Nursery, in accordance with the said contract, and to cause a statement of the nursery accounts to be made, showing the state of the accounts, and also to take proof of any sums that may be due and owing to the said Morgans by virtue of any of the contracts hereinbefore mentioned, and to calculate interest on all the amounts from the day of payment, or time the same was due, to the date of decree, and report the same to the court with specific items.

The report of the master was filed January 30, 1858. It is a detailed statement of the accounts.

The report sets forth that the said Morgans claimed, that as by the terms of the contract of sale by said Sheffield to Herrick of the interest in said nursery premises, the interest on said contract was payable annually, that on stating the account, the interest should be compounded, which claim was disallowed by the master.

Also, that the said Morgans should be allowed the sum of $67.10, paid by them to W. B. Ogden, attorney of Sheffield, for the purpose of being reinstated in the Whitney contract, which was in default; which was disallowed by the master.

The following exceptions were filed to the report of the master, which were overruled by the court:

1. For that the master took and received proof of the receipts and expenditures on account of carrying on the nursery, subsequent to the filing of the bill.

2. For that the master did not include in said report, the amount of $67.10, paid W. B. Ogden, attorney of Sheffield, to be reinstated in the contract, and on account of forfeiture.

A decree was entered March 2nd, 1858, by which the said James and Thomas Morgan were ordered to make a deed, conveying to the said Thornton Herrick, one equal undivided half of all the right, title and interest which they acquired by virtue of the deed from said Sheffield, from which an appeal was taken to this court.

Errors assigned, are:

1. The court erred in rendering a decree for complainants in said bill.

2. Because the said complainants had not shown a performance of the agreement set forth in the bill, in respect to the payments required by the said agreement.

3. Because the said complainants failed to tender the amount due on said contract.

4. Because there was no evidence offered of the heirship of the complainant.

5. Because the complainants failed to pay or to tender the taxes due on said premises.

6. Because said contract had been forfeited.

7. The court erred in decreeing a specific performance against the Morgans, who bought in good faith, for a full and valuable consideration, after notice of default on the fulfillment of the contract by Herrick.

8. The court erred in overruling the exceptions to the master's report.

ARNOLD & LARNED, for Appellants.

THOMAS, ROBERTS & BLACKWELL, for Appellees.

BREESE, J. The principal questions presented in this case are, 1, Was time of the essence of the contract made by Josiah B. Herrick, deceased, with William Whitney, on the 19th October, 1849, for an interest of one-eighth in the land in controversy; 2, Did the non-performance of complainants at the time, work a forfeiture of the contract, and justify the defendant Whitney, in selling to his co-defendants, James and Thomas Morgan, and then in buying the same interest, they being fully informed of the existence of this contract, and of all the circumstances in regard to it; 3, Was the tender by the administrator on the 1st of June, 1853, a sufficient tender, and 4, Was the heirship of Thornton Herrick, sufficiently established, and a subordinate question, growing out of exceptions to the master's report.

It will be observed, there is no appearance or answer by Whitney. The case has been argued, on both sides, with ability, and much industry and research exhibited in the collection, and collation of authorities, supposed to bear on the case, and as furnishing this court the rule which should govern it, if any general rule can be said to exist in such cases.

As to the tender by the administrator on the 1st of June, 1853, the day on which the last payment became due, of $595.44, it is alleged, that being less as found by the report of the master, than the amount actually due on the contract, it is an insufficient tender. It will be observed here, that the tender was not objected to on this ground at all.

The report of the master, and the decree of the court consequent thereon, makes the amount due, $833.83, but it will be ob-

served, that this computation was made on the 5th of April, 1858, nearly five years after the tender, and is made up of deficits growing out of the nursery contract, and non-payment of Herrick's share of the taxes on the land, as well as the defaulted payments on the contract. The sum tendered was the amount due with interest for the land, nearly five years anterior, and was on the land contract only, and which we think, was all that was necessary to be tendered, for the facts show, that this "nursery concern," although growing out of the sale by Sheffield who owned it, to Whitney of one-fourth interest in it, did not in any sense, make the contract of sale of that interest dependent upon *it*—it was subordinate to the sale. They were partners in the nursery, but not in the land, of that, they were tenants in common, each owning a specified undivided interest, and it is expressly stipulated in the "nursery contract," that it is to be conducted thereafter, during the pleasure of the parties in interest, as stipulated in the agreement with Sheffield, Lewis and Whitney, which is, "for joint accounts, profits and loss, in proportion to their interests therein." It was no part of the contract for the land, that it should be forfeited, if the dues on nursery account were not paid. If the deferred payments for the land were met, Whitney would have been obliged to convey, and the court would so decree, if Herrick was in arrears on nursery account, though the court might make it a part of the decree, that the amount so in arrears should be a lien on the "nursery." The contract to convey the land would not be affected by these arrears. And so of the payment of the taxes. Each co-tenant is equally bound to keep the taxes paid, and one who pays all, can claim no advantage over the other on that account, he can only claim to be reimbursed with interest. It could not deprive the laggard of his right to resort to a court of chancery to compel a conveyance, having paid the purchase money, though the taxes were unpaid. The court might impose terms, that until the taxes and interest and costs were paid, the deed should not be delivered, or any other reasonable terms. The right to have a deed for the land, grows out of the contract to make a deed, and it expressly provides, that a deed may be demanded on payment of the first installment of the purchase money, giving bond and mortgage in return. It was not at all, in any sense, dependent on payment of the nursery expenses and taxes, or anything else but the purchase money, at the several times specified.

The other questions in the case and the most important will be examined together.

It is a familiar principle, that at law, the time fixed for the performance of a contract is deemed of the essence of the con-

tract; and generally, if the seller is not ready and able to perform his part of the agreement on the day, the purchaser may elect to consider the contract at an end. *Tyler* v. *Young et al.*, 2 Scam. R. 446.

But in equity, time is not necessarily deemed of the essence of a contract, indeed, it was formerly held that the parties could not make time the essence. Courts of equity are frequently called on to relieve, where the terms for the performance and completion of the contract, have not, in point of time, been strictly complied with. *Smith* v. *Brown*, 5 Gilm. R. 314. The parties may make time of the essence of their agreement, and when this distinctly appears to have been their intention and no peculiar circumstances have intervened to prevent or excuse a strict performance, it must in equity be considered and treated as of the essence. As with all other contracts, the intention of the parties controls.

The contract between J. B. Herrick and Whitney, is substantially the same, with that of Sheffield and Whitney, and both, only provide a day or time on which the several payments shall become due and payable, and providing, that on the payment of the first installment a deed may be demanded on giving a mortgage, they both expressly provide, that on full payment of the purchase money "a deed should be made." It is true, the time specified in the notes from Herrick to Whitney, are the same days and times on which his own notes to Sheffield are due and payable, and the most that can be made of that circumstance is, that Whitney probably, looked to it as a fund out of which he might discharge one-half of his indebtedness to Sheffield. It might be important to him that Herrick should "come to time," but no forfeiture is declared if he does not—but whenever full payment is made a deed shall be made. Had it been in the contemplation of these parties, that being in arrears should put an end to the contract, it was very easy so to provide as in *Smith* v. *Brown*, 5 Gilm. R. 314; *Kemp* v. *Humphreys*, 13 Ill. R. 573, by declaring, in that event, the agreement shall be null and void, or in some other appropriate form express such intention. We do not say that the intention shall be actually expressed in words, but we do say, that the contract itself and the attendant circumstances, must make manifest the intention.

We find no other circumstance except that of making Herrick's notes correspond, in time of payment, to Whitney's notes to Sheffield, and as in the notes to Sheffield a day being fixed for payment, time is not thereby made of the essence of the contract so neither is it in the notes of Herrick to Whitney. There is nothing whatever to show that such was the intention of the parties, nor can we conceive of any very strong reason,

why, in this particular case, time should be of the essence. Sheffield did not make it so with Whitney, by his agent Mr. Ogden, though he states in his deposition, that such was the rise in value of real estate in and about Chicago for the last ten years, "that time is considered to be of the essence of contracts for the sale and purchase of real estate, whether so expressed or not."

We do not so understand the meaning of the terms, "of the essence," that it has reference alone to the rise in the value of lands, or that it is subject to its fluctuations, but depends wholly upon the intention of the parties which, it is true, that consideration may and does greatly influence.

Indeed that consideration does not seem to have influenced either of these parties. The agreement to give a deed, on the payment of the first installment and a mortgage to be returned, is a very strong circumstance to show that time was not considered of the essence, for on taking an ordinary mortgage, the aid of a court must be invoked for a strict foreclosure and sale, all which is productive of great delay, to which is to be added the time given by statute in which to redeem after sale. We are clearly of opinion, that as to this contract time is not of its essence, and that the parties did not intend that it should be void, if the payments were not made on the days and times stipulated.

But if time was of the essence of this contract, has any circumstance intervened to prevent or excuse a strict performance.

The facts show, that soon after the payment of the first installment and interest by J. B. Herrick, he left for a distant State, and died, leaving as is alleged, an only child, Thornton Herrick, one of the complainants in this suit, in a state of the most helpless infancy, being at the time of the decree not more than seven years of age, and having at no time a guardian. It is true, administration was granted on his estate, but of its condition we are not informed, nor of the conduct of the administrator in the execution of this trust. He could, doubtless, had he been so disposed and had the means, have paid the installments as they became due, and it was his duty so to do, if, in his judgment, it would have been for the benefit of the estate. This was a problem left for his own solution, and for its correct solution he was responsible. There are cases where heirs have suffered from the *laches* or dishonesty of the administrator, but courts do not, as a general thing, allow them, or any delinquencies in the management of the estate, to work serious, and perhaps, irremediable injury to infant heirs, if they can prevent it by a proper exercise of the powers with which they are vested. Infants are the peculiar objects of chancery care—they are the

wards of the court, and it must be a very strong case indeed, in which they will impute laches to them, or as a general rule, suffer them to be prejudiced or injured by lapse of time, or by the conduct of others, with whom they are not in privity, and whose actions they can neither control or advise.

The death and intestacy of the ancestor, and infancy of the heir at law, we regard as strong circumstances, to prevent and excuse a strict performance of this contract.

But we have said we do not consider that time was expressly or necessarily of the essence of this contract, and not being so, it is purely a matter for the exercise of that sound discretion which exists in the court, to enforce it or refuse, as the circumstances may warrant. The doctrine in equity is not forfeiture, but compensation.

The books are full of cases where, in contracts like this, and sought to be enforced, in which the stirring, business men of the world were parties, rigid rules have not been applied. Cases abound where credit is given, and a conveyance to be made on payment of the last installment, as in this case, and time not the essence of the contract. Courts of chancery have enforced a specific performance, though the payments have not been promptly made. If so with full grown men, then, surely, when an infant, a mere child, is litigating.

A leading case in this court, on this subject, is that of *Glover* v. *Fisher et al.*, 11 Ill. R. 666, cited by the appellees' counsel. That case has not the strong features which this has, arising out of death, intestacy and infancy, but in other facts bears a close resemblance, those of the payments especially. In that case twenty-one hundred dollars was the price stipulated for the property; here two thousand and five dollars. There, nine hundred dollars was paid down, less than one-half the purchase money—here thirteen hundred and eighty dollars, more than one-half. There, in October, about six months after the contract, four hundred dollars was to be paid, of which two hundred and twenty dollars was paid before due, and the remainder, one hundred and eighty dollars, was delayed until the first of May following, the time of the last payment, when six hundred dollars was tendered, a sum less by near four hundred dollars than the amount actually due. Here, the whole of the first installment was paid, and the interest on the balance of the purchase money—near three-fourths of the second installment was paid, and although the third was wholly neglected, the whole amount actually due, was tendered on the day of the last payment when a deed was, by the contract, to be executed. The court, in the case cited, considered the extent of the delay—the amounts which had been paid, and all the circumstances which may have

excused or justified the party in his remissness, and pronounced a decree in his favor.

In that case there was a delay of more than fourteen months before the complainant offered to pay the full amount due. The conduct and motives of both parties was regarded in determining if this delay should work a forfeiture, and the court thought there was nothing in it, to show that it was caused by a design on the part of the complainant, to abandon the contract.

In this case the only defalcation was in a small part of the second, and in the whole of the third installments, amounting in all to a sum not exceeding two hundred dollars including the interest due on the balance of the contract. The administrator did not provide for these payments, and the infant was powerless to act, and it would be going farther than any court or case has gone, to declare that for such remissness, under such circumstances, a forfeiture of the contract should be declared. For failing to pay the pitiful sum of two hundred dollars on the very day it was due, when sixteen hundred dollars had been promptly paid, and the party an infant incapable of action and without a guardian—to decree a forfeiture under such circumstances, is asking more than justice will allow. There can be no pretense here, that the complainant had, wantonly, and in the exercise of an arbitrary will, or caprice, refused to pay on the day, he having the means and the power to make the payments, nor any other pretense, the naked fact being alone relied on, that the payment was not made on the day. *Tyree et al.* v. *Williams et al.*, 3 Bibb, 367.

But let us look at this case a little further.

The defendants Morgan, made the purchase of Whitney of this child's interest, on the 2nd of April, 1852, two months before he was in default for the third installment. At that date, there was due on the contract about sixty dollars only. The administrator did not pay, being unable or indifferent; the little child, "muling and puking in his nurse's arms," unconscious of its own existence except through its appetites, could only cry for food, and now, to visit him with the severe penalties demanded by the defendants, would be harsh indeed.

Though Whitney's payments to Sheffield were in arrear, time not being of the essence of their contract, it could not have been declared forfeited, on that account, for a specific performance would have been decreed, on payment, or tender of the whole purchase money if made on the day of the last payment, no intention of abandoning the contract being manifested, and that being the day on which a deed could be demanded.

And that this money due from Herrick, was to be applied to save this contract from forfeiture, cannot be true, as appears by

the defendant, James Morgan's own showing in his amended answer. It will be remembered, that Herrick succeeded to one equal half of this contract, and was to pay, and did pay about the time it was due, 1st June, 1850, one hundred and twenty-five dollars, being the one-half of the amount due from Whitney to Sheffield on that day, and that the administrator paid him the further sum of ninety dollars in the summer of 1851, being nearly two-thirds of the amount then due. Now if this money due from Herrick was necessary to save this contract, why did not Whitney apply these amounts or some portion of them, to extinguish so much of it—$215—as it would extinguish? That he did not, is shown by James Morgan's amended and sworn answer, for he there says, "at the time of his purchase from Whitney, April 2nd, 1852, there was due, owing and unpaid on said contract, between Whitney and Sheffield, the following sums of money, viz.: $250 due June 1st, 1850, $250 due June 1st, 1851, together with taxes and the annual interest," etc., being the amounts precisely, which Whitney owed Sheffield, when he sold to Herrick.

That the money due from Herrick was wanted for any such purpose may be true, but when received, that it was not so applied, is most certainly true. Mr. Ogden's testimony shows, Whitney was in arrear on his payments, independent of Herrick's, up to the time Morgan made the purchase, and Whitney's whole conduct shows an intention to defraud Herrick, for when he received of him $1,380, at the time of making the purchase, he paid not one dollar of it over to Sheffield, though then largely in arrears.

This then seems to be a mere pretense, and as Whitney had not appropriated any portion of the payments made by Herrick to the satisfaction of his contract with Sheffield, it is not probable he would have so appropriated any future payments, and would suffer the contract to be forfeited in reality.

Through Whitney's remissness, his contract with Sheffield, would, most probably, have been forfeited, as we have seen he appropriated none of the moneys he received, to save it.

But the defendants say, we have received none of the money Herrick paid to Whitney, and have paid out large sums to save the estate from forfeiture, and ample justice can be done complainants, by decreeing against Whitney a return of the purchase money—our purchase should not be disturbed—the estate has risen rapidly in value, and is now worth twelve or fifteen thousand dollars.

Was it the fact that Whitney was able to respond in damages, we should not deem recourse to him, as in any degree meeting

the just demands of this case. It would not afford adequate compensation.

No part of the defense seems to us, to have any merits. One of the defendants, James Morgan, is a member of the bar, and it is not an unjust presumption, that he was fully cognizant of the whole case, and designed to do, what he attempted. We cannot recognize, under the circumstances of this case, any claim, he and his co-defendants may suppose they have to the favorable consideration of the court, and we want no other authority to sustain us in disposing of it, than those pure and universally acknowledged principles of equity and justice, which should have their lodgment in the breast of every court.

The exceptions to the master's report, are not deserving of special notice.

The first could not prejudice, materially, the defendants, and the second, is the amount of the *douceur*, $67.10, the Morgans paid to obtain the chance to do a wrong. It was a small sum to pay for the hazard, and we think no good claim is shown, to demand its restoration. The defendants' case, in no aspect, has any merits whatever, as we think.

There is, however, a want of proof of the heirship of Thornton Herrick, though this fact does not seem to have been contested, but was considered, on the hearing, and at the time of passing the decree, as not in issue between the parties. It is a material fact, and which, though not expressly denied, not being admitted by the answer, must be proved. *De Wolf* v. *Long*, 2 Gilm. R. 679. For this reason alone, the decree must be reversed, and the suit remanded, with directions to the court below, to hear proofs on this point only, and if this allegation of the bill, as to heirship, be proved, then to enter a decree in conformity with this opinion, the costs of this appeal to abide the event of the suit.

Decree reversed.

Richard H. Pease, Appellant, *v.* The City of Chicago, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Courts of general jurisdiction, in the city of Chicago, may examine into the proceedings of the Common Council, as to all matters connected with a tax, or assessment, without a resort to the common law writ of *certiorari*.

The Common Council of the city of Chicago, has no authority to levy a tax or assessment, for the purpose of collecting money, to pay for improvements, voluntarily and previously made, without the order of the council.

THIS was a proceeding under a special assessment warrant of the city of Chicago.

Joseph N. Hendricks, city collector, filed in the Cook County Court of Common Pleas, his report, warrant, assessment roll, return, and notice of sale.

The report states that special warrants, attached, duly issued and signed, were delivered to him, on or before the second Tuesday of October, 1858.

That he published in corporation paper, notices, for thirty days, of the receipt of said warrants, and that, in default of payment, the taxes and assessments therein mentioned, would be collected, etc.

That he has given ten days' notice of his intended application for judgment upon said warrants, by publication in the corporation paper, and filed a copy of notice with certificate of publication.

That the annexed schedule is a correct list of lands, etc., with the taxes, assessments, interest, and costs, thereon unpaid, and prays judgment against the same.

Collector's affidavit to same.

The special warrant, No. 367, was signed by the mayor, comptroller, and attested by the city clerk, and recites that the Common Council of Chicago, on the 4th day of October, 1858, confirmed the assessment of $31,000, made by commissioners, upon the real estate of the West Division of said city, deemed benefited by macadamizing West Lake street, from *Halsted* street to the city limits, in pursuance of an order of said Common Council, made July 19, 1858, which assessment roll is headed thus:

"ASSESSMENT ROLL.

"A description of the real estate in the West Division of the city of Chicago, deemed benefited by macadamizing Lake street, from *Morgan* street to the city limits (west), with the valuation thereof, and the sums of money severally assessed thereon for benefits, by the commissioners, to wit;" in which assessment roll, among other lots or parcels of land, are the following, headed thus:

CANAL TRUSTEES' SUBDIVISION OF SEC. 7, T. 39, R. 14 E.

Name of Owner.	Description.	S. Lot.	Lot.	Block.	Valuation.	Assessment.	
			1	55	1500	42	23
			2		1600	45	25
			3		1600	45	25
			4		1600	45	25
			16		1600	45	25
			17		1600	45	25

The final footing of the whole, is $31,000.

Commands said collector to collect the several sums in said warrant, of the goods and chattels of the owners of said lots, and return the same in thirty days from date, and dated October 6th, 1858.

Collector's return to said warrant states, that he has collected the assessments on all lots therein marked "paid;" that he has demanded payment on those not marked "paid," and has not been able to find personal property, out of which to make the same.

Collector's notice of application for judgment on the 27th of January, 1859.

Judgment headed thus:

"Warrant, No. 367, west, dated October 6th, 1858, for macadamizing West Lake street, from Halsted street to the city limits."

The description of property in question, valuation, assessment, damages and costs, are in the following form, but no names of owners, viz:

CANAL TRUSTEES' SUBDIVISION, SEC. 7, T. 39, R. 14 E.

Name.	Description.	S. Lot.	Lot.	Block.	Valuation. Dollars.	Amount of Assessment. Dol's.	Cts.	Ten per ct. Costs. Dol's.	Cts.	Costs. Cts.	Total. Am't due. Dol's.	Cts.
			1	55	1500	42	23					
			2	55	1600	45	25					
			3	55	1600	45	25					
			4	55	1600	45	25					
			5	55	1600	45	25					
			16	55	1600	45	25	4	53			
			17	55	1600	45	25	4	53			

The judgment recites that on the 5th day of February, 1859, due notice having been given of application, that objections were filed, that the objections were insufficient, and are overruled, and judgment rendered for the amount of assessments, costs, and ten per cent. damages additional, and orders sale of lands, etc.

Richard H. Pease excepted, and prayed an appeal as to lots in question, which is allowed.

Pease, as owner of lots 1, 2, 3, 4, 16 and 17, in block 55, section 7, township 39 north, 14 east, filed the following objections:

1st. Said lots were, knowingly and intentionally, fraudulently assessed on a valuation of $1,600 each, and worth but $400 each.

2nd. Said lots were assessed for $45.25 each, whereas by law they could not be assessed to exceed $12 each.

3rd. The orders for making and confirming said assessment were procured by fraud.

4th. The matter of said improvement was not referred to a committee to prepare and report plan, with estimate of expense, etc.

5th. Said improvement was commenced, and partially performed under a private contract, between John C. Evans and part of the property owners, dated May 15th, 1858, and the order of the Common Council for said improvement, dated July 19, 1858, was made for the purpose of enforcing said private contract, according to the specifications of the same.

6th. The election of commissioners was without the previous nomination of the mayor.

7th. City has no authority to commence improvement until 50 per cent. collected, and paid into treasury office, which was not done.

8th. Assessment not made in conformity with the order of council, and ten days' notice of expiration of time of filing of objections not given.

9th. Assessment roll and report of commissioners not returned in forty days after their appointment.

Appended is—report of city superintendent, showing estimate of improvement, "according to the specifications set forth in the contract for said work, between John C. Evans and the owners of the property interested in said improvement."

Also report of committee on streets and alleys of West Division, recommending said improvement.

Order, that West Lake street be macadamized in accordance with the superintendent's estimate and specifications.

Order, that the sum of $31,000 be assessed upon property deemed benefited by said improvement, and that the council do now elect three respectable and disinterested freeholders to make said assessment.

Passed July 19th, 1858.

All of which objections said Pease offered to prove by witnesses, by the Common Council, by the proceedings of this case, and by affidavits, showing said lots to be worth not exceeding four to five hundred dollars.

City Attorney demurred orally to all of said objections.

Court sustained said demurrer to all of said objections, except the 5th, and overruled all of said objections, except the 5th, and refused to admit any evidence in support of any of said objections so overruled.

To which overruling and refusal said Pease excepted.

Demurrer to 5th objection overruled, and issue taken upon the same.

City introduced in evidence, orders of July 19th, 1858, for macadamizing West Lake street, from Halsted street to the city limits, and for assessing $31,000 for the same, and election of three commissioners to make said assessment.

Also proceedings of commissioners, and their notice and assessment roll, with oath of commissioners.

The return of commissioners recites their appointment on the 19th day of July, 1858, the publication of notice of the time and place of their meeting, that they had fixed a valuation upon the real estate in the assessment roll, and assessed the benefits resulting thereto by said improvement, and certifies that such assessment does not exceed three per centum per annum on the property assessed.

Notice of meeting of commissioners to make assessment.

Certificate of publication of said notice.

Assessment roll.

CANAL TRUSTEES' SUBDIVISION OF SEC. 7, T. 39, R. 14 E.

Names.	Description.	S. Lot.	Lot.	Block.	Valuation.	Assessment	
			1	55	1500	42	23
			2	55	1600	45	25
			3	55	1600	45	25
			4	55	1600	45	25
			16	55	1600	45	25
			17	55	1600	45	25

And other property.

Certificate of city clerk of return of said assessment roll, showing that the same was filed in the clerk's office, September 1st, 1858.

Assessment notice, first published September 3rd, 1858, to file objections to said assessment on or before the 13th day of December, 1858, at 7 o'clock P. M.

Certificate of publication of the same.

Order of confirmation, made October 4th, 1858, and ordered that a warrant be issued for the collection of assessments.

Warrant issued October 6th, 1858.

To all of which the defendant below objected. Objection overruled, and defendant below excepted.

Defendant below introduced in evidence contract, dated May 15th, 1858, between John C. Evans, of the first part, and Stephen F. Gale, and other property owners, of the second part, in which said Evans agrees to macadamize Lake street, from Halsted street to the city limits, in a certain manner, and upon certain terms and conditions therein set forth.

The parties of the second part agree to pay the party of the first part therefor in the manner therein specified.

Also that, "whereas, it would be necessary hereafter for the Common Council of the city of Chicago to permit the said street to be improved as aforesaid, and to order an assessment for the same, so as to reach and compel all the property benefited thereby to pay its due proportion of the cost of said improvement, they, the parties of the second part hereto, agree to pay

in addition, their due proportion of the cost or expense of making and levying said assessment." The party of the first part agrees to receive the assessment roll when made, and credit the parties of the second part thereon, for as much money as may have been paid by them, and that he will look to said assessment roll for his remuneration for the work to be done.

Security was given for the performance of said contract.

Reuben Taylor was called by defendant below and testified. Could not certainly state how much of Lake street was macadamized by the 7th day of June, 1858; some of it was macadamized, but not one-quarter, he should think; that by the 19th day of July one block or more was done, but he cannot say how much more.

John Evans was called by defendant below and testified, that by the 19th day of July, 1858, he should think one block or more of Lake street was macadamized; thinks some work was done on other blocks west; on the 12th day of August, thinks the day of date of contract with the city; these blocks were finished and some other work done, cannot say how much; the blocks finished were the blocks next west of Halsted street; says that he does not consider that he did the work under the contract with the property owners; considered the contract as a petition to the council to have the work done; had no contract with any one else before he made the contract with the city; was never released from the contract by the property holders; he called on property owners to pay for work done, under said contract with them; S. F. Gale paid him on such work, $700, and another person paid him something; others called on refused to pay; he demanded pay of persons who signed the contract; never called on Mr. Goodrich for pay under said contract.

The city introduced in evidence the following, as an estimate of city superintendent:

"The city superintendent of public works, under a requisition from the committee on streets and alleys of the West Division, submits the following as an estimate of the cost of macadamizing West Lake street, from the west line of Halsted street to the city limits—the whole to be done according to the specifications set forth in said contract for said work between John C. Evans and the owners of property interested in said improvement, viz., and which specifications are herewith submitted:

"From west line of Halsted street to west line of Morgan street, 1264 feet (lineal), at $5, per contract, - - - - - - - -	$6,320.00	
"Engineering, Supt., etc., - - - - -	130.00	
		$6,450.00
"From west line of Morgan street to city limits, 952 feet (lineal), at $2.60, per contract, -	$24,234.00	
"Engineering, Supt., etc., - - - -	316.00	
		$24,550.00
	$31,000	

Also a contract between the city of Chicago and John Evans, dated August 12th, 1858, for macadamizing West Lake street, from west line of Halsted street to city limits; in which said Evans agrees to perform said work in the manner and time therein specified; and the said city of Chicago agrees to pay him $30,554.60, in the manner therein specified, "provided no payment shall in any case become due or payable to said Evans upon this agreement, except as said city shall be in funds from the avails of an assessment levied for said improvement; nor shall said city be liable for any delay in collecting said assessment."

Which was all the evidence introduced by the parties in the above cause.

And thereupon the said court rendered a judgment against said lots and parcels of land, severally, for the amount of the said assessment and costs, and also ten per cent. in addition thereto.

G. Goodrich, and J. H. Kedzie, for Appellant.

E. Anthony, for Appellee.

Caton, C. J. There is one question demanding the first consideration in all these cases involving the levy of taxes and assessments by the Common Council of the city of Chicago. The counsel for the city object, that the Court of Common Pleas could not inquire into the regularity of the action of the Common Council, nor even into the question of their jurisdiction in the proceedings which we are now called upon to review, and that the only mode in which those matters can be properly inquired into by the courts, is on a return to a common law writ of *certiorari*. If this be so it puts an end to all further inquiry, and at once relieves us from the labor and responsibility of investigating and deciding the many and perplexing questions which have been

argued at the bar. Unfortunately the counsel has been misled by the fact that most of the cases found in the reports have been brought up by writ of *certiorari*, where the law had not provided any other mode of reviewing the proceedings of municipal bodies, and when such is the case the writ of *certiorari* must necessarily be resorted to, or those jurisdictions would to a great extent become irresponsible to the law.

Ordinarily the corporate powers of cities have not been required to resort to the courts of law to collect their general and special revenues, and such was the case with Chicago till the passage of the law of 1857. Before the land on which a tax or assessment was levied could be sold for its payment, that law requires a resort to the courts for its condemnation, and permits the owner of the land to make a defense to the proceeding. The 14th section of that act, under which this proceeding was instituted, is as follows:

"If, from any cause, the taxes and assessments charged in said collection warrants are not collected or paid on the 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 vacation, special 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 legal notice both of the aforesaid intended application by the collector to said court for judgment, and a refusal and a demand to pay the said taxes and assessment."

Under this section the proceeding is instituted by the collector, and the 43rd section of the same act tells us in what mode the court shall proceed in the matter. It says:

"It shall be the duty of the court upon calling the docket of said term, if any defense be offered by any of the owners of said property, or any person having a claim or interested therein, to hear and determine the same in a summary way, without pleadings; and if no defense be made, the said court shall pronounce judgment against the said several lots, lands, pieces or parcels of land, as described in said collector's reports, and shall thereupon direct said clerk to make out and issue an order for the sale of the same, which said order shall be in form, as nearly as

may be, of that prescribed in the twenty-ninth section of an act entitled 'An Act concerning the public revenue,' approved February 26, 1839, by the general assembly of this State: *Provided*, That in all such cases where a defense is interposed, the trial of any issue or issues therein shall be disposed of with as little delay as possible, consistently with the demands of public justice at said term. But should justice require that for any cause the suit as to one or more owners should be delayed for more than twenty days, judgment shall then be rendered as to the other owners and lands, and process shall issue for the sale thereof, the same as in all other cases."

Here then is an express provision that the owner or person interested in the land may make defense, and it cannot, we think, be reasonably contended that such defense shall not embrace everything which shows that the tax or assessment, to collect which the proceeding was instituted, ought not to be collected. Less than this would be but a mockery of justice. Anything which a court of law would examine into under a writ of *certiorari* may be considered on this trial, and even more, for the court may inquire *de hors* the proceedings of the Common Council, and see if any facts exist which renders the tax or assessment illegal, as well as into any substantial irregularity in the mode of assessing it, for which a court of law should set them aside.

In this case a defense was made. It was proved on the trial that a part of the improvement for which the assessment was levied, had already been made by private parties, without any contract with or liability by the city authorities, and this assessment was levied in part for the purpose of collecting money to pay for such improvement already voluntarily executed. For this purpose, the law gave the Common Council no authority to levy a special assessment upon the property deemed benefited by the improvement already executed. The first section of the seventh chapter of the city charter provides that, "the Common Council shall have power, from time to time, first, to cause any street, alley or highway to be graded, leveled, paved, macadamized or planked, and keep the same in repair," and the second section authorizes the Common Council to levy a special assessment upon the property deemed benefited by such improvement, to pay the expenses thereof. It is in these words: "The expenses of any improvement mentioned in the foregoing section (except side walks and private drains) shall be assessed upon the real estate in any natural division benefited, with the costs of the proceedings therein in proportion, as nearly as may be, to the benefits resulting thereto; *provided*, such assessment shall not exceed three per cent. per annum on the property assessed."

No doubt the Common Council may make the improvement mentioned in the first section, and levy a special assessment to pay the expenses thereof or to reimburse the city treasury; or they may estimate the cost of any improvement thus ordered, and levy an assessment therefor before the improvement is made, but neither the letter or the spirit of the statute can authorize them to levy an assessment for an improvement which they do not cause to be made. If a party voluntarily improves a street, when no such improvement has been ordered by the council, they cannot adopt the work and become a collecting agency, and create a liability against the owners of the property benefited by the improvement, when no such liability could otherwise exist by law. When an improvement is once made and satisfactorily, by other parties, it is no concern of the Common Council by what means or agency it was made. If it was not caused by them, they are not responsible for it and have nothing to do with it. The law only authorizes them to assess for what they cause to be done. As this assessment was levied in part to pay for improvements already executed, without the order or direction or liability of the Common Council, it was not warranted by the law, and the court erred in rendering judgment for it, and that judgment must be reversed, and the cause remanded.

Judgment reversed.

Thomas J. Himes *et al.*, Appellants, *v.* Henry Blakesley, Appellee.

APPEAL FROM ROCK ISLAND.

A security for costs, is good, if it can be identified with the record; and need not be marked filed as of any term; and if inadvertently marked as of one term, when it should ave been of another, the mistake may be corrected.

February 12th, A. D. 1858, Henry Blakesley sued Thomas J. Himes and Charles T. Clippinger, as partners, in assumpsit, returnable to the March term, A. D. 1858.

February 12th, 1858, plaintiff, by his attorneys, filed an instrument purporting to be a bond for costs in the above cause, in the usual form, but entitled to the November term of the court, A. D. 1858.

February 12th, 1858, plaintiff filed his declaration, containing special count upon a certain promissory note, and the common counts, with copy of note attached.

March 17th, 1858, defendants filed their motion in writing, to dismiss the cause for want of security for costs, and averring the non-residence of plaintiff.

March 24th, A. D. 1858, defendants' motion to dismiss coming on to be heard, plaintiff entered his cross-motion for leave to amend his bond for costs. The court overruled defendants' motion to dismiss, and allowed plaintiff to amend his bond for costs.

Defendants excepted.

Judgment was entered against the defendants by default; damages assessed by the clerk at $157.43. Defendants prayed an appeal.

The errors assigned are:

1. That the court erred in overruling defendants' motion to dismiss.

2. That the court erred in sustaining the plaintiff's motion for leave to amend the writing filed as his security for costs.

3. That the court erred in allowing the plaintiff to amend the writing filed, as his security for costs.

4. That the court erred in rendering judgment against the defendants.

E. T. Wells, for Appellants.

Beardsley & Smith, for Appellee.

Caton, C. J. The form given in the statute for bonds for costs does not require the term to be stated to which the action was brought, nor is there any necessity for it so long as there can be no difficulty in identifying the cause in which it is filed. In this case a term was stated, but a wrong term, and the court allowed *November* to be stricken out and *March* inserted. As the statement of the term was unnecessary and really surplusage the court might have ordered it stricken out altogether, or treated it as a good bond in the case, without any such change, so long as there could be no difficulty in identifying it with the case pending. The filing upon the bond was sufficient to show that the statement of the term was a mistake, and to identify the bond with the proper case. It was the duty of the court to overrule the motion to dismiss, either with or without the change which was made in the statement of the term.

The judgment must be affirmed.

Judgment affirmed.

The Firemen's Benevolent Association, Plaintiff in Error, *v.* Wales B. Lounsbury, Defendant in Error.

ERROR TO COOK.

The legislature has the right to provide, that foreign fire insurance companies may be burthened for the benefit of the Chicago Firemen's Benevolent Association, and that the revenue resulting from such burthens, need not be paid into the state treasury.

That the burthen imposed, is not incompatible with the title of the bill authorizing it, and that the whole is properly expressed, by the title of the bill.

This was an action of debt in the court below, brought to recover of the defendant in error, the two per cent. mentioned in the sixth section of an act, entitled, "An Act to incorporate the Firemen's Benevolent Association, and for other purposes," approved June 21st, 1852.

This section is as follows:

"There shall be paid to the treasurer of said association, for the use and benefit of such association, by every person who shall act in the city of Chicago, as agent for, or on behalf of any individual or association of individuals, not incorporated by the laws of this State, to effect insurances against loss or injury by fire, in the city of Chicago, although such individuals or association, may be incorporated for that purpose, by another State or country, the sum of two dollars upon the hundred dollars, and at that rate, upon the amount of all premiums, which, during the year or part of year, ending on the next preceding first day of December, shall have been received by such agent or person, or received by any other person for him, or shall have been agreed to be paid for any insurance effected or agreed to be effected or promised by him, as such agent or otherwise, against loss or injury by fire, in the city of Chicago."

The defendant below demurred generally to the declaration, and the principal question raised upon the argument, was the legality of the charter of the Firemen's Benevolent Association, and particularly of the 6th section, quoted above. The demurrer was sustained by the Circuit Court, Manniere, Judge, presiding, and the plaintiff in error brings the case to this court, assigning as error, the ruling of the Circuit Court on the demurrer.

Such portions of the act of incorporation as are necessary to be referred to, are contained in the following sections:

Sec. 1. Incorporates all such persons as now are, or hereafter may become members of the Firemen's Benevolent Association of the city of Chicago, in accordance with the provisions of the constitution of said association, and the by-laws of the

board of directors of said association, under the name of the "Firemen's Benevolent Association of the city of Chicago."

Sec. 2. Gives said corporation power to make and establish a constitution and by-laws for its own government, and concerning the management and disposition of its own funds, and alter and amend the same at pleasure.

Sec. 3. The object of the association shall be to create a fund and provide means for the *relief of the distressed, sick, injured or disabled members thereof, and their immediate families;* and *all the property and money* acquired by said association, shall be held and used *solely for that purpose.*

Sec. 4. Authorizes the association to take interest upon the loan of money, at the rate of twelve per cent. in advance, per annum.

Sec. 6. Is set forth above.

Sec. 7. Requires the agent to execute and deliver to the treasurer of said association, a *bond* in the penal sum of one thousand dollars, *with such sureties as the said treasurer shall approve*, with a condition that he will annually, on the first day of January, of each year, render to said treasurer a just and true account, under oath, of all premiums received by him or agreed to be paid, during the year ending on the first day of December, preceding such report, *for any insurance against loss or injury by fire, in the city of Chicago*, effected or promised to be effected from any individual or individuals or association, not incorporated by the laws of this State, and annually pay to said treasurer, the sum of two dollars upon every hundred dollars, and at that rate upon the amount of such premiums.

Sec. 8. Every person who shall effect any insurance specified in the preceding sections of this act, without having executed and delivered such bond, shall for each offense, forfeit one thousand dollars, for the use of said association.

Sec. 9. Requires, under a penalty of five hundred dollars, to be recovered and collected in the name and for the use of said association, that every agent shall report in writing, under his proper signature, to the treasurer of said association, every removal or change of his place of doing business in said city, designating in such report, the individual or individuals and association or associations, for which he may be such agent or otherwise.

Sec. 10. Repeals all the provisions of sections 22, 23 and 24, of chapter 64, entitled "Licenses," of the Revised Statutes, *so far as they relate to fire insurance or fire insurance agents in the city of Chicago.*

E. and A. and J. Van Buren, for Plaintiff in Error.

E. C. Larned, Hooper, Causin & Sherman, and James P. Root, for Defendant in Error.

Caton, C. J. The only question which has been discussed and which we propose to decide in this case is, whether the legislature had a right to pass the sixth section of the act incorporating the plaintiffs. This legislative power is denied, upon grounds which may be reduced to two distinct propositions. First it is said, that the legislature had no right to impose this burthen for any purpose or object; and second, it is urged, that if the first is not sustained, the legislature had no right to impose this burthen for this object.

Every principle and objection involved in the first proposition is distinctly settled and deliberately overruled by this court in the case of *Thurber* v. *The People*, 13 Ill. R. 554. The question has now again been fully considered, and that case carefully re-examined, and we are satisfied that the question was there correctly decided; and we do not feel inclined to repeat the reasons there assigned, or to extend the argument there advanced in support of this exercise of legislative power. Much might be added to what has been there said, in support of the conclusion then and now arrived at by the court, but we do not deem it our duty to do so.

The other objection is, that here a revenue is attempted to be raised, not for State purposes, nor yet to meet any public exigency or want, but purely for the benefit of a private charity. That it is not required to be paid into the State treasury but must be paid to this private corporation, for whose benefit the burthen is imposed.

The general grant of legislative power, found in the constitution confers upon the general assembly all legislative power, and authorizes the law-makers to pass any laws and do any acts which are embraced in the broad and general word *legislation*, as known and defined in the English language. It authorizes the passage of any law which could be enacted in the most despotic government. It even authorizes everything which the people could enact in their primary capacity. Anything which they would have a right to embody in the constitution itself. After this broad grant of legislative power, the constitution in various provisions proceeds to limit and restrain its exercise. So far as was deemed necessary to prevent oppressive and unjust legislation, and only to the extent of these limitations, has the legislative power thus granted been circumscribed, and beyond these limitations, the power exists in its full vigor. Hence the neces-

sity, whenever it is alleged that the legislature has transcended its powers, to point out some restriction or limitation, which has been disregarded. It is not pretended that there is any express provision in the constitution, inhibiting the legislature, from passing any law which shall impose a burthen upon some members of the community, which shall be devoted to the benefit of other members. There is nothing to be found in the constitution which can be held to inhibit the legislature from imposing burthens, or raising money from citizens of the State, which is not for the direct benefit of the State, and is never designed to belong to the State. To deprive the legislature of this power, would to a great extent destroy its usefulness—while it would to a certain extent, deprive it of the power of abuse, it would destroy its power to regulate by law a thousand things, which the public good requires should be regulated by law. It is astonishing how fertile the modern mind is in theorizing, too often without reflecting where these happy theories would lead us. Let us once hold that the legislature could not compel any citizen to submit to a burthen, except for the benefit of the State aggregate, or for some subdivision of it, as a county, city or town, or to pay any money except it shall go into the State or some subordinate public treasury, and we should soon find ourselves on the brink of anarchy itself—we should tie up the hands of the legislature it is true, so that they might not do some evils which they have hitherto had the power of doing; but we should also let loose upon society ten thousand evils, which in every well regulated community it has always been the duty of the legislature to suppress. It is in the exercise of this indispensable power, that ferries, toll bridges and the like are licensed or chartered. The legislature, finding it necessary to afford especial encouragement to private enterprise to erect a bridge or a ferry, has ever exercised the power of imposing a burthen on some, for the benefit of others. Who ever doubted the right of the legislature to charter a bridge and to require all persons crossing the stream within certain limits, to pay the tolls, whether they cross on the bridge or not? It is the exercise of the same power, which fixes the fees of officers for the performance of certain services. It is the power which the legislature possesses, of imposing burthens upon certain members of the community who are supposed to be benefited, by the efforts or acts of certain other members of the community, as a reward or compensation for such acts. This power is only exercised by prudent and judicious legislators, where it is supposed that the public have a general interest in the acts thus encouraged, and the individuals or classes upon whom the burthen is imposed, have a particular interest in the performance of the acts. It

would fill a volume to enumerate all the familiar instances of the exercise of this power—a power which must be exercised constantly in every civilized community, or the well being of that community must vitally suffer. This power may no doubt be abused, by an unjust and oppressive exercise of it. There are some whose minds are constantly exercised by harrowing apprehensions of terrible calamities to befall individuals and states, by an abuse of the powers, with which public officers are entrusted, and to avoid such dangers, would deprive the legislature of all power to do mischief, without remembering that at the same time they deprive them of power to do good. A large discretion must necessarily be left with the legislature for the proper and judicious exercise of which, there can be no accountability, but to those who elect them. In this case we are far from the opinion that there has been any abuse of the exercise of that discretion. The legislature incorporated this charity, which was deemed worthy of some sort of an endowment. It might have been endowed from the public treasury, and a fund for that purpose, provided by any legitimate mode of raising a revenue. A charge of a percentage upon the gross receipts by the agents of underwriters, we had in *Thurber's Case*, decided to be a legitimate source of revenue. The legislature in its wisdom and in the exercise of its discretion, thought proper to divert this fund to the direct endowment of this charity, which was instituted for those, who should be disabled while in a service, the general effect of which, is for the direct benefit of underwriters, and to what source therefore could they more properly look, than to those in whose service, the objects of this charity would receive the injuries, entitling them to the benefits of the charity? It is in fact a burthen not upon the agent personally, nor yet upon the underwriter, but upon the assured, for the premium will always be graduated in view of every risk and every expense incurred by the assurer; as well as the encouragement afforded to the fire department and its efficiency.

With the view we take of this case, it is immaterial, whether this be considered a public or a private charity. But it should more properly be considered a public charity. As such, the legislature had a right to consider it, as much as the institution for the blind. It might have conferred upon it, the right to take and condemn private property for a site for the building, as well as to confer upon a railroad company the right to take private property for a road way.

We think the sixth section germane to the objects of the bill and embraced properly in the same subject, the whole of which, is sufficiently expressed in the title.

After a careful consideration of the case, we are of opinion that none of the objections to the constitutionality of the act are tenable, and that the demurrer to the declaration should have been overruled.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Hiram P. Moses, Thomas Kane, and Dennis Lordin, Appellants, *v.* The Pittsburgh, Fort Wayne and Chicago Railroad Company, Appellees.

APPEAL FROM COOK.

Where a railroad company by its charter, is authorized to bring its road to a city, and acquire property within it, the right to enter the city is also conferred.

Where by a city charter, its local authorities are vested with exclusive control over the streets, as in the city of Chicago, and those authorities grant permission to locate railway tracks along a street, the owners or occupants of property fronting on such street, cannot enjoin the laying of such tracks, nor receive any damage or compensation for such use of a street.

The fee simple title to the streets of the city of Chicago, as in other cities, is vested in the municipal corporation.

The use of steam as a motive power, may be used, along the streets of a city, by proper permission.

This was a bill in chancery filed by the appellants against the appellees on the 22nd day of March, 1858, in the Circuit Court of Cook county, setting forth—

That on the 18th day of June, A. D. 1855, there was, and before that time had been, a certain street or public highway called Beach street, commencing at or near the south line of block seventy-three, in school section addition to Chicago, and running thence north to Harrison street, in said city, of the width of forty feet, including the spaces on each side for sidewalks, which said street was as above described, marked and laid out upon the original recorded plat of said school section addition to Chicago, and then became a public street and highway of said city to be used as such, and ever since has, with the additions and extensions made thereto, continued to be one of the public streets and highways of said city.

That Hiram P. Moses was, and still is, the owner in fee of the north half of north half of block seventy-three, in said school section addition to Chicago, lying and being contiguous to said Beach street, and fronting thereon about one hundred feet along said street, together with all and singular the appur-

tenances unto the said premises belonging. That Sherman Kane, another of complainants, about the time aforesaid, was, and still is, the owner in fee of lot forty-three, in block sixty-five, in said school section addition, lying and being contiguous to said Beach street, and fronting thereon for about the distance of one hundred and twenty feet, together with the appurtenances. That Dennis Lordin was, and still is, the owner in fee of lot forty-two, in block sixty-five, in said school section addition, lying and being in front along and contiguous to said street, together with all and singular the appurtenances unto the said premises belonging.

That complainants have the right to use said Beach street in front of their said premises as a highway; and that no person or persons have any right to interfere with the free and unobstructed use by them of the said street for the purposes of a public highway along and in front of the said premises.

That in the early part of 1856, Hiram P. Moses caused to be built upon his said premises a large machine shop for the manufacture of divers kinds of machinery, which said building extends about sixty-five feet in front along said street, and is erected one foot distant from the east line of said Beach street. That Thomas Kane, sometime in the month of August last, commenced to build, and has in process of erection, a building of the value of about $40,000, for the purposes of stores, grocery stands, etc. And that in order that said buildings so erected, and to be erected, may be of any service for the purposes for which they were built, and in order to carry on business therein, that it is necessary that there should be space in front of their said buildings for horses and carts, drays and wagons to back up and stand without hindrance to load and unload from said machine shop, and also from said store buildings when the same are completed. Also, that there are two dwelling-houses upon the premises of Dennis Lordin, used and occupied as such.

That by reason of the narrowness of said street, and its inadequacy to accommodate the public, or from some cause, on or about the 18th day of June, A. D. 1855, the Common Council of the city of Chicago made and passed an order directing the city surveyor to proceed to survey, mark and plat, and record the land necessary to be taken to open and extend said Beach street sixty feet wide from its then terminus on the south side of block seventy-three aforesaid to Twelfth street in said city, by taking forty feet in width fron the west side of blocks 74, 75, 76, and twenty feet in width from the east side of blocks 61, 62, and 63, in said school section addition. And also to widen said Beach street from the south line of block 73 afore-

said to Polk street, taking twenty feet in width from the east line of block 64 in said school section addition. And that such proceedings were had, as that Beach street was widened to sixty feet from Twelfth street to Polk street, and remaining and being of its original width of forty feet from Polk street to Harrison street.

That their respective parcels of land aforesaid were largely assessed by the said freeholders or commissioners for the purpose as aforesaid, as being real estate deemed benefited by the improvement aforesaid. That the said commissioners in making the said assessments upon the real estate of complainants, acted in pursuance of the order and direction of the Common Council of said city, and that complainants paid the several assessments aforesaid. And that the said assessments or moneys paid in that behalf, were appropriated to the payment of the damages resulting to persons to whom damages or recompense were by said commissioners ascertained to be due, in pursuance of the order of said Common Council before mentioned. And that no damages were awarded to them, or either of them, for or on account of the said improvement made as aforesaid.

That said street was extended and widened as aforesaid for the use and benefit of the public and complainants as a public highway, and was widened as aforesaid because it was found necessary to do so in order that the public highway, or Beach street, at the place where the same was widened, might be of a width sufficient to accommodate all persons using the said street as a public highway, and that said street is in no part thereof of a greater width than the use of said street as a public highway actually requires.

That by reason of the narrowness of said Beach street, through which is constantly passing a large number of teams, carts, wagons, and other vehicles standing and passing upon and along said street for the legitimate, reasonable and ordinary purposes of business and travel, that a railroad track upon and along said street, opposite and in front of said premises, on which locomotives and railroad cars might, etc., run, would greatly obstruct said street for public use, and seriously obstruct and damage the business of complainants carried on as aforesaid, and would greatly injure and damage their said property assessed for the benefits therewith resulting by reason of the improvement, or widening said street as aforesaid, which said assessments were fully paid by complainants.

That by an act of the legislature of the State of Illinois, approved February 5, 1853, entitled, "An Act to incorporate the Fort Wayne and Chicago Railroad Company," the Pittsburgh, Fort Wayne and Chicago Railroad Company became incorpo-

rated under the name and style of the Fort Wayne and Chicago Railroad Company, to which said act of incorporation for the powers, privileges, franchises and duties thereby conferred upon and pertaining to the said railroad company, and for the provisions of said act, complainants, for more certainty, refer. That afterwards, by an act of the legislature of the State of Illinois, entitled, "An Act to amend an act entitled an act to incorporate the Fort Wayne and Chicago Railroad Company," approved February 5, 1853, and approved February 22, 1854, the said railroad company were authorized and empowered in all cases where they might not be able to acquire the right of way through any lands or premises where necessary for the purposes of said railroad, by purchase or donation, to obtain the same in the mode provided by an act entitled, "An Act to amend the law concerning the right of way for the purposes of internal improvement," approved June 22, 1852. And it was thereby enacted that said company should be entitled to all the beneficial provisions thereof, or of any subsequent general law on the same subject.

That afterwards the corporate name of said railroad company became changed from the style of Fort Wayne and Chicago Railroad Company to the name and style of Pittsburgh, Fort Wayne and Chicago Railroad Company, by which the said company is now known and designated.

That said railroad company has not, under all and any of the acts of incorporation thereof by the legislature of this State, any right, power, or privilege conferred upon the said company of building or constructing any railroad track, or maintaining the same, or of running their line of railroad within the corporate limits of the city of Chicago, or of procuring the right of way for the purpose of constructing or laying down any railroad track within the corporate limits of said city. And that said railroad company is in no manner empowered by law to take or use the streets or public highways of said city for the purpose of laying down a railroad track thereon.

That afterwards, to wit, on the 17th day of November, 1850, the Common Council of the city of Chicago, in due form of law, passed an ordinance, approved on the day and year last aforesaid by the mayor of said city, whereby the said Common Council pretend to authorize and empower the said Pittsburgh, Fort Wayne and Chicago Railroad Company, amongst other things, to lay down, maintain and operate a railroad track or tracks, with necessary switches, turn-outs and side tracks, in the street in the city of Chicago, running north and south on the section line of section 21, township 39 north, range 14 east of 3rd principal meridian, from the south line of North

street to the north line of Twelfth street; and then on Beach street aforesaid to Harrison street, upon the terms, conditions and provisions in said ordinance specified, which said ordinance the said railroad company afterwards, and on or about the 20th November, 1856, accepted.

That at the time when said Common Council passed the foregoing ordinance, that the said council had no legal right or power under, or by virtue of the charter of the city of Chicago, or of the laws of this State, to permit or authorize said railroad company to occupy said Beach street in manner, or upon the terms or conditions set forth in said pretended ordinance passed as aforesaid. And that said ordinance, so far as the same relates to Beach street, or authorized said railroad company to use said street in manner in said ordinance specified, was at the time of its passage, and still is, utterly null and void, and without any legal authority whatsoever; and that said ordinance gave said company no right or authority to use said street in manner therein provided.

That the said Pittsburgh, Fort Wayne and Chicago Railroad Company are now proceeding under color of the said ordinance, but without legal rights or authority, to lay down, maintain and operate a single railroad track upon and along the whole length of Beach street aforesaid, and are already laying down, maintaining and operating said track upon and along said Beach street, under the pretended color and authority of the acts incorporating said railroad company, the chartered and corporate powers of the city of Chicago, and the ordinances of said city passed in pursuance thereof as aforesaid, and without the consent of complainants, or any of them, ever had or obtained in that behalf, and have already placed a portion of their said railroad track in front of the premises of complainants, and are proceeding to operate the same without the consent, and contrary to the express wishes of complainants, by means whereof the said railroad company are greatly obstructing the said Beach street, are hindering and interfering with the travel thereon, and have, as to so much of said street as is by said company occupied and used, as aforesaid, actually diverted and changed the same from the purposes for which the same was widened and opened as aforesaid, that is to say, from the purposes of a public highway, so far as laying down a single track in the centre of said street, and transporting thereon in the cars of said company, passengers and freight through, to and from the city of Chicago, in the regular course of business. And your complainants insist that the Common Council of said city has not the power to allow, permit or authorize any person or corporation to encroach upon or injure the said Beach street in

manner aforesaid, or in any other way or manner, or to divert or change, or to authorize any person or corporation to divert or change the said Beach street or any part thereof, from the use or purpose for which the same was dedicated, widened and extended as aforesaid, and to direct or permit the same, or any part thereof, to be used for any other or different purpose whatsoever.

That if the said railroad company is permitted to lay down, maintain and operate their said railroad track, with or without necessary switches or turn-outs, and side tracks, in, along and upon said Beach street, that the complainants will be continually and permanently injured in their said business, by the danger of the approach of trains of cars, and be deprived of the use of said street, or a portion thereof, for the purposes of a public highway along and in front of their said premises at the time of the passing of the trains of said company; that said company are already using and contemplate using locomotives driven by steam, in operating their said track upon and along Beach street, and in front of the premises aforesaid, in conducting railroad cars over and along said track, and that the sparks and cinders therefrom will greatly endanger the safety of the buildings upon the said premises; by means whereof the enjoyment of the property will be rendered precarious upon and along said street. That complainants cannot use and occupy the said street as a public highway in front of their said premises as otherwise, without great fear and apprehension for their personal safety from running cars upon and along said street.

Complainants aver that said railroad company has not the right, and is not legally authorized or empowered to lay down, maintain and operate a railroad track or tracks, with necessary or any switches, turn-outs or side tracks, or otherwise, upon and along said Beach street.

Bill prays that the said Pittsburg, Fort Wayne and Chicago Railroad Company, its privies, agents, employees and servants, and all others confederating therewith, be perpetually enjoined, restrained and prohibited from laying down, continuing, maintaining, or operating further, any railroad or railroad tracks, with or without switches, turn-outs or side tracks, or in any way supporting the same hereafter, in, upon or along Beach street aforesaid.

The defendants filed a general demurrer for want of equity, which was *pro forma* sustained by the court, MANNIERE, Judge, presiding, and the bill dismissed. From which decree the complainants appealed, and bring the case to this court.

The errors assigned are: the sustaining of said demurrer, and the rendition of said decree.

C. Beckwith, and Sherman & Kales, for Appellants.

Judd & Winston, and Glover & Cook, for Appellee.

Caton, C. J. By its charter this company was authorized to bring its road to Chicago, and to acquire property within the city. By this it was intended to allow the road to run into the city. It was not the intention that it should be compelled to stop so soon as it touched the city limits, and thus render the road comparatively useless both to the public and the company. The language of the charter requires no such limited construction, and the objects of the law would be evidently frustrated by so illiberal an interpretation.

But the complainant is the owner of property on Beach street, and the Common Council of the city have authorized the defendant to lay down its track through the centre of that street, and to run its cars and locomotives over it; whereby the complainant's property will be injured, for which he has received no compensation; and he asks an injunction to restrain the defendant from exercising the right thus granted. By the city charter the Common Council is vested with the exclusive control and regulation of the streets of the city, the fee simple title to which we have already decided is vested in the municipal corporation. The city charter, also empowers the Common Council to direct and control the location of railroad tracks within the city. In granting this permission to locate the track in Beach street, the Common Council acted under an express power granted by the legislature, so that the defendant has all the right which both the legislature and the Common Council could give it, to occupy the street with its track. But the complainant assumes higher ground, and claims that any use of the street, even under the authority of the legislature and the Common Council, which tends to deteriorate the value of his property on the street, is a violation of that fundamental law which forbids private property to be taken for public use without just compensation. This is manifestly an erroneous view of the constitutional guarantee thus invoked. It must necessarily happen that streets will be used for various legitimate purposes, which will, to a greater or less extent discommode persons residing or doing business upon them, and just to that extent damage their property, and yet such damage is incident to all city property, and for it a party can claim no remedy. The Common Council may appoint certain localities, where hacks and drays shall stand waiting for employment, or where wagons loaded with hay or wood or other commodities shall stand waiting for purchasers. This may drive customers away from shops or stores in the vicinity, and

yet there is no remedy for the damage. A street is made for the passage of persons and property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone, shall it be expelled the streets? For the same reason camels must be kept out, although they might be profitably introduced. Some fancy horse or timid lady might be frightened by such uncouth objects. Or is the objection not in the motive power used, but because the carriages are larger than were formerly used, and run upon iron, and are confined to a given track in the street? Then street railroads must not be admitted—they have large carriages which run on iron rails and are confined to a given track. Their momentum is great and may do damage to ordinary vehicles or foot passengers. Indeed, we may suppose or assume that streets occupied by them are not so pleasant for other carriages or so desirable for residences or business stands, as if not thus occupied. But for this reason the property owners along the street cannot expect to stop such improvements. The convenience of those who live at a greater distance from the centre of a city require the use of such improvements, and for their benefit, the owners of property upon the street, must submit to the burthen when the Common Council determine that the public good requires it. Cars upon street railroads are now generally, if not universally, propelled by horses, but who can say how long it will be, before it will be found safe and profitable to propel them with steam, or some other power besides horses? Should we say that this road should be enjoined, we could advance no reason for it which would not apply with equal force to street railroads; so that consistency would require that we should stop all. Nor would the evil which would result from the rule we must lay down stop here. We must prohibit every use of a street, which discommodes those who reside or do business upon it, because their property will else be damaged.

This question has been presented in other States, and in some instances where the public only have an easement in the street, and the owner of the adjoining property still holds the fee of

the street, it has been sustained, but the weight of authority, and certainly in our apprehension all sound reasoning, is the other way.

The bill was properly dismissed and we affirm the decree.

Decree affirmed.

William T. Shufeldt, impleaded with William S. Littell, Appellant, *v.* Joel Seymour *et al.*, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

The question of partnership should be put in issue by a plea of abatement properly verified.

This was an action of assumpsit, commenced by the appellees against the appellant and William S. Littell, by summons.

The action was upon a promissory note, signed "W. T. Shufeldt & Co."

The declaration charged the defendants below as co-partners, under the firm name and style of W. T. Shufeldt & Co., and contains a special count and the usual common counts.

The first or special count states that the defendants below made their promissory note in writing, bearing date, etc., and delivered the same to the appellees, in and by which note the defendants below, by the name, style and description of W. T. Shufeldt & Co., promised to pay to the order of the appellees, by the name and style of Seymour & Woodruff, etc.

The appellant, Wm. T. Shufeldt, pleaded non-assumpsit, and annexed to his plea and filed therewith an affidavit, denying the execution of the note by the defendants below, and denying also that the defendants below ever were partners.

William S. Littell, the other defendant, did not plead, and his default was entered.

The cause came on for trial upon the issues thus raised, by agreement of counsel, before the court without the intervention of a jury.

The plaintiffs below called a witness who testified that the signature to this note is in the hand-writing of the defendant, William T. Shufeldt, and was by defendant Shufeldt subscribed in his presence.

The note was then read in evidence.

The appellees then rested their case.

The appellant Shufeldt thereupon submitted to the court for its decision, the question, whether the evidence of the plaintiffs

below was sufficient under the pleadings to entitle them to a judgment against him, which question the court decided in favor of the plaintiffs below, to which decision the appellant Shufeldt excepted.

The appellant Shufeldt then called as witness, *George A. Shufeldt, Jr.*, and asked him who composed the firm of W. T. Shufeldt & Co., at the time of the making of the note in suit, to which question the appellees objected, on the ground that the partnership of the defendants below was not at issue, which objection the court sustained, and the appellant duly excepted.

This was all the evidence in the cause, and thereupon the court found the issue for the plaintiff below, and assessed the damages at $102.28.

The appellant thereupon entered a motion for a new trial, which was overruled, and thereupon he took an appeal.

The errors assigned and relied on by the appellant, are as follows, to wit:.

1st. That the court erred in deciding that the question of the partnership of the appellant and the said Littell, defendants below, was not put in issue by the pleadings in this action.

2nd. That the court erred in deciding it to be unnecessary for the plaintiffs below to prove the partnership of the defendants below.

3rd. That the court erred in refusing to allow the appellant to prove who composed the firm of W. T. Shufeldt & Co., at the time of the making of the note on which this action is founded, and that the defendant below, William S. Littell, never was a member of the firm of W. T. Shufeldt & Co.

4th. That the court erred in entering judgment in favor of the plaintiff below.

5th. That the court erred in refusing the motion for a new trial.

And the appellees join in the above errors.

Hopkins & Guthrie, for Appellant.

Helm & Clark, for Appellees.

Caton, C. J. The plea was a plea denying the execution of the instrument on which the action was brought. It did not put in issue the fact of the partnership, which was averred in the declaration. That fact could only be put in issue by a plea in abatement, properly verified, as directed by our statute. *Warren* v. *Chambers*, 12 Ill. R. 124. The execution of the note was put in issue, and that alone was in issue. That fact was abundantly proved on the trial, and the fact of partnership

having been admitted by not filing a plea in abatement, it followed necessarily that the plaintiff was entitled to judgment.

The judgment must be affirmed.

Judgment affirmed.

ELIAS B. RHEA, Appellant, *v.* JACOB C. RINER, Appellee.

APPEAL FROM KNOX.

In a sale or exchange of personal property, the question of delivery is a fact for the jury.

Replevin may be sustained, where it is understood and intended, that the title to the property should pass without any further act of the parties.

In an exchange of horses, whether the contract was in all respects carried out, as to the condition of the animals, is a question for the jury, and their verdict will not be disturbed, unless under unusual circumstances.

THIS was an action of replevin, commenced in the Knox Circuit Court, to recover one bay mare, claimed by plaintiff, and was tried in that court, before a jury, at the October term, A. D. 1857. Verdict and judgment for plaintiff. Motion for a new trial by defendant overruled.

The declaration was as follows:

First count charges that defendant, on 12th May, 1857, on a certain farm in township 9 N., R. 4 E. of 4th P. M., Knox county, Illinois, took one bay mare, black mane and tail, about eight years old in spring of 1857, sixteen hands high, of the plaintiff, of value of one hundred and fifty dollars, and unjustly and wrongfully detains the same, against sureties, etc.

Second count same as first, but describes a different close, in same township.

Third count same as second, except it charges that defendant "*detained*" instead of "*took*" the mare.

Fourth count same as third, except changes the place, as on his farm, in township 9 N., R. 4 E. 4th P. M., and lays damages at two hundred dollars.

On the 21st day of October, A. D. 1857, at same term of the court, defendant filed his general demurrer to the first count of plaintiff's declaration, and pleas to second, third and fouth counts of said declaration, and assigned as special cause of demurrer, that the place whence mare was alleged to have been taken, was not described with sufficient certainty.

And afterwards, on same day, the court overruled the demurrer to said first count of said declaration, and upon motion of defendant, granted leave to withdraw the demurrer, and plead to

said first count, and the said defendant, on the same day, filed his pleas to the first count of said declaration, as follows:

1. Plea to first and second counts of declaration, that defendant did not take, and unlawfully, unjustly and wrongfully detain the said mare.

2. Plea to third and fourth counts of said declaration, that he did not detain the said mare.

3. Plea to whole declaration, property in defendant.

Issue was joined on the first, second and third pleas of defendant.

The plaintiff called a witness, who testified that he knew the parties; took the mare, Coly, to defendant, last spring; was told to take her by the plaintiff; left the mare with defendant; heard him tell his wife that they had traded horses; some of the hands put the mare in the stable; defendant turned her out in the field; she was stiff next morning. Defendant said a week afterwards, that if Coly was as well as she was when they traded, it would be all right; Coly got over her stiffness by the next Sunday; told defendant that we came after the mare Jane; defendant told me, when I left, to tell Rhea, if he did not send the mare up in a week, to come down after her.

Riner said, if the mare Coly did not get over the stiffness, he would not have her; Coly is brown, Jane is bay.

By another witness, the plaintiff proved that he went down to defendant's after a mare, about a week after Paddock took the mare down; defendant then had Coly; he told Riner that he had come after the mare Rhea traded for; Riner said he had not got done using her; defendant said Coly had not got over her stiffness; thought she was going to have the poll-evil, and that under the circumstances, he was not willing to let Jane go.

Another witness stated that Rhea demanded the mare Jane, and Riner told him he did not feel disposed to give her up; Riner said, if you will take Coly, and say nothing more about it, I will give you five dollars; Coly was not lame, but a little stiff; Coly got over her stiffness in about a week after she had a colt; Riner, the defendant, told plaintiff that if Coly was all right as she was when they traded, it would be all right, and said if Coly got over her stiffness, he would let plaintiff have Jane.

Another witness stated he knew the mare Jane; sheriff took her on Riner's farm, in Salem township; I took Coly to Rhea for Mr. Riner, a week before Jane was replevied, and defendant took her up to plaintiff on the same day; I know when Paddock brought Coly down; Jane was in defendant's possession up to the time when she was replevied.

Defendant told Paddock the next day after he brought her down, that if Coly did not get over her stiffness, he would not

receive her; defendant told Paddock to tell plaintiff that he would not receive Coly unless she got over her stiffness; defendant, in the absence of plaintiff, told me he was to keep Jane until he got through his plowing, and he did not get through his plowing until after she was replevied, and both parties claimed that if anything happened to either mare, it was to be no trade; Riner, the defendant, took the mare Coly up to plaintiff second time, and she was put into plaintiff's stable; it was fourteen days from the time Paddock brought Coly down, to the time that Jane was replevied; Coly was stiff the day he took her up to Mr. Rhea's, plaintiff's, home; Coly was very stiff in all her legs, and could hardly walk.

Defendant called witnesses, who testified that they observed that the mare Coly was stiff; defendant said he would not have anything to do with the Coly mare, in the condition she was in; said the same to Paddock when he brought the mare down to defendant's; and when Paddock left on that day, defendant sent the same word to plaintiff; Coly was diseased; heard another conversation between the plaintiff and defendant, at the plaintiff's house, at the time defendant took Coly back to plaintiff, in which conversation, both parties said, if either of the mares got crippled or injured, or anything was the matter with either of them, before they exchanged mares, each of the parties was to bear the loss of the injury to his own mare, and it was to be no trade.

The plaintiff then called *John Bell*, who stated that the mare was not stiff when brought back to plaintiff's, or did not notice any stiffness.

The plaintiff then re-called *Obed Rhinehart*, who stated that he could not see as the mare Coly was stiff when brought back.

The plaintiff then re-called *John Kirby*, who stated that he was present at the time mare Coly was brought back; she did not appear to be stiff.

The plaintiff then recalled *James Paddock*, who stated that he was present at the time mare Coly was brought back; did not notice as she was stiff.

On cross-examination, stated, that if either mare got injured, it was to be at the risk of the party having the mare, or no trade, or to that effect.

The plaintiff then asked the court to instruct the jury as follows:

1st. If the jury believe, from the evidence, that the defendant traded the mare replevied to the plaintiff for the Coly mare, and that defendant was to have the use of the mare replevied for a time, and that that time had elapsed before the commencement of this suit, and that the plaintiff demanded the same

before the commencement of this suit, and defendant refused to deliver, they will find the issues for the plaintiff.

2nd. The jury is instructed that if they believe, from the evidence, that the contract for the trade of the horses was, that if the mares either of them became injured before the time expired for which the parties were to use them, that the person in possession of the horse injured should pay the loss occasioned by the injury to the other, and if they believe, from the evidence, that the mare traded to defendant became injured before the time expired, still the proof of those facts does not invalidate the contract, and that the defendant must sue for the loss occasioned by the injury.

Which instructions were given by the court, to the giving of of which the defendant excepted.

The defendant then asked the court to instruct the jury as follows:

1st. If the jury believe, from the evidence, that the defendant was to retain the mare Jane until he got his plowing done, and that if anything happened to either of the mares before the time for delivery, it was not to be a trade, and that the defendant was not done plowing at the time the mare Jane was taken, and that the mare Coly was stiff or lame, they will find for defendant.

2nd. If the jury believe, from the evidence, that the title to the mare was not passed, or it was not to be a trade if anything was the matter with either of the mares, and that the mare Coly was stiff and lame before Jane was to be delivered by the contract, they will find for the defendant.

3rd. If the jury believe, from the evidence, that the defendant was to have the mare Jane to plow with until he got his spring plowing done, and that he had not got his plowing done at the time the sheriff took the mare upon the writ in this suit, and at the time this suit was commenced, and the defendant did not deliver the mare Jane to the plaintiff before the commencement of this suit, the jury will find for the defendant.

4th. If the jury believe, from the evidence, that by the contract between the parties, the possession was not to pass of the mares until the defendant got his plowing done, and that defendant did not get his plowing done before the mare Jane was replevied, and that the possession of Jane was not delivered by defendant to plaintiff, and defendant refused to receive the Coly mare as a trade, the jury will find for the defendant.

5th. That in order for the jury to find the issues for the plaintiff, they must believe, from the evidence, that the mare Jane is the mare described in the declaration and the property of the

plaintiff, and was at the time of the commencement of this suit, and that the plaintiff was entitled to the possession of the mare Jane at the time of the commencement of this suit.

6th. That the jury must believe, from the evidence, that the plaintiff demanded, either by himself or agent, the mare Jane from the defendant after the making of the contract, and before the commencement of this suit, or they will find for the defendant.

7th. If the jury believe, from the evidence, that the parties to this suit contracted to exchange mares the one for the other, and that each was to retain the mare he had before said contract at his own risk for some days after said contract was made, and that said mares were not to be exchanged until some days after said contract was made, and that said plaintiff never had possession of the mare Jane prior to the commencement of this suit, the plaintiff cannot recover in this suit.

8th. The jury are further instructed, that there is a distinction between *a contract for a sale*, and *a sale;* that to constitute a sale of personal property there must be delivery of possession, and that the plaintiff must here show a delivery of the mare Jane to him by the defendant in order to recover in this action.

The court refused to give the 7th and 8th, and refused to give the 1st and 2nd as asked, and gave the 3rd, 4th, 5th, and 6th, as asked by defendant.

To the decision of the court in refusing to give the 1st and 2nd instructions as asked, and refusing to give the 7th and 8th, the defendant excepted.

The court gave the 1st and 2nd instructions asked by the defendant, as modified by the court, which are as follows:

1st. If the jury believe, from the evidence, that the defendant was to retain the mare Jane until he got his plowing done, and that if anything happened to either of the mares before the time for delivery it was not to be a trade, and that the defendant was not done plowing at the time the mare Jane was taken, and that the mare Coly afterwards got hurt or became unsound, they will find for defendant.

2nd. If the jury believe, from the evidence, that the title to the mares was not to pass, or it was not to be a trade if anything was the matter with either of the mares before delivery, and that the mare Coly was *seriously injured* by stiffness or lameness before Jane was to be delivered by the contract, they will find for the defendant.

To the giving of the said instructions, so modified by the court, the defendant excepted.

The cause was then submitted to the jury, who found the issues for the plaintiff, and assessed damages at one cent, to which verdict the defendant then and there excepted.

The defendant then filed a motion for a new trial, which was denied.

DOUGLASS & CRAIG, for Plaintiff in Error.

TYLER & SANFORD, for Defendant in Error.

WALKER, J. It is urged as ground for a reversal of the judgment below, that as the property replevied was not delivered to the plaintiff below at the time the sale was made, that he could not maintain the action.

At the common law a delivery of possession was not necessary to pass the title to chattels from the vendor to the purchaser. To complete the purchase and vest the title in the buyer, it was only necessary that the terms of the sale should be complete and the property sold specified and separated from other property of the same kind, where it was incapable of identification. When this was done by the parties the sale was complete and the title to the property became vested in the purchaser. But the 17th section 29 Car. 2, provides that no sale of goods, wares, or merchandize, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some memorandum in writing of the bargain shall be signed by the parties to the contract, or by their duly authorized agents. It will be observed that, in our statute of frauds this provision of that act is omitted, and consequently the common law is left in force to that extent. And if the contract was completed by the parties and nothing remained to be performed except to deliver the property to plaintiff below, and the parties understood and intended that the title to the property should pass without any further act of the parties, then a delivery was not essential to the right to maintain the action. And what the terms of the contract were, and whether it was consummated by the parties, was a question of fact to be determined from all the surrounding circumstances, and while the evidence is not clear and entirely satisfactory, yet it was sufficient to justify the inference that the contract was complete and the title to the animal in controversy, had vested in the plaintiff. At the time of the trade, the defendant received and took away with him the animal he got in exchange for his, and by arrangement of the parties was to retain the animal he gave in exchange, for the purpose of plowing, a short time. It seems from the evidence that he afterwards gave notice to appellee that he would

deliver the animal in a week afterwards, but when the demand was afterwards made he refused to deliver it to appellee.

It is again urged that the exchange of the horses was upon the condition, that if anything happened to either, it was not to be a trade. And that the animal given by appellee did become diseased and that appellant offered to return the property he had received and demanded that given by him, and consequently there was no liability incurred by refusing to deliver the animal he gave in exchange. There was some evidence that the animal given by appellee became stiff soon after the exchange was made, but all the evidence, as well that of the appellant as of the appellee, is that it only lasted a few days. And the evidence conflicts as to whether she was disordered as alleged. Some six witnesses called by appellant testify that when returned and offered to appellee, she was quite stiff, while some five called by appellee as explicitly testify that they saw the animal at the time, and that she was not so diseased. Even granting that a condition was inserted in the contract, that the sale should be rescinded in case either animal became diseased before they were delivered, still whether that event had occurred was a fact to be determined by proof, and it was a question for the jury alone to determine from the evidence. And their finding should not be disturbed unless it is clearly against the evidence, which is not the case in this finding. Nor did the terms of the contract authorize either party to rescind the sale unless the event occurred. It was not enough that he asserted it to be true, but he was bound to establish it by proof. Neither was a trifling, temporary ailment sufficient to authorize a recision of the sale. The true construction of the agreement, contemplates some injury or disease, of such a character as would render the animal less useful or valuable, and not a trifling or natural ailment. There is no pretense but the animal was free from all appearance of disease until after she had her foal, and it may be that the apparent stiffness of this animal resulted from that fact, and if so that was not within the condition of their agreement. We, after examining the whole record, are of the opinion that there is no error in either giving, refusing, or modifying the various instructions asked, and that the evidence sustains the finding of the jury, and that there is no error in the record requiring the reversal of the judgment of the court below. The same is therefore affirmed.

Judgment affirmed.

Robert R. Mecum, Plaintiff in Error, *v.* The Peoria and Oquawka Railroad Company, Defendant in Error.

ERROR TO PEORIA.

If there are dependent covenants in an agreement, by which one party is to convey land, and the other to make fences, cattle guards, passes, etc., if the conveyance has not been made, the party cannot recover for the omission to build the fences, cattle guards, etc. These duties are co-relative.

Courts will not hold covenants to be independent, where one party may refuse, and yet enforce performance; unless there is no other way of construing them.

In this case there was a trial by jury, Powell, Judge, presiding. The jury found for Mecum, plaintiff below, the amount of the note sued on, in connection with the agreement set out in the opinion of the court. Upon this verdict a judgment was rendered. Mecum moved for a new trial, which motion was overruled. The plaintiff below, as well as in this court, assigned the following errors:

1. The finding and judgment of the court for the plaintiff are for $745.10; whereas the finding and judgment of the court ought to have been for $1,262.37 for the plaintiff.

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

3. The records and proceedings aforesaid are otherwise manifestly irregular and contrary to the law of the land.

Charles C. Bonney, for Plaintiff in Error.

N. H. Purple, for Defendant in Error.

Caton, C. J. The declaration in this case counts on the following agreement and the note made in pursuance of it:

"This Agreement, made October 9th, 1854, between Robert R. Mecum of the one part, and the Peoria and Oquawka Railroad Company of the other part, witnesseth as follows:

"The said Mecum hereby agrees, in consideration of the premises on the part of the said company hereafter made, that he will give and grant to said company the right of way for their railroad over and across the north-east quarter of section thirty-six, and twenty acres off the east side of north-west quarter of said section, in township eleven north, one west, in Warren county, Illinois, of the width of fifty feet, and of so much greater width not exceeding one hundred feet as may be necessary for the purpose of constructing their said road.

"And the said company on their part agree, in consideration of the premises, that they will make and keep in repair on both

sides of said road a sufficient fence, as soon as practicable after the commencement of running the trains across said land—not exceeding twelve months; that they will make cattle guards where the road enters upon and leaves said land; that they will make two cattle passes over said road, and that they will pay to said Mecum the sum of six hundred dollars, one hundred dollars of which shall be paid by the construction of a cattle pass under said road at the large slough across which the same passes, and five hundred dollars remaining to be paid by the note of said company, due in one year, with interest, with the privilege to said Mecum to take five shares of stock in said company in lieu of said five hundred dollars and interest, if he elects to do so at any time before said note is due.

"This contract and agreement to be binding and obligatory upon both the parties aforesaid, if approved by the board of directors of said company, else to be void."

The case was tried on an agreed state of facts as follows:

"The board of directors of said railroad company approved the contract set out in the declaration, on the 10th day of October, 1854. The defendants took the right of way mentioned in said contract, at or about the date of said contract, and have ever since held, used and run their trains of cars across the same. The defendants have not paid the note declared on. The defendants have never built the fences, passes and cattle guards specified in said contract, or any or either of them; nor has the plaintiff built the same. The cost and value of such fences, passes and cattle guards is six hundred and sixty-three (663) dollars. The plaintiff has not shown any *special damage* other than the loss of the land which the defendants have taken, and the necessary division of his farm thereby. The plaintiff is entitled to verdict and judgment for the amount of the note declared on and interest. The only question in the case is, whether the plaintiff ought to recover, in addition thereto, the cost and value of such fences, passes and cattle guards."

The court below rendered judgment for the amount of the note, but refused to compute the damages sustained by reason of the non-fulfillment of the undertakings, contained in the agreement on the part of the railroad company.

In this we think the court was right. The agreement itself did not convey the title to the land to the company. It was but an agreement to convey. By the terms of the agreement, until the land was conveyed, the duty did not arise on the part of the company to perform the stipulations on their part contained in the agreement. If they chose to give the note before the conveyance, very well;—they must be bound by it, but that did not create the duty to fulfill the other stipulations. Mecum, in con-

sideration of the premises, agreed to convey the land, and the company "in consideration of the premises" agreed to make fences, cattle guards, etc., as well as to give the note. These undertakings are dependent and neither can complain of the other till he has performed on his part. In consideration of the premises, that is the conveyance of the land, the company agreed to do the specified acts. He could not convey the land to another or retain the title himself and still compel the company to perform. The question presented now is the same as if he had refused to convey or had even conveyed to another, of whom the company would have again to purchase it. Courts will not and ought not to construe covenants and agreements independent, where one party may refuse to perform and still enforce performance by the other, unless there is no other mode of construing the instrument—unless it clearly appears, that such was the deliberate intention of the contracting parties, at the time the instrument was executed. In such a case courts of law must enforce it, however unjust and oppressive it may be, and the party if he has any remedy must seek it in a court of equity. In this case however, we have no trouble of that sort. There is nothing to show that the intention was that one party could neglect or refuse to perform and still sue the other for non-performance.

The judgment must be affirmed.

Judgment affirmed.

Andrew Garrison, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO THE RECORDER'S COURT OF THE CITY OF CHICAGO.

Henry and Harry are distinct names, and in a proceeding by *scire facias*, if it is assumed that the one name is a corruption of the other, proper averments should be used, or the judgment, if by default, will be erroneous.

A default admits the truth of the averments in a *scire facias*.

A *scire facias* upon a recognizance to appear and answer from day to day until discharged, is good, although no indictment was presented to the grand jury.

This was a *scire facias* out of the Recorder's Court of the city of Chicago, upon the following recognizance:

This day come the said People, by Carlos Haven, State's Attorney, and the said defendant, being three times solemnly called, came not, nor any one for him, but herein fails and

makes default, and Andrew Garrison, security for the said Henry Freelove, being three times solemnly called, that he produce the body of said defendant, and failing therein, thereupon

It is ordered by the court that the default of the defendant and his security be entered of record, and that *scire facias* issue, returnable to the next term of this court.

STATE OF ILLINOIS, }
COUNTY OF COOK, }
City of Chicago. }

The People of the State of Illinois, to the Sheriff of Cook County, GREETING:

WHEREAS, on the twenty-fifth of March, A. D. 1858, Harry Freelove and Andrew Garrison appeared before John King, Jr., a justice of the peace in and for said county, and entered in recognizance, in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

This day, personally appeared before the undersigned, one of the justices of the peace in and for said county, Harry Freelove and Andrew Garrison, and jointly and severally acknowledged themselves to owe and be indebted unto the People of the State of Illinois, the sum of one thousand dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the premises and conditions following, to wit:

Whereas, the above bounden Harry Freelove, on the 25th day of March, A. D. 1858, was examined by and before John King, Jr., justice of the peace in and for the county aforesaid, on a charge preferred against him for bigamy, and upon hearing the testimony of all the witnesses present, (they having been duly sworn) was adjudged and required by said justice to give bonds, as required by the statute in such cases made and provided, for his appearance to answer to said charge. Now, the condition of this recognizance is such, that if the above bounden Harry Freelove shall personally be and appear before the Recorder's Court of the city of Chicago, in the said county of Cook, on the first day of the next term thereof, to be holden at the court house in Chicago, on the first day of the next term thereof, A. D. 1858, and from day to day thereafter, until discharged by order of said court, then and there to answer to the said People of the State of Illinois, on said charge of bigamy, abide the order and judgment of said court, and not depart the same without leave, then, and in that case, this recognizance to become void; otherwise to be and remain in full force and virtue.

As witness our hands and seals, this twenty-fifth day of March, A. D. 1858.

Taken, entered into and acknowledged before me, this 25th day of March, A. D. 1858.

HENRY FREELOVE. [L.S.]
ANDREW GARRISON. [L.S.]

JOHN KING, Jr.,
J. P.

Which said recognizance was filed in the clerk's office of the Recorder's Court, on the 25th day of March, A. D. 1858.

And whereas, at the April term of said Recorder's Court of the city of Chicago, begun and held at the court house, on the first Monday of April, A. D. 1858, in the city of Chicago, in said county of Cook, the said Henry Freelove being three times solemnly called to answer to the charge preferred against him, in said recognizance set forth, came not, nor any one for him, but herein failed and made default; and the said Andrew Garrison being three times solemnly demanded that he bring the body of the said Henry Freelove into court, or that his said recognizance would be declared forfeited, came not, nor any one for him, nor did he produce the body of the said Henry Freelove, but made default herein, which was taken and entered of record against the said Henry Freelove and Andrew Garrison, and their recognizances declared forfeited.

Now therefore, we command you that you summon the said Henry Freelove and Andrew Garrison, if they shall be found in your county, personally to be and appear before our Recorder's Court of the city of Chicago, in the county of Cook, and State of Illinois aforesaid, on the first day of the next term thereof, to be holden at the court house in said Chicago, on the first Monday of June next, then and there to show cause, if any they have or can show, why the forfeiture aforesaid should not be made absolute, and the People of the State of Illinois have execution to make the amount of the same, according to the force, form and effect of the said recognizance; and have you then and there this writ, with an endorsement thereon in what manner you have executed the same.

The sheriff's return was, "Served on Garrison; Freelove not found."

The following order and judgment appear of record: And now come the said People, by Carlos Haven, State's Attorney, and it appearing to the court that the said defendant, Andrew Garrison, has been duly served with process of *scire facias*, and the said defendant, Henry Freelove, being now three times solemnly called, comes not nor any one for him, but herein fails, and the said defendant, Andrew Garrison, having been again called to produce the body of the said defendant, Henry Free-

love, and failing therein, and also failing to show cause why the said default should not be made absolute, according to the force and effect of said recognizance in said *scire facias* mentioned,

Thereupon it is ordered by the court, that the said People of the State of Illinois do have and recover of the said defendant, Andrew Garrison, the said sum of one thousand dollars in said *scire facias* mentioned, together with their costs and charges in and about this suit, in that behalf expended, and have execution therefor.

Garrison & Hudson, for Plaintiff in Error.

W. Bushnell, State's Attorney, for the People.

Walker, J. This was a *scire facias* on a recognizance, entered into by Harry Freelove and Andrew Garrison, before a justice of the peace, for the appearance of Freelove before the Recorder's Court of Cook county, to answer a charge of bigamy. The recognizance was returned into that court, and the cause was docketed against Henry Freelove, and he and his bail were called, failed to answer, and a default was entered against them, and a *scire facias* was awarded. The *scire facias* was against Henry Freelove and Andrew Garrison, which was served on the latter, but returned not served on the former. The plaintiff in error was called, and failing to plead, a default was entered and execution was awarded against him. To reverse which, he prosecutes this writ of error.

It is objected that Henry Freelove and not Harry Freelove was called and defaulted. While the name of Henry is sometimes corrupted into Harry, yet they are separate and distinct names. We cannot therefore hold that they are the same, unless it were shown by averment and proof. Had the *scire facias* averred that Harry Freelove and Henry Freelove were one and the same person, and the averment had been sustained by proof, or its truth admitted by the default, the judgment would be sustained. *Graves* v. *The People*, 11 Ill. R. 542. But, failing in this, the judgment awarding execution, was erroneous.

It is likewise urged, that the recognizance set out in the *scire facias* does not appear to have been filed, and become a matter of record in the Recorder's Court, before the forfeiture was taken. There is an averment in the *scire facias*, that the "recognizance was filed in the clerk's office of the Recorder's Court, on the 25th day of March, A. D. 1858," and the forfeiture was had at the April term following. The default admits the truth of all the averments in the *scire facias*, and the party in error cannot contradict that admission. Had the plea of *nul tiel record*

been interposed, the party could have raised the objection, but he has waived that right by permitting the default to be taken. This averment is sufficient to sustain the judgment on the default, and there is no error in not setting out a copy of the endorsement of the filing by the clerk, on the recognizance, in the *scire facias*.

It was again objected that the *scire facias* contains no averment that an indictment was presented against the principal cognizor. By the terms of his recognizance, he bound himself to appear on the first day of the next term of the court, and from day to day thereafter, until discharged by the court, and then and there to answer the People of the State, on the charge of bigamy, and to abide the order and judgment of the court, and not depart the same without leave, then his recognizance was to be void, otherwise to be in full force. The plaintiff bound himself by becoming his bail, that the principal cognizor should perform these several acts. And when Freelove failed to appear, and plaintiff in error failed to produce him, when called in open court, at the term to which he had bound himself to appear, the recognizance became forfeited, and the plaintiff in error could not discharge himself from the forfeiture, but by surrendering the principal into custody, before execution was awarded on the recognizance. The provision of the constitution, that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury," has no application to an appearance according to the terms of his recognizance. The bail had the undoubted right to have surrendered him in open court, before the finding or presentment of an indictment, which would have been a compulsory appearance in court, though it would in neither case have been an appearance to answer a charge of a criminal offense, but to await the presentment of the grand jury. Had he failed to procure bail, he would have been committed to prison, to await the presentment of the grand jury, and yet, it will hardly be contended that such imprisonment would be a violation of this constitutional provision. He was in the custody of his bail, who was his jailer for the time being, and yet, such custody is not a violation of this provision, although he is held by his recognizance and his bail, to answer any criminal charge which might be presented against him, and this too, before the presentment of an indictment.

The judgment of the court below, awarding execution, must be reversed, and the cause remanded, with leave to amend the *scire facias*.

Judgment reversed.

Louisa Townsand, Plaintiff in Error, *v.* Thomas A. Townsand *et al.*, Defendants in Error.

ERROR TO KANKAKEE.

It is error to render a decree for a divorce by default, when there has not been any service of process.

April 2nd, 1855, Jonathan B. Townsand, who was the father of the defendants in error, filed his bill against the plaintiff in error, for a divorce. The bill alleges marriage of the parties in Canada, in 1852, their removal to Illinois, 1853.

Summons issued same day. The summons was returned not served, the defendant not being found in the county. A copy of an affidavit, of one George Chipman, is among the papers, stating that he read and delivered a copy of the bill to the plaintiff in error, in Chicago, April 2nd, 1855; but that affidavit is not made a part of the record in any way.

A decree of divorce was rendered, May 16th, 1855.

Since this writ of error was brought, Jonathan B. Townsand died. The defendants in error are his heirs at law.

The error assigned is, that the court erred in rendering a decree, without having service of process therein.

Glover & Cook, for Plaintiff in Error.

Caton, C. J. The summons in this case, was returned not served. The court proceeded to default the defendant, and rendered a decree, divorcing the parties, without noticing, no doubt, that there had been no service. The decree must be reversed.

Decree reversed.

WILLIAM WILLIAMS, Appellant, *v.* JULIUS M. WARREN, Appellee.

APPEAL FROM COOK.

Boundaries to land may be ascertained by the aid of parol evidence, which may be used to identify, explain or establish the objects of the call in the deed. A deed will not be held void for want of description, until such evidence has been resorted to and failed.

All monuments, objects and things referred to in a deed, for the purpose of locating a tract of land, may be established and identified by evidence extrinsic the deed.

A tract of land mentioned in an award, may be ascertained in the same way, or by the same proofs, as if it were mentioned in a deed. A description, if sufficient in a deed, will also be sufficient in an award.

A court of equity may rectify a mistake of arbitrators, in omitting the name of the person from an award to whom certain land was to be conveyed, if the proof is clear and explicit as to what was intended by the arbitrators.

The language of the submission will control the powers of the arbitrators.

THIS bill of complaint was filed in Circuit Court of Du Page county, and by change of venue was re-filed in County Court of Cook county, and again filed April 3rd, 1851, in Circuit Court of Cook county.

The bill sets out the following bond of submission:

"*Know all Men by these Presents*, That I, William Williams, of the county of Du Page, and State of Illinois, am held and firmly bound unto Julius Warren, Warren Smith, Joseph Wilson and Reuben Austin, of the same county, in the sum of one thousand dollars of good and lawful money of the United States, to be paid the said Warren, Smith, Wilson and Austin, their executors, administrators or assigns, for which payment well and truly to be made I do bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal, dated this *seventeenth* day of September, A. D. 1844.

"The condition of this above obligation is such, that if the above bounden William Williams, his heirs, executors and administrators, on his and their part, shall and do, in all things, well and truly stand to, obey, abide by, perform, fulfill and keep the award, order, arbitrament and final determination of James Brown, David McKee and Timothy Woodward, arbitrators indifferently elected and named, as well on the part and behalf of the above bounden Williams as of the above named Warren, Wilson, Smith and Austin, to arbitrate, award, order, adjudge and determine, of and concerning all and all manner of actions, cause and causes of action, quarrels, controversies, damages and claim whatsoever, at any time heretofore had, made, suffered, committed, or depending by and between the said parties, for or on account of, concerning or in any wise affecting the following

described real estate, situate, lying and being in the county of Du Page, and State of Illinois, and known and described as being the south-west quarter of section number thirty-one, (31,) in township number thirty-nine (39) north, of range number nine (9) east of the third principal meridian, and which is the same property to which the said Williams has proved up a pre-emption right, and which said pre-emption right is contested, and also all other the lands, real estate and property belonging to either or any of the above named Julius Warren, Warren Smith, Joseph Wilson and Reuben Austin, which may be affected by the award to be made by the said arbitrators, *the object being to settle all disputes that may exist between the parties as to claim lines, whether said claims have become the deeded property of any of the parties hereto or not*, so as the said award be made in writing, under the hands of the said Brown, McKee and Woodward, or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before five o'clock, P. M. of Thursday, the nineteenth day of September, in the year of our Lord one thousand eight hundred and forty-four, then this obligation to be void, or else to remain in full force. And the said William Williams further covenants to and with the said Warren, Wilson, Smith and Austin, that the said submission shall be made to the above named arbitrators on their own knowledge, no evidence to be adduced on the part of either party; and said Williams further agrees and covenants to pay the sum of one thousand dollars to said Warren, Wilson, Smith and Austin, if he fails, refuses or neglects to perform, upon his part, the award to be made by said arbitrators, when the same shall be made, and the said sum of one thousand dollars is hereby declared to be liquidated damages, to be recovered by the said Warren, Wilson, Smith and Austin, from said Williams, upon his making such failure, refusal or neglect to perform said award as aforesaid; and the said Williams further covenants and agrees, under the same penalty, to and with the said Warren, Wilson, Smith and Austin, that in case his pre-emption shall be set aside, and any member of his family, or any person for him, or claiming under or in his right, or by his suggestion or direction, shall obtain said premises, that he will obtain from them such conveyances or disposition of any portion of said premises as said award shall require and direct, to such persons as shall be directed in said award."

The bill avers the making of a bond of like penalties and like conditions on the part of complainants, the delivery thereof, on the day and date of former bond, to said Williams, and its acceptance by him. Also avers that it was mutually understood

that said Wilson would not be a party to said arbitration, nor join in said bond.

The bill further avers, that on the 19th day of September, 1844, the said arbitrators, by the consent of all the parties, proceeded to arbitrate and adjudge in the premises, and on that day did award and adjudge, *in substance*, as follows:

"The decision of arbitrators, in suit pending between J. Warren, W. Smith and R. Austin, of one part, and Wm. Williams, is as follows: the said Williams shall deed to said R. Austin up to his original claim line in the timber, and said Austin is to pay to said Williams one dollar and twenty-five cents an acre, with twelve per cent. interest from the time the land was paid for up to the time of receiving of his deed, which shall be within sixty days; a warranty deed.

"Also said Williams shall deed to said W. Smith, in the timber up to his original claim line, for which said Smith shall pay to said Williams government price from the time the land was paid for at the office, with twelve per cent. interest until he receives his deed, which shall be within sixty days; a good warranty deed.

"The decision of the arbitrators is as follows: said William Williams shall deed twenty-two and a half acres off from the east side of the east eighty of fractional quarter that Williams pre-empted in the *big woods*. Furthermore, it is decided that each party shall pay what costs they have caused to be made."

There was the following further award on a separate piece of paper:

"The decision of the arbitrators in the suit now pending between J. Warren, Warren Smith, R. Austin, is as follows: the said Warren Smith shall deed up to the original claim line on the prairie, which said Smith pre-empted, and said William Williams shall pay to said Smith government price, with twelve per cent. interest from the time the land was paid for until Williams receives his deed, which shall be within sixty days; a good and sufficient warranty deed. Each party shall be at the expense of surveying, and their deeds; furthermore, it is decided that each party shall pay what costs they have made."

Complainants represent that said award was, on said September 19th, 1844, delivered to said Williams, and has been ever since in his possession, and they have not been permitted to see it, and ask that said Williams be compelled to produce and file the same. Also represent that said award was made as aforesaid, ready to be delivered by the time specified in said bond; and also that the land awarded to said Austin amounted to $6\ \frac{65}{100}$ acres, and was part of tract pre-empted by Williams; and also the land awarded to said Smith amounted to $36\ \frac{49}{100}$ acres, and

that said Smith did, within said sixty days, tender to said Williams the sum of $1.25 per acre, with twelve per cent. interest, pursuant to said award, and that Smith offered, and is ready to convey to Williams, pursuant to same.

Complainants further represent that the arbitrators, in awarding the 22½ acres, to be deeded as in said award is mentioned, by *mistake* and *accident* left out the name of said Julius M. Warren as grantee of said conveyance; that the lands to be deeded as per award, by said Williams to complainants, were part of same tract mentioned in said bonds, and of the same lands pre-empted by Williams, to wit: part of S. W. ¼, S. 31, 39, 9, and the same was in dispute between the parties, and also that the land awarded to be deeded to Williams by Smith, which he had purchased, was part of S. W. ¼, S. 35, 39, 9.

Specific relief asked. That said Williams convey according to said award. Oath not waived.

Leave was given complainants to amend their bill.

An amended bill was filed first, November 7th, 1849, in Cook County Court.

Said *amended* bill mentions *original* bill, *change of venue*, and the order of Cook County Court granting leave to *amend* the bill. *Amended* bill sets out that on or before September 17, 1844, certain disputes between the parties existed, in relation to their claim lines, and the equity and right of title of said complainants to parts of said S. W. ¼, S. 31, 39, 9, to which said Williams had proved up a pre-emption, and to determine these disputes and their equitable rights, the parties agreed to arbitrate, and that said Williams, for this purpose, entered into the following bond: (which is before recited.)

Complainants aver the making and delivery of bond on their part, and the withdrawal of Wilson by consent of all parties, as in *original bill.*

Complainants represent that on September 19, 1844, said arbitrators having assumed the burden of arbitration, did, by the consent of said Williams, the parties being present, arbitrate and award in the premises, and made their award in writing, under their hands and seals, and were about to make copies thereof, to be delivered to the several parties, but upon the solicitation of Williams, and his false pretenses and representations, they delivered said award to him, and that he fraudulently retained the same, and refused to deliver or to show the same to said arbitrators, or to said complainants.

Complainants *charge* that the counsel of Williams has given them what he *pretends* is a copy of said award, *in substance*, as follows: (which award is before recited, appearing on two pieces of paper.)

Complainants represent that it is represented by said arbitrators that said *pretended* copy is not a true copy of said award, as made by them and delivered to said Williams, as aforesaid, but that the *original* award so made by them, awarded the 22½ acres to said Julius M. Warren, and therefore the said Warren especially charges that said tract was awarded to him, and that his name had been fraudulently erased, by said Williams, or some one, from said award, and they charge if said *pretended* copy is a true copy, the name of Julius M. Warren was omitted in said award by mistake.

They represent that the award was ready to be delivered by the time specified in said bond, but the same was prevented from being copied and delivered, by the fraudulent representations and conduct of said Williams.

They further represent that the land awarded to Austin amounted to 6 $\frac{65}{100}$ acres, and was part of the land pre-empted by Williams; that they were ready and offered to pay $1.25 per acre, and twelve per cent. interest thereon, for said land, and they aver that Williams, within said sixty days, upon the offer of said Austin to pay said money and interest thereon, refused to convey the said land. And also that the land awarded to said Smith amounted to 36 $\frac{49}{100}$ acres; that Smith, within said sixty days, tendered to Williams $1.25 per acre, with interest thereon, as aforesaid, and also a readiness to perform, at all times, the said award on their part; and also that Smith was ready and offered, and still is ready to convey to Williams, pursuant to said award.

They aver that said Warren, within said sixty days, tendered to said Williams the sum of $1.25 per acre, with interest thereon at twelve per cent., for the land so awarded to him, and he now offers to pay the same; also avers that said lands awarded to be deeded by Williams, were parts of land mentioned in said bond, and part of the same pre-empted by him, to wit: S. W. ¼ S. 31, 39, 9, and that the land awarded to Williams, is part of S. W. ¼ S. 35, 39, 9, purchased by said Smith of government, and which said land, up to claim lines, amounts to 9 $\frac{78}{100}$ acres, and that they file a deed thereof to said Williams, for reference, etc.

Tract awarded to Austin: Com. at S. E. cor. of S. W. ¼, S. 31, thence N. 84 rods, thence W. 4 rods 13 links, thence on a direct line to strike S. line of said S. W. ¼ 13 rods W. of said S. E. cor., thence E. 13 rods, to beg., containing 6 $\frac{36}{100}$ acres.

Tract awarded to Smith: Com. 13 rods W. of said S. E. cor., thence W. to W. line of said sec., thence N. 32 rods, thence E. parallel with S. line to strike said Austin's W. line, thence

southerly along Austin's W. line, to south line of section, containing 36 $\frac{49}{100}$ acres.

Lands awarded to Warren, being 22½ acres off of the east side of said S. W. ¼ Sec. 31, exclusive of the lands awarded to Austin and Smith.

Tract awarded to Williams. Com. on W. line of Sec. 35, 3.75 chains from S. W. cor. of said Sec., thence N. 5 deg. 10 min. on section line 34 chains 16½ links, to centre of highway, thence along centre of highway, 4 deg. 15 min. S. of E. 5 chains 80 links, thence S. 5 deg. 15 min. W. 32 chains 25 links to beg., containing 9 $\frac{78}{100}$ acres, all of said lands being in T. 39, R. 9 E. of 3rd P. M.

The bill shows a conveyance of lands awarded to Williams, by said Smith and wife, August 13, 1847, to George Packard, and a conveyance of said lands by Packard and wife, August 31, 1847, to said Julius M. Warren, and an offer of Warren to convey to Williams, as per award.

Complainants aver a readiness to perform said award on their part, and a refusal on the part of Williams.

Specific relief prayed as in original bill.

The answer of defendant says that on Sept. 17, 1844, he had proved up a pre-emption, and purchased at the land office of the United States, said S. W. ¼ of Sec. 31, 39, 9, in the timber, and that said land, in all respects, lawfully and legally was his property. Also says that at and before said time he had made a claim to other land upon the prairie, and had made claim lines, which were well known to complainants; that he had pre-empted the said prairie, and entered the same, except a small strip of about nine acres; which was cut off from his claim by the government survey, and was entered by said Smith, with a full knowledge of his right thereto, the same having been improved and fenced by said defendant, and in his actual possession, and that said Smith, at the time he entered said strip, agreed to convey the same to him; that he settled upon said lands and made the claim thereto in 1834, and had remained in possession ever since.

Defendant admits that on or about Sept. 17, 1844, there did exist some disputes between the parties, *as to where some original claim lines run*, and for the purpose of defining and settling these lines, the parties agreed to submit the same to the arbitrators aforenamed, and that said bond may be a copy, and that said complainants executed a bond of submission to him. He states that he has no recollection about Wilson withdrawing from said arbitration, or of any agreement in relation thereto.

He denies that said arbitrators determined or adjudged the disputes referred to them. He admits that said arbitrators met

about the time stated in said bill, and for the purpose therein stated; that he was present, but that all of complainants were not present.

And he says that while they were so together, the said arbitrators had the custody and possession of the bonds of submission, and then and there made and signed what they called their "decision," on two separate pieces of paper, and one or more of said arbitrators asked who would pay for their time, etc., and said they would not give up the papers until they were paid; defendant asked if they would trust him; they said they would, and upon his promising to pay, they gave him the bond coming to him, and two pieces of paper, called their "decision."

He avers that said arbitrators professed to have concluded their labors, and that nothing was said about making copies, but that they separated without any intention expressed of meeting again. He says he has no recollection of promising said arbitrators to return to them said pieces of paper, or of their requesting him so to do, or of his refusal, and that said decision of said arbitrators was not altered after the same was given him, that he soon thereafter handed the same to his counsel, Scammon & Judd.

He denies that said complainants, or either of them, within said sixty days, or at any time since, tendered to him any money for any of said lands, and that said Smith ever tendered to him a deed of said *prairie lands*, in said bill and said decision mentioned, but, on the contrary, alleges that said Smith ever refused to give him a deed of said *prairie lands;* and after said decision, said Smith sold said prairie land to George Packard, who afterwards sold the same to said Warren, who has for the last five years deprived him of the possession thereof.

He avers that he was in the country, and made his claim to the timbered land aforesaid, long before Smith or Austin came into this State, and that said quarter section did not embrace any land of theirs whatever, nor were they entitled to any portion thereof, nor was said Warren entitled to any part thereof in law or equity. Also avers that said arbitrators had no power to award that either party should convey to the other, or, if at all, it was only in case his pre-emption should fail; and he avers that the same did not fail, but that his title to said quarter section remained perfect; that it was the duty of said arbitrators only to fix upon, determine and locate the claim lines of the respective parties, as stated in the bond.

He avers that having awarded in matters outside of said bond of submission, their said decision and award is void. He denies that said arbitrators made any mistake, except in the subject of difference submitted to them. He states if said arbitrators had

authority to direct conveyances (which he denies) the said award is *uncertain* and *void;* it leaves the parties to determine where the claim lines run, and to make surveys; uncertain in description, in quantity, and as to parties.

He says that the bond given by complainants to him, and said papers, delivered to him by said arbitrators, cannot now be found; that he believes the same have been lost or mislaid.

A general denial of all other matters not answered unto, confessed, admitted, or denied.

Complainants afterwards filed their *supplemental* bill, with an order for an injunction. Said supplemental bill is the same in substance and effect as the amended bill, and was filed for the purpose of enjoining said defendant from committing waste, etc.

The answer is same in substance and effect as defendant's former answer to amended bill. He admits he has taken timber from said premises, and claims he has a perfect right so to do, as he is advised and believes.

October 25th, 1858, a decree was entered as follows, by MANNIERE, Judge.

Decree recites that, *it appearing* to the court from the amended bill, etc., proofs, etc., and *testimony of James Brown, taken after the hearing of the cause*, that prior to September 17, 1844, claims had been made upon government lands in DuPage county, by the several parties, and one Joseph Wilson, and that disputes had arisen about the rights of the parties, growing out of their claims; that to settle these disputes, on said September 17, 1844, they, with said Wilson, submitted these matters of difference to Timothy D. Woodward, Joseph Brown, and David McKee, for arbitration; that said Joseph Wilson, by mutual consent of the parties, withdrew from the arbitration; that said arbitrators did, on September 19, 1844, arbitrate in the premises, and make their written award as follows: (setting it out); that the subject of submission and award was concerning real estate in DuPage county, Ill., known as S. W. ¼ Sec. 31, 39, 9, pre-empted and purchased by said Williams; that said Austin, previous to the pre-emption, had paid the son and agent of said Williams, $1.25 per acre for the land so awarded him; that Williams had refused to convey the same; it is therefore ordered, etc., that Williams, within thirty days, convey to said Austin that part of said S. W. ¼ Sec. 31, 39, 9, up to his, said Austin's, original claim line, so awarded to be conveyed by said Williams to said Austin.

It also appearing, that within sixty days from the making of said award, Smith offered to pay Williams $1.25 per acre for each acre awarded to him, and 12 per cent. interest from the date of purchase of said land, (being $46.60,) and demanded

a conveyance, and that Williams refused the money and to make the conveyance, it is further ordered, etc., that Smith pay Williams, within ten days, the sum aforesaid, and that thereupon said Williams, within thirty days, convey by warranty deed, to Smith, that part of said S. W. ¼ Sec. 31, 39, 9, in the timber, up to his, said Smith's, original claim line.

It also appearing, that in the award, (here follows that part which mentions the 22½ acres,) the name of Julius M. Warren was omitted by mistake, and that it was the determination of said arbitrators that Williams should convey said 22½ acres to said Warren, it is therefore ordered, that the said award, in this respect, be corrected by inserting the name of Julius M. Warren after the words "big woods;" and it further appearing from the amended bill, etc., proofs and testimony of James Brown, introduced as aforesaid, the said fractional quarter section pre-empted by Williams was in the "big woods," and is the S. W. ¼ Sec. 31, 39, 9, and that said 22½ acres was awarded to be taken from the east side of east eighty of said quarter Sec., after taking out of said quarter Sec. the land awarded to said Austin and Smith, It is ordered, that Williams within thirty days, convey to said Warren 22½ acres off from the east side of east eighty of the fractional quarter section that Williams pre-empted in the big woods; that such conveyance be made off the east side of said eighty, exclusive of that decreed to be conveyed to Austin and Smith.

It also appearing, that Williams had made claim in the prairie, that the lines of said claim run over and upon the south half of Sec. 35, 39, 9, on that part thereof pre-empted by Smith; that said arbitrators awarded Smith to convey to Williams up to his original claim lines on the prairie, which Smith pre-empted; and said Williams should pay within 60 days to said Smith government price therefor, and 12 per cent. interest thereon; and that said Smith did within said 60 days offer to convey said land so awarded, on the said Williams paying him $1.25 per acre, and interest thereon as aforesaid; that Williams refused to receive said deed and pay said money, and that by the amended bill, and amendment thereto, made upon the hearing, etc., proofs, etc., that the land so awarded to be conveyed to Williams, is part of south half of section 35, 39, 9, (metes and bounds and courses given); that said land was conveyed by Smith to Packard, and afterwards by Packard to Warren, and Warren having, by the said amendment, averred his readiness to convey according to said award: It is therefore ordered, etc., that within 30 days said Williams pay said Warren $1.25 per acre for each acre of said land so awarded, with 12 per cent. interest thereon, as aforesaid; and that thereupon said Warren did con-

vey the said land to said Williams, up to the original claim lines on the prairie which said Smith pre-empted.

To all of which orders, etc., the defendant at the time excepted.

Goodrich, Farwell & Smith, for Appellant.

Farnsworth, Eastman & Beveridge, for Appellee.

Walker, J. It is urged that the award is uncertain in fixing the boundaries of the portions of land to be conveyed, by reference to claim lines. When grants and conveyances of lands are made, the usual mode of describing the premises, conveyed, is by reference to natural or artificial monuments as boundaries, and by means of which the premises may be found and distinguished from other tracts or parcels of land. The same object is also attained by describing the premises conveyed by a specific name; but in either case the location is not always determined alone by the description in the conveyance, independent of extrinsic evidence. The deed describes the objects bounding the premises, but parole evidence usually is resorted to, for the purpose of identifying the objects themselves. And no principle of law is better settled than that any description adopted in a deed, by which the premises intended to be conveyed, may be identified and distinguished from all other lands, is sufficient. And it is equally well settled that all monuments, objects and things referred to in the deed for the purposes of locating the land, may be established and identified by extrinsic evidence. In most instances, however perfect the description employed by the conveyance, the premises could not be located and identified, without reference to extrinsic evidence, either more or less proximate. And for the purpose of sustaining a grant, extrinsic evidence may always be used to identify, explain or establish the objects of the call in the deed. And when calls are made, whether of objects or of distance, courts will never presume that the same may not be established by parole evidence, and will not until such evidence has been resorted to and failed, hold a deed void for want of description. But it is otherwise when there is a want of all description.

In this case the award requires conveyances to be made of certain portions of land, by the parties, up to the original claim line. Now if the term claim line, has either a general or local specific meaning which will enable the boundary to be found and identified, it is sufficient to enable the land to be located, and would therefore be sufficient to support the grant. It is not necessary to the validity of a conveyance that the most public,

notorious and easily proved objects, should be adopted in the description. The parties may if they choose, adopt others, and if the thing referred to has an existence and is capable of identity by proof, it is sufficient. The arbitrators in this case have referred to "original claim lines," as things that have an existence, and we will not presume that they do not exist, or that they are incapable of being located and established by proof. When used they are as definite as the lines of the government surveys, and if the call had been for such lines, it would not have been more certain that it is by this description. And if contained in a deed, it would be amply sufficient, and no reason is perceived, why it is not equally good in an award.

It was also urged that the award was insufficient, inasmuch as it left the land, to be surveyed by the county surveyor. In this objection we are unable to perceive any force. Here were different persons having conflicting claims, to portions of the same lands, and to settle these disputes, they submit the matter to arbitrators of their choice, who after having heard and investigated the matters in dispute, award that one of the claimants, shall convey a certain portion on a designated side of the land he claims, running up to the original claim line, to another claimant. And so of all the others. Now if a deed of conveyance is executed for a certain number of acres to be taken from a designated side or end of a described tract of land, it would not be denied, that such a description would be abundantly certain to pass the land. No one would contend that the grant was void, because the survey had not been made, the lines and corners established, and the monuments erected and described in the deed. Nor would it be contended that it was void because it would have to be surveyed to designate the land and fix the boundaries, to conform to the call of the deed. And no reason is perceived, why a description which is admitted to be sufficient in a deed, should not also be good in an award. We do not perceive any force in the objection, that when the survey shall be made, that a contest and dispute may be produced as to its correctness.

Had the arbitrators located and designated the lines, the parties could if they were disposed to be contentious, have just as readily disputed as to where they had been located, as to dispute the correctness of the survey when made. The question is not can the parties dispute the things settled, but does the award on its face, leave the rights of the parties so uncertain, as to render litigation necessary to determine what those rights are. For with the contentious, all things may be disputed however clear and certain they may be. In this case, the award on its face, does show that the land is capable of being located and

designated with absolute certainty, if the claim lines called for have an existence that can be established. When we take into consideration that these parties had made and surveyed their claims to these lands, before the government surveys were made; and that when they purchased of government, it was the mutual agreement of the parties that they should severally hold according to their claim lines, and not in accordance with the government lines, by which their purchases were made; and that they would convey to each other in conformity with that agreement, all difficulty is at once removed. We then see, that as some of the parties had refused to convey the portions held by them and embraced within the boundaries of the claims of the others, to avoid litigation, the matter was submitted to arbitration; and when the expression is used to convey up to the claim lines, reference is had to the lines established by the parties, when they located their several claims. And for aught that appears, those claim lines may be as notorious and as certainly established as those of the government surveys. We therefore think, that the award is not so uncertain as to render it void. If the parties should be unable to locate and establish these claim lines, they are left in precisely the same situation of a party who holds lands by patent, from the government, and should be so unfortunate as to be unable to establish its boundaries; or a person who holds a conveyance for lands described by objects, that cannot be found, so as to designate the lands. The court could not until proof was heard, determine that the deed was void. In this case, witnesses testify that they can locate the premises by the description used in the award, and if that be so, the description must be held sufficient for the purposes of this proceeding.

It was again objected that the court had no power to rectify the mistake of the arbitrators, in omitting the name of Julius M. Warren, as the person to whom the twenty-two and a half acres was directed to be conveyed. There is no head of chancery jurisdiction more firmly established than that mistakes may be corrected by a court of equity. And under this branch of chancery jurisdiction, deeds, covenants, contracts, agreements, notes and every species of writings, except wills and deeds of *femmes covert*, are reformed and mistakes corrected, so as to conform to the intention of the parties. And awards should not be, nor are they an exception to the rule. Records, judgments and decrees, are constantly amended in accordance with the facts, and in promotion of justice, and for the purpose of securing the rights of parties, and every principle of equity and good conscience, would require that the same rule should be applied to awards. But in making such corrections the evidence should

be clear and explicit, as to what was intended by the arbitrators, and that it was an accidental omission by mistake. In this case the award on its face shows there was a mistake, in omitting the name of the person to whom the conveyance was to be made, and the proof is clear and explicit, that Julius M. Warren's name was intended to have been inserted, but by mistake was omitted. This is different from an effort to insert a new clause, varying the provisions and terms of an award, but is only carrying out provisions already made by the award. It had required the appellant to convey this land, but omitted the name of the grantee. By the insertion of the name of appellee the rights and obligations of appellant are not increased or changed; he is still but required to convey the land specified in the award.

It was also urged, that the submission did not authorize the arbitrators to award conveyances. The language of the submission, referring the differences to the arbitrators, is as follows: "To arbitrate, award, order, adjudge and determine of and concerning all, and all manner of actions, cause and causes of action, quarrels, controversies, damages and claim whatsoever, at any time heretofore had, made, suffered, committed, or depending by and between the said parties, for or on account of, concerning or in anywise affecting the following described real estate, situate * * * * * * and which is the same property, to which the said Williams has proved up a pre-emption right, and which said pre-emption right is contested, and also all other the lands, real estate, and property belonging to either or any of the above named Julius Warren, Warren Smith, Joseph Wilson and Reuben Austin, which may be affected by the award to be made, by the said arbitrators; the object being to settle all disputes that may exist between the parties, as to claim lines, whether the claims have become the deeded property of any of the parties hereto, or not, so as the said award be made in writing," etc. It was also by the submission agreed, that the award should be made on the knowledge of the arbitrators, without hearing evidence, and the appellant covenanted to perform the award; and "that in case his pre-emption shall be set aside, and any member of his family, or any person for him, or claiming under or in his right, or by his suggestion or direction, shall obtain said premises, that he will obtain from them such conveyances or disposition of any portion of said premises, as said award shall require and direct, to such person as shall be directed in said award." When this language is considered, it will be seen that it is broad and comprehensive enough, to embrace the power to award in regard to all disputes growing out of the questions of ownership, to the various portions of these lands.

It is true, that it does recite, that the object is to settle all disputes that may exist between the parties, as to claim lines, whether the claims have become the deeded property of any of the parties or not, so that the award be made in writing and under the seal of the arbritrators. If it only, as was contended, authorized the arbitrators to fix the lines, when they became established by the award, it would necessarily affect the title to the land between the disputed lines and the line so fixed. But the language employed, we think, was broader and more comprehensive, and contemplated that the arbitrators should award conveyances to be executed, otherwise only a part of the differences would have been settled, and the express object was to settle all differences; and that such was the intention of the parties, is made more manifest, from the covenant of appellant, to procure conveyances to be made to the person, to whom directed by the award. From this language, we can come to no other rational conclusion, than that the submission conferred the power to award the execution of deeds to end all strife, litigation and disputes.

We are therefore of the opinion, that the Circuit Court committed no error in decreeing that Julius M. Warren's name be inserted in the award, and that appellant execute the deeds in the manner, and with the description required by the award; and that the decree should be affirmed, except that portion which relates to the costs. And that the costs of the court below be equally divided among all the parties to the proceeding, and that the appellants pay the costs of this court.

Judgment affirmed.

Luther Scammon, Appellant, *v.* Milroy A. McKey, Appellee.

APPEAL FROM BUREAU.

An affidavit of merits unaccompanied by a plea, is not sufficient to obviate the effect of a rule of court, it is the plea, which answers the declaration; and without that, a default may be entered in accordance with the rule of court.

Courts have the power to adopt and alter rules, for pleading, and granting defaults.

A party who files his plea in apt time, has the right to do so under the statute, without an affidavit of merits.

This was an action of assumpsit commenced by the appellee against the appellant, in Bureau County Circuit Court. Summons issued in December, A. D. 1858, and returnable at the January term, 1859.

A declaration was filed in proper time.

The cause was called on the third day of said term, and the defendant was called and defaulted, and judgment rendered against him for the sum of one hundred and ninety-six dollars, seventy-five cents.

The defendant appeared by counsel and excepted to the ruling of the court in defaulting defendant, and rendering judgment against him, and asked for and obtained an appeal to the Supreme Court, which is allowed; upon the following state of case as presented by the bill of exceptions:

That on the fifth day of January, 1859, being the third day of said term of court, this cause was then set for trial on the eighteenth day of said term, upon the docket of said court, and the said court, prior to said term, had adopted a certain rule of practice in said court, which rule of practice was, on the said fifth day of January, 1859, in full force in said court, which rule of practice is in the words and figures following, to wit:

In all docketed suits brought upon notes, bills of exchange, single bills and accounts to which no attorney's name shall be entered for defendant, by the seventeenth day of March, and in all suits of the same nature, that shall hereafter be instituted in or appealed to this court, judgment shall be entered for the plaintiff or plaintiffs upon the first calling of the docket, unless the defendant or defendants, his or their attorney, shall give satisfactory evidence to the court by affidavit that he or they have a meritorious defense to the whole or a part of the plaintiff's claim.

The said defendant under the said rule filed his affidavit in the above cause, on the first day of said term, setting up or purporting to set up a partial defense to the note sued on in the above suit, which affidavit is in the words and figures following, to wit:

Luther Scammon, being duly sworn, on his oath says, that he has a good and meritorious defense to a part of the suit instituted against this affiant, by Milroy A. McKey in the Circuit Court of said county, to the amount of about fifty dollars.

Which affidavit was there, to wit, on the said fifth day of January, on file among the papers in said case. The said cause was then and there called by said court for the purpose of defaulting the said defendant, and the defendant then and there appeared by his counsel and objected to the default being taken against said defendant, grounding his objections upon the said affidavit, and the said court then and there adjudged the said affidavit to be insufficient and ordered the said defendant to be called and defaulted, and ordered judgment to be rendered against the said defendant for the sum of one hundred and

ninety-six and 75-100 dollars damages, with costs of this suit, to all of which rulings of the court in ruling and adjudging the said affidavit insufficient and ordering the defendant to be called and defaulted, and entering judgment against defendant for said damages and costs, the said defendant by his counsel then and there duly excepted, and on the same day, immediately after the rendition of the said judgment, the said court ordered, that upon the filing of a new and sufficient affidavit of merits by the defendant during said term, that said judgment by default against said defendant be set aside, and that he then and there have leave to plead, (there being no plea on file at the time said default was taken,) but the defendant then and there refused to file any other affidavit than the one above set forth, and then and there moved the said court for leave until the ninth day of said term to plead in said cause, (there being a rule of practice in said court then and there in full force, allowing to defendants time until the ninth day of said term in which to file their pleas, demurrers and answers, if there is a sufficient affidavit of merits on file at the first calling of the cause,) which motion for leave to defendant until said rule day, was then and there overruled by the court, and to which ruling of the court, overruling said motion, the defendant by his counsel then and there duly excepted, and from all of which rulings of the court, the defendant, by his counsel, prayed an appeal, which was granted.

The appellant brings the cause to this court and assigns the following errors:

1. The court erred in ordering a default at the first calling of the docket, when there was an appearance entered for the defendant, at that time.
2. The court erred in refusing the defendant until the general rule day to plead.
3. The court erred in requiring the defendant to file an affidavit of merits.
4. The court erred in adjudging the affidavit of merits, filed by the defendant, insufficient.

W. H. L. Wallace, and Eckels & Kyle, for Appellant.

Peters & Farwell, for Appellee.

Caton, C. J. The Circuit Court may give time to plead upon condition that the party file an affidavit of merits. So far as parties desired to take advantage of the rule allowing them nine days to plead, the other rule requiring an affidavit of merits, was adopted in the exercise of an undoubted power possessed by the court. Where a party files his plea at the commence-

ment of the term or before he is called or the expiration of a rule for a plea, the statute gives him the right to do so without an affidavit of merits. His plea is then filed without the indulgence of the court, and as he asks no favors he cannot be subjected to conditions. In this case there was no plea on file when the default was taken. There was nothing on file for the defendant but what was designed for such an affidavit as the rule required. It was not, however, a compliance with the rule. But had it been the best affidavit which skill and ingenuity could draw and recklessness swear to, it could not prevent a default without a plea. It is the plea and not the affidavit of merits which answers the declaration and prevents a default. As there was no plea here the default was regular and the judgment must be affirmed.

Judgment affirmed.

James Moir *et al.*, Appellants, *v.* William B. Hopkins *et al.*, Appellees.

APPEAL FROM HENDERSON.

Where a party is in default by not having filed his plea, a court may impose conditions, as an affidavit of merits, upon setting aside a default. Otherwise, if the plea was filed in proper time.

This was an action of assumpsit. The declaration was filed December 11, 1857, counting upon a promissory note made by defendants.

Defendants, on December 24th, 1857, filed two pleas. One was the general issue, and the other set up a failure of consideration.

On December 21, 1857, the court caused a general order to be entered on the records of said court, as follows: "It is ordered by the court that in all actions on promissory notes, when pleas are filed, an affidavit must accompany the same, of the defendant or some one for him, that he has a good and sufficient defense to the cause of action or a part thereof, and in default of such affidavit, the pleas filed will be stricken from the files, and judgment by default for want of a plea, entered, and that such plea and affidavit must be filed on or before the second day of the term."

On December 24, 1857, the following order was entered in said case: "This day came the plaintiffs by their attorney, and moved the court to strike the defendant's plea from the files.

Thereupon it is ordered by the court that the said pleas be stricken from the files of this court, they having been filed in contravention to a rule thereof." * * And the said defendants having been three times solemnly called, came not, nor any person for them, to defend this suit, but made default: whereupon judgment was rendered for the plaintiffs.

Defendants prayed an appeal. Appeal allowed.

And for causes of error they assign the following:

1. The court erred in striking the pleas of the defendants from the files.

2. The court erred in rendering judgment by default against defendants.

3. The court erred in not rendering judgment for the defendants.

PURPLE & HARDING, for Appellants.

O. C. SKINNER, for Appellees.

CATON, C. J. In the case of *Scammon* v. *McKey*, *ante*, we have expressed the opinion that a party may file a plea if he does it in proper time or before he is in any default, without an affidavit of merits; and that the court has no authority to require an affidavit of merits, except where the party is in default, and the court has a right to impose conditions upon granting to the defendant, the indulgence to file a plea, which in strictness of law he should have filed earlier. In this case, the pleas were not filed at the commencement of the term, nor until some days after the general rule requiring affidavits of merits. At the time that rule was entered the court had a right to have entered the default of the defendant, or it had the right to allow him to plead on condition that he should file an affidavit of merits. As to this case, then, the rule was entered in the exercise of a legitimate power possessed by the court, although its terms are broad enough to embrace cases as to which the court has no right to impose such condition. The rule must be a nullity as to such cases, while it may have full force in cases where the court has a right to impose conditions, as was the case here. Besides, it does not clearly appear that the plea was stricken from the files for non-compliance with this rule. The order does not say so, and possibly there may have been a special rule entered in this cause which was not complied with. The judgment must be affirmed.

Judgment affirmed.

Charles L. Kelsey, Appellant, *v.* James R. Lamb, Appellee.

APPEAL FROM BUREAU.

Where the parties, by consent, dispense with formal written issues, and submit the cause for decision, by agreement, they will be estopped from assigning for error, the want of joinder or replication to pleas.

A party who desires to have a declaration or other pleading, taken as confessed, must invoke the aid of the court, by a default.

Parties may dispense with formal pleadings at any stage, and the court may try the case, as if the pleadings had been properly traversed.

This case is stated in the opinion of the court.

Peters & Farwell, for Appellant.

W. H. Wallace, for Appellee.

Walker, J. This was an action instituted by appellee on a promissory note, in the Bureau Circuit Court, against appellant. There was filed a plea of the general issue, a plea of no consideration, and a plea of no consideration and fraud. To these pleas, no replications were filed, and the parties, by agreement, waived a jury, and the cause was submitted for trial by consent to the court. After hearing the evidence, the court found for the appellee, and rendered a judgment against appellant. From which, he prosecutes this appeal, and assigns for error, the rendition of the judgment against him, when his special pleas remained unanswered by demurrer or replication, but were confessed by not taking issue upon them, and that the court could not proceed to trial of the cause on the general issue, until an issue of fact was formed on the special pleas.

As a general rule of pleading and of practice, it is true, that it is error to proceed to the trial of a cause until there are issues of fact formed on each of the pleas filed. But this rule has no application to cases, where, by consent of the parties, formal written issues are dispensed with. There can be no doubt that the parties may agree to try a cause without plea or replication being filed, and by such agreement, the parties would be estopped from insisting upon the want of a plea or replication, as error. If the defendant has filed his plea, and the other party fails to reply within the time required by the rules of the court, he has a right to judgment by default, against the plaintiff, but until he obtains such a default, the pleas cannot be considered as confessed by the plaintiff. It is the default which gives the right to consider and act upon the pleas as true. In this case, no such

default was taken. When the parties submitted the case to trial by the court, without a jury by consent, it had the effect of submitting the case to trial on the pleadings, as if there were proper issues formed, and the court will hear evidence under all the pleas presenting a legal defense, precisely as if the allegations of such pleas had been formally traversed. This is the fair and reasonable construction to be given to such agreements. But it is otherwise, where the party is compelled to proceed to trial, without the issues being formed in the case. There the act is not voluntary, and no such intendment can be made.

By submitting the case to the court for trial, and waiving a jury, by agreement, the parties submitted it to be tried by the court, on the pleadings in the case, and the trial by consent cured the defect of issues not being formed upon these pleas. *Brazzel* v. *Usher*, Breese R. 14; *Ross* v. *Reddick*, 3 Scam. R. 115; *Graham* v. *Dixon*, 1 Scam. R. 73. In the first of these cases, there was a trial without any plea, and in the second, no plea was filed to any of the counts of the declaration, and in each of them the court held that the objection was cured, by going to trial without objection, and that the statute of amendments and jeofails has provided for such cases, and prevents the defendant from assigning it for error. In the other case, the general issue and an unanswered special plea were on file; and the court held, that where several pleas are filed, one of which is not answered, and particularly where the matter may be given in evidence under the general issue, and the parties proceed to trial without objection on the part of the defendant, that such plea remains unanswered, it will be considered as waived, or the irregularity will be cured by the verdict of the jury. In those cases the parties proceeded to trial without objection, while here the trial was had by express consent, and it must be presumed that the court admitted all evidence tending to establish any defense set up by the pleas, to the action. And even if the statute of amendments and jeofails would not operate to cure the defect, the consent of the parties did.

The judgment is affirmed.

Judgment affirmed.

John R. Mills, Appellant, *v.* Benjamin Weeks and Caleb D. Weeks, Appellees.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

When the parties to a building contract agree that the architect shall decide certain matters, his certificate is admissible in evidence, in so far as it is connected with the matters referred to him, and no farther.

In such a case, where an architect certifies that when some slight additions should be made to the work it would be acceptable, and it appears that these additions have been made, and on notice thereof no further objections are made, it will be a sufficient acceptance.

If parties are to procure the certificate of the architect as to extra work done, before they are to be paid, they must do so, or show a good reason for not doing it.

This action, assumpsit, was brought in the Cook County Court of Common Pleas, and at the September term, 1858, was tried before the court and a jury.

The declaration contains two special counts and the common counts. The counts upon contracts are for the recovery of balance of price upon the completion of the work.

The defendant pleaded the general issue, and a plea of set-off.

The two special counts in the declaration are framed upon two several special contracts, containing the same identical provisions, and differing only in the work to be done and the price to be paid for such work.

Both contracts were without seal, and executed by the plaintiffs below in the name of B. & C. D. Weeks.

The contract set forth in the first special count, contained certain specifications, the parts of which, material in the questions involved in the assignments of error in this case, are as follows:

He shall be strictly held to make such work and to use such materials as hereinafter described, and to work up the building to the given design, and in all cases where the drawings are figured, the figures must be taken by him as the given dimensions, without reference to what the drawing may measure on its scale. He will be further held to submit as to the character of the materials used and the work done, to the judgment of the superintendents, and to procure from them all necessary interpretations of the design, *and all necessary certificates regarding his payments.*

Wm. W. Boyington, or his assistant architect, are declared to be the superintendents of the work for the owner; their duties will consist in giving, on demand, such interpretations, either in language, writing or drawing, as in their judgment,

the nature of the work may require, having particular care, that any and all work done, and materials used for the work, are such as is hereinafter described, and in giving, *on demand, any certificates that the contractor may be entitled to*, and in settling *all deductions of, or additions to the contract price, which may grow out of alterations of the design, after the same is declared to be contract;* also, *determining the amount of damages which may accrue from any cause*, and to particularly decide upon the fitness of all materials used and work done.

All payments made upon the work during its progress, are on account of the contract, and shall, in no case, be construed as an acceptance of the work executed; but the contractor shall be liable to all the conditions of the contract, until the work is accepted as finished and completed.

The coal vaults and cellars under the wall, may be put in after the walls of the building are laid up, and must complete the whole job of masonry within 150 days after the above mentioned time,—*said work in no case shall be considered as finished, unless the same is so reported to the superintendent, and accepted by him.*

And in order to secure the execution of the work, in the manner and at the times specified, it is hereby distinctly declared, that the damages arising from the non-fulfillment of the contract, as regards time, shall be thirty-two dollars per day, which is a fair rent of the premises, for each and every day the work remains unfinished, and which sum of damages, shall be deducted from the contract price, as liquidated damages.

Payments to be made on the block as may hereafter be agreed.

These articles of agreement, made and entered into this twenty-second day of March, A. D. 1856, between B. & C. D. Weeks, of the first part, building masons, of the city of Chicago, and Jno. R. Mills, of the same place, of the second part, witnesseth, that the said B. & C. D. Weeks, or their executors, administrators and assigns, for and in consideration of the payment hereinafter to be made to them, by the said Jno. R. Mills, or his executors, do on their part contract and agree to build, finish and complete, in a careful, skillful and workmanlike manner, *to the full and complete satisfaction of Wm. W. Boyington, or his assistant superintendent*, and by and at the times mentioned in the foregoing specifications, the mason's work, of two marble front, five story stores, erected on the corner of Wabash Avenue and Lake street, as aforesaid, so as fully to carry out the design of the work, as is set forth in the foregoing specifications, and the plans and drawings therein especially referred to. Said specifications, plans and drawings, being hereby declared part and parcel of this contract.

And the said Jno. R. Mills, or his executors, administrators or assigns, for and in consideration of the said B. & C. D. Weeks furnishing materials, and fully and faithfully executing the aforesaid work, so as fully to carry out the design for the same as set forth by the specifications and according to the true spirit, meaning and intent thereof, *and to the full and complete satisfaction of Wm. W. Boyington, or his assistant superintendent*, as aforesaid, and at the times mentioned in the foregoing specifications, doth hereby agree to pay to the said B. & C. D. Weeks, the sum of fifteen thousand six hundred ($15,600) dollars, in the following manner: As the work progresses, the superintendent is to make out estimates of the work and materials furnished, and inwrought into the building, and upon the presentation of a certificate of eighty-five per cent. on said estimate, the said Jno. R. Mills is to pay the amount, *and the balance of fifteen per cent. to be paid on the completion of the contract;* Provided, *that said superintendent shall certify in writing that they are entitled thereto.*

The contract and specifications set out in the second count are precisely like those contained in the first count, except that such contract is for the stone cutting work, on the same building, and the amount to be paid is fifty-one hundred dollars, and the contract is made and executed in the same way, and in the name of B. & C. D. Weeks.

Upon the trial of this cause, the plaintiffs read in evidence the original contracts, of which copies are given in the first and second counts of the declaration.

Plaintiffs then offered in evidence a certificate of Wm. W. Boyington, dated the 29th day of November, 1856, admitted to be in the hand-writing of and signed by the said Boyington, in the words and figures following, to wit:

"I hereby certify, that the within bill is, in my judgment, just and correct between the parties. I have carefully estimated and taken the whole matter into consideration, and have given Messrs. B. & C. D. Weeks a written list of different deficiencies that I wish them to do in order to complete the contract, and when these different items are completed, the building will be acceptable.

WM. W. BOYINGTON, *Superintendent.*"

November 29th, 1856.

Which said certificate was written upon the back of a paper containing the following account, which was also admitted to be in Boyington's hand-writing:

Mills *v.* Weeks et al.

Chicago, November 10th, 1856.

Mr. J. R. Mills,

To B. & C. D. Weeks, Dr.

To Extra Base on Party Wall, 210 ft. *a* .40	$84.00
" 295 ft. extra Stone Work in Party Wall, thickness 17	101.15
" Extra height of Basement Story, 391 ft. 17	66.47
" 70 lbs. Anchors for Iron Lintels, 08	5.60
" Setting 120 Iron Lintels, 20 5-12	25.00
" 1 Stone Pier in Cellar	24.50
" 560 ft. Stone Work, extra thickness to vault wall, .16	89.60
" 5,400 Brick in Follansbee's Chimneys, *a* $13.00	70.20
" Setting Curb	35.00
" 45,675 Brick in Partition Wall, *a* $12.00	548.10
" 3,600 Brick in Jog in Wall	43.20
" Extra for turning Arches in 1st story	30.00
" 60 yards extra Plastering, *a* .25	15.00
" 68 Window Eyes in area Hall, *a* .10	6.80
" 2,310 ft. Truck Pointing, Labor, Mortar, etc	50.00
" 3 days extra, (height of wall) Brick work, etc	96.00
	$1,290.62
Amount of Contract	20,700.00
	$21,990.62
Am't Bro't Up	20,907.97
	$1,082.65

Messrs. B. & C. D. Weeks,

To J. R. Mills, Dr.

For 60 days delay non-compliance with Contract, *a* $32.00 per day	$1,920.00	
" Bill of Items, A. Campbell	32.97	
" Accommodation to Carpenter,	5.00	
" Delay caused to Carpenter	350.00	2,307.97
" Certificates drawn		17,400.00
" Order to Illinois Stone Dressing Co		1,200.00
Carried up		$20,907.97

Which said account was not offered in evidence by the plaintiffs with said certificate, and the defendant by his counsel, then and there objected to the reading of said certificate as evidence, unless said account was also read, for the reason that said account was referred to in, and thus made a part of said certificate, which objection the court overruled, and the defendant then and there excepted.

The signature being admitted, the plaintiffs also offered and read in evidence, the memorandum of deficiencies referred to in said certificate of Boyington, which is as follows:

"MESSRS. B. & C. D. WEEKS:

Your attention is called to the following items that will be required to be done to close up the contract of J. R. Mills' Block of Stores, on corner of Lake St. and Wabash Avenue, viz: Point up about chimneys and fire walls on roof, and secure some loose brick. Point up under all the windows in each story, the same as done in the upper story. Point up under some of the arches under the side-walks. Clean down front stone-work and side window-caps, and cement up holes in top of caps. The lintels over several of the windows are not wide enough to reach, the wood-frame should be pointed. Fill up where the slip sills were put in on Wabash Avenue not thick enough. Point up about basement window frames.

WM. W. BOYINGTON,

Chicago, Ill., Nov. 20, '56. *Superintendent.*"

There was no other certificate made by Boyington or assistant, given in evidence.

There was evidence adduced on both sides, but it is not material to the points ruled by the court, and therefore it is not introduced.

Here the plaintiffs rested, and defendant by his counsel, thereupon moved the court to exclude from the jury all the evidence offered as to the work done under the contracts, on the ground that it has not been shown that the building has been completed to the satisfaction of the superintendent, and no certificate has been produced from the superintendent showing that plaintiffs are entitled to payment.

The court overruled the motion, and defendant excepted.

William W. Boyington, for defendant, testified that he was the person named in the contracts as superintendent. Then stated as to the taking down part of the wall on Wabash Avenue, and the reason, and stated that the changes of wall and excavating, did not occasion delay. That he made out the writing, dated Nov. 20th, 1856, and offered in evidence by plaintiffs. The deficiencies therein mentioned, actually existed at that time. I have no recollection of ever having been notified by the plaintiffs that the work specified in the writing, was completed. They may have notified me and I forgotten it.

The defendant proved his offsets, and rested his case.

The certificate of the 29th Nov., 1856, with the statement on the back thereof, made by said Boyington, was given to the jury by the consent of counsel on both sides.

The defendant asked the court to instruct the jury as follows:

1st. That the parties in and by the contracts, set out in the first and second counts of the declaration, and given in evidence in this cause, have fixed upon a certain mode by which the plaintiffs' right to payment under the said several contracts, as upon a completion of the work therein mentioned shall be ascertained, viz: *the certificate of the superintendent, in writing, tha*

they are entitled thereto. The plaintiffs, therefore, in order to enforce the said contracts, or either of them, as upon a completion thereof, must show that they have done everything on their part, in this respect, which could be done, to carry the respective contracts into effect, and they cannot compel the payment of any alleged balance under the said contracts, or either of them, as upon a completion of the work mentioned in the said respective contracts, unless they procure and prove such certificate in writing of the said superintendent, or show that by time, accident, fraud, or by some other reasonable excuse, they were unable to do so.

2nd. If the jury believe, from the evidence, that the matters contained upon the same paper, and on the side thereof, other than that on which the certificate of Wm. W. Boyington, bearing date the 29th day of November, 1856, is contained, are the same referred to in said certificate, then the jury should consider the said matters as a part of said certificate, and as competent evidence, and proper for their consideration in connection with the other testimony in this case, in determining the rights between the parties to this suit, and the amount of the recovery therein.

3rd. If the jury believe, from the evidence, that at the time of making the several contracts set out in the first and second counts of the declaration, and read in evidence in this cause, and also in doing the work in question, the witness, Hiland B. Weeks, was associated with the plaintiffs, and doing business with them, under the name of B. & C. D. Weeks, and under that name entered into the said contracts, and performed all the work in question with plaintiffs, then he should have been joined as plaintiff, and the jury must find for the defendant.

4th. That if the jury find, from the evidence, that any portion of the plaintiffs' claim in this suit, is for work done by making alterations from the contracts set out in the first and second counts of the plaintiffs' declaration, and read in evidence, and the plans and specifications connected therewith, and that the said alterations were made by the direction of the superintendent of the work mentioned in said contracts, yet the plaintiffs, in order to recover payment for such work, must procure and prove the certificate in writing of said superintendent, that they are entitled thereto, or show that by time, accident, fraud, or some other reasonable excuse, they have not been able to do so.

The court refused to give the second, third and fourth instructions, and the first instruction was modified by the court, and the said amendment made to read as follows :

1st. That the parties, in and by the contracts set out in the first and second counts of the declaration, and given in evidence in this cause, have fixed upon a certain mode by which the plaintiffs' right to payment under the said contracts, as upon a completion of the work therein mentioned, shall be ascertained, viz: *the certificate of the superintendent, in writing, that they are entitled thereto.* The plaintiffs therefore, in order to enforce their said contracts, or either of them, as upon a completion thereof, must show that they have done everything on their part, in this respect, which could be done, to carry the respective contracts into effect; and they cannot compel the payment of any alleged balance under the said contracts, or either of them, *as specified or for extra work*, as upon a completion of the work mentioned in the said respective contracts, unless they procure and prove such certificates, in writing, of the said superintendent, *or unless you believe, from the evidence, that all the work specified in the memorandum given in evidence, in the hand-writing of Mr. Boyington, and referred to in the certificate of said Boyington, in relation to the completion of the work, was completed before the commencement of this suit.*

And the said first instruction, so amended as aforesaid, was given by the court. To which said ruling of the court in refusing the said second, third and fourth instructions, and each of them, as asked for by the said defendant, and in modifying the said first instruction, the said defendant, by his counsel, then and there excepted.

The jury found a verdict for the plaintiffs, and against the defendant, for $5,675.89.

The defendant made a motion for a new trial, which the court overruled.

The court rendered judgment for plaintiffs against defendant, upon said verdict, and defendant prayed an appeal.

Plaintiff in error assigns for error the following:

1st. The court erred in excluding the statement or account, upon the other side of the paper containing the certificate of Wm. W. Boyington.

2nd. The court erred in overruling the motion to exclude the plaintiffs' evidence, for the reason that there was no evidence that the work was done to the satisfaction of the superintendent —the plaintiffs did not produce and prove the certificate of the superintendent that they were entitled to any payment under the contracts.

3rd. The court improperly refused the second, third and fourth instructions asked by the defendant, and in modifying the first instruction, so asked as aforesaid.

4th. The court erred in overruling the motion for a new trial.

Scates, McAllister & Jewett, for Plaintiff in Error.

King, Scott & Wilson, for Defendants in Error.

Walker, J. The first assignment of error, questions the correctness of the decision of the court below, in excluding the statement on the opposite side of the paper, containing the certificate of the superintendent. It is insisted that this statement was admissible under this provision of the contract of the parties, that Boyington, or his assistant architect, should be the superintendents of the work, for the owner, which provides that "their duties will consist in giving, on demand, such interpretations, either in language, writing or drawing, as in their judgment, the nature of the work may require, having particular care that any and all work done, and materials used for the work, are such as is hereinafter described, and in giving, on demand, any certificates that the contractors may be entitled to, and in settling all deductions of, or additions to the contract price, which may grow out of alterations of the design, after the same is declared to be contract; also, determining the amount of damages which may accrue from any cause, and particularly to determine upon the fitness of all materials used, and work done." The certificate read in evidence, by appellees, was given by Boyington, on the back of a paper containing his statement of an account between the parties, and in which he states, that the bill in his judgment is correct. And in the certificate, he says he has carefully examined the whole matter, and given to appellees a written list of different deficiencies under the contract, which he wished them to perform, in order to complete the work, and when they should be completed, the building would be acceptable. In the bill of items, referred to in this certificate, he fixes the amount of extra labor and materials, furnished by the appellees, and estimates the damages sustained by the appellant, for delay, and the damages that the carpenters had sustained by delay of the work by appellees, and allows payments made by the appellant to the appellees, and items to other persons, as charges against them. The architect, under this agreement, had the authority, and it was made his duty, to estimate all additions to, or deductions from the contract price, growing out of a change of plan, or damages accruing from any cause. If any of the items in this account, were for increased labor or materials furnished by reason of a change in the plan of the work, then such estimate, both as to amount and value, were admissible, as

they were provided for by the contract, and the superintendent was required to make such estimate. But if any portion of these items were for labor and materials, not embraced in the original contract, and were furnished without any change in the plan, then the contract did not authorize the superintendent to take them into his estimate, and appellees were not bound by his estimate of such items. The superintendent had the right, under the agreement, to estimate and determine the amount of damages which might accrue, from any cause. The delay in completing the building within the time specified, was a damage to the appellant, and although the parties agreed that it should be thirty-two dollars for each day that the work should be delayed, still the amount was not determined, and it still required that the number of days be ascertained, before the amount could be fixed. This damage was one of the causes provided for in the agreement, and the superintendent had a right to estimate it, and when made, the parties were bound by it. But the contract gave to the superintendent no right to fix and determine the damage the carpenters had sustained, and until they claimed of appellant such damages, and the amount had been ascertained, the superintendent had no right to take them into any estimate he might make. If they were charged to, and paid by appellees, and were never claimed of, or paid by appellant, to the carpenters, appellant would receive money to which he has no claim, legal or moral. Nor does the agreement confer upon the superintendent, the right to ascertain and allow payments made by the owner to the contractor, and so far as his statement of accounts between the parties makes such charges, it is unwarranted, and is not binding upon them. But when the appellees offered this certificate, the account should have been admitted with it, and the court should, by instruction, have directed the jury to disregard such portions as the superintendent was not authorized to make, and to receive and act upon the remaining portion, as evidence in the case.

It was urged on the argument, that the court erred in not excluding the evidence, because the appellees did not show that the work had been accepted by the superintendent. He by his certificate to both parties, stated that when some slight additions were made to the work, that it would be acceptable. And the evidence tends to show that this work had been done, and the superintendent was notified of the fact, and no objections made. And we think that these facts show a sufficient acceptance of the work, to authorize appellees to maintain an action, to recover the balance, if any, to which they may be entitled, under the contract. So soon as this work, specified and required to be done by the superintendent's certificate, was performed, the work,

by the terms of that certificate, was accepted by the superintendent, and they then became entitled to their pay, under the contract.

If the contractors became entitled under this contract, to additional compensation for work and materials furnished in consequence of any alteration of the plan, and had used all reasonable efforts to get the superintendent to make the estimates of the same, and were prevented by accident, fraud or any unavoidable cause, they would be entitled to recover for such labor and materials, such value as they proved themselves entitled to receive. But under the provisions of this agreement to recover for such items, they are required to produce the superintendent's written certificate of amount and value, or show that they have made the effort to procure it and have been prevented by fraud, accident or unavoidable cause.

Upon an examination of the record we perceive no evidence tending to prove that H. B. Weeks was a partner of his sons in this transaction, the appellant's third instruction was therefore properly refused.

The various questions raised by the errors assigned in refusing the other instructions of appellant, and the modification made to the first, before it was given, have already been considered in this opinion, and we deem it unnecessary to again notice them specifically.

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

Judgment reversed.

Tobias Wynkoop, Plaintiff in Error, *v.* Caleb Cowing *et al.*, Defendants in Error.

ERROR TO LAKE.

The rule in equity being, once a mortgage always a mortgage, the true character of every conveyance of land is open to investigation.

Full proof is required to countervail two sworn answers in equity.

Technical words used in letters, by unprofessional persons, should not be so construed as to violate the purport and meaning of the missives, in which they are used. Nor can sworn answers to a bill in chancery be overcome, by resort to such technical phrases or words.

Although parties may not, at the same time by the same instrument, stipulate for converting a loan and mortgage into an absolute purchase upon the happening of a subsequent event, yet it is true that a subsequent *bona fide* agreement for the extinguishment or purchase of an equity of redemption for a valuable consideration, will be sustained.

Parties are estopped by the recitals in an agreement, and are bound by their admissions in it.

Where parties make time one of the conditions of a contract, courts of equity will not relieve a defaulting party, where there is no waiver by the other party.

A condition in a deed may be annexed to every species of estate and interest in real property.

A count of money tendered may not be necessary, when the party to whom it is offered absolutely refuses to receive it. But this may not dispense with the existing ability to make the payment, by actually having the money present, or within convenient reach, so that it may be counted and delivered.

This suit was commenced by the complainant against the defendants, in the Circuit Court of Lake county, by bill in chancery, setting forth that Tobias Wynkoop, about the first day of June, 1835, entered upon and took possession, by right of preemption, of certain lands, lying and being in township No. 44 N., R. 11 E. of 3rd P. M., and describing them, in all 1,520 and $\frac{18}{100}$ acres, and that Wynkoop continued to reside upon, occupy and improve said lands from June, 1835, to about the first day of May, 1850. That Wynkoop, during the years 1835, '36 and '37, enclosed all of said land by fence. That said lands at the time Wynkoop took possession of the same, belonged to the United States Government, and so continued until about June 11th, 1842, at which time they were offered for sale by said government. That Wynkoop was desirous of purchasing said lands at said sale, and not being in possession of money sufficient to enable him so to do, entered into arrangements with Caleb Cowing, of the county of Yates, and Abraham A. Post, of the county of Ontario, in the State of New York, for a loan from Cowing and Post of the money necessary for the purchase of said lands from the United States. That Wynkoop was induced to call on Cowing for the loan of this money, from the fact that Cowing had on several occasions during the years 1840, '41 and '42, written to Wynkoop that he, Cowing, would assist Wynkoop in the purchase of said lands, that he, Cowing, had the money and would loan it to Wynkoop, and charge him seven per cent. interest per annum. That Wynkoop went to the State of New York in May, 1842, and induced Cowing and Post to come to Illinois and loan him the money. That about June 1st, 1842, Cowing and Post came to Chicago, where the land sale was to take place. That Cowing then and there agreed with Wynkoop that he would loan to Wynkoop the sum of $1,200, which was to be paid to the United States, as the consideration for the purchase of 960 acres, being part of lands first described. That June 11th, 1842, Cowing loaned and advanced to Wynkoop $1,200. That Wynkoop, for his own use and benefit, then purchased the lands last above described, and took the certificates of purchase therefor in the name of Cowing, to secure him for said loan, and to secure him for his expenses in coming to Illinois on the business

of Wynkoop, and to secure him for $30 which Cowing then loaned Wynkoop, besides the amount to purchase said land. That Cowing, at the time of the loan aforesaid, agreed with Wynkoop, in consideration of the conveyance aforesaid, that he would, immediately upon receiving the certificates of purchase, make, execute and deliver to Wynkoop, a bond in writing, conditioned that if Wynkoop, his heirs or assigns, at any time within four years from June 11th, 1842, should pay or cause to be paid to Cowing, his heirs or assigns, $1,630 and interest at seven per cent. per annum, to be paid semi-annually, then he, Cowing, should convey to Wynkoop, his heirs or assigns, by deed in fee simple, the tracts of land last above described. That in accordance with said agreement, a bond was drawn up and ready to be signed by Cowing, and presented to him to sign by Wynkoop. That about June 11th, 1842, Wynkoop met Cowing on a steamboat, in the Chicago river, at a time when Cowing was leaving for the State of New York, and then asked Cowing if said bond was signed, and if he would deliver it to him, Wynkoop, to which Cowing replied, that he was in a hurry then, but would make it all right with Wynkoop, and that Cowing then handed to Wynkoop a piece of paper containing a memorandum, stating the amount of the loan to Wynkoop, which amount was about $1,630; $1,200 of the same being for money loaned as aforesaid, $400 being for the expenses incurred by Cowing in coming to Illinois at the request and on the business of Wynkoop as aforesaid, and $30 for money loaned to Wynkoop by Cowing to pay for cattle. That Cowing immediately after delivering said memorandum to Wynkoop, left for the State of New York, and ever after neglected and refused to deliver said bond to Wynkoop.

That said land, June 11th, 1842, was worth in cash $8 per acre, and that Wynkoop had been offered prior thereto, for his interest and claim, $3,000.

That Wynkoop on the 11th June, 1842, at Chicago, entered into an agreement with Abraham A. Post, by the terms of which said Post was to loan to Wynkoop $700 to enable him to purchase certain described lands, in all five hundred and sixty acres, and being parcel of the land first described; and that the deeds of said last above described lands were to be taken to Post to secure him for the loan of said money, and to secure him for the amount of his expenses incurred in traveling to and from the State of New York on the business of Wynkoop; and also for money loaned to Wynkoop at the same time; and according to said agreement, Wynkoop borrowed of Post, June 11th, 1842, at Chicago, $1,287, and Post took a title to said lands last mentioned, in his name, but for the use and benefit of Wyn-

koop, and as security for said loan, being the amount last mentioned. Post at the same time executed and delivered to Wynkoop a bond conditional, that if Wynkoop at any time within four years from June 11th, 1842, paid or caused to be paid to Post, said $1,287, with interest at seven per cent. per annum, payable semi-annually, then Post, his heirs, admininistrators or assigns, would convey said lands last mentioned to Wynkoop by warranty deed in fee. That said land is now in Cowing's possession. That the cash value of lands conveyed to Post at the time of conveyance to him, was $8 per acre. That on the 11th March, 1848, Post conveyed by quit claim deed to Cowing, all his right and interest to said lands for the consideration of $1,751.20. That at the time that Cowing purchased of Post he well knew of Wynkoop's rights in the lands, and that the title that passed from Post to Cowing was only a lien or security on said lands for the payment of said loan to Post by Wynkoop, and it was at the time of said sale expressly agreed between Post and Cowing that Wynkoop's rights in the premises should not be affected by said sale, and that Wynkoop should have further time, until January 1st, 1849, to pay the amount due Post on the bond, and if he should pay the same on or before that time, then Cowing should make and deliver to Wynkoop a warranty deed of said lands so purchased by Cowing of Post, according to said bond from Post to Wynkoop.

That January 3rd, 1849, Wynkoop entered into an agreement with Cowing, which said agreement was reduced to writing, and signed by Cowing and Wynkoop, and is to the effect and purport as follows:

This Agreement, Made this third day of January, 1849, between Caleb Cowing, of Yates county, in the State of New York, of the one part, and Tobias Wynkoop, of Lake county, in the State of Illinois, of the other part, witnesseth: That said Cowing is the owner of one thousand five hundred and twenty-seven acres of land, in township number forty-four North, of Range eleven East, in Lake county, in the State of Illinois, now in possession of said Wynkoop, under a forfeited contract for the purchase of the same. 2nd. The said Wynkoop hereby surrenders to the said Cowing the actual possession of the said lands and of every part thereof, and acknowledges himself to occupy the same as tenant at will of the said Cowing, and liable to be removed from the occupancy at the will of said Cowing. 3rd. It is agreed by and between the said Cowing and Wynkoop, that he, the said Wynkoop, may sell and dispose of so much of the said lands as will amount to the sum of five thousand six hundred dollars, with interest and other charges as hereinafter expressed, and that upon receiving the money or securities arising from such sales, he, the said Cowing, will convey the lands so sold to the purchasers thereof by a good and sufficient deed, executed by himself and wife; such sales may be made for cash, or part cash and part credit, according to the

custom of the country, and the whole purchase money on such sales to be paid to the said Cowing, and the securities, whether by contract or bond and mortgage, are to be received by him before the execution of a conveyance of the land or any part of it. 4th. When so much of the lands shall have been sold as that the money and securities received therefor shall amount to the said sum of five thousand six hundred dollars, with interest thereon to be paid half yearly, on the first days of June and December of each year, at and after the rate of seven per cent. per annum, until the whole principal shall be paid, together with taxes, the said Cowing may hereafter pay on the said lands, and the expenses of the said Cowing in going to, remaining at, and returning from the State of Illinois to attend to the business of the said lands, with a compensation of one dollar and fifty cents per each day devoted to the said business, and in traveling to and from, and staying in Illinois on such business; and all the expenses of counsel, and of drawing and recording papers; then and in that case the said Cowing hereby agrees and covenants to and with the said Wynkoop that he will retain and hold such portions of the said lands as may remain unsold, for the benefit of the said Wynkoop or his family. 5th. In case the said Wynkoop shall not, by the first day of June next, sell enough of the said lands to pay off the several sums above mentioned, then the said Cowing reserves the right to sell and dispose of one-third part of the said land, during the year one thousand eight hundred and forty-nine, and apply the proceeds as herein provided for sales by the said Wynkoop; and also, during the year one thousand eight hundred and fifty, the said Cowing has the right to sell the residue of the said lands, or so much thereof as shall be sufficient to pay off the balance that may remain, after applying the proceeds of the sale that may have been made in the year one thousand eight hundred and forty-nine, such right, however, not to be exercised by the said Cowing in either year provided the said Wynkoop shall proceed with reasonable diligence in the sale of said lands.

Witness our hands and seals, the day and year above written.

CALEB COWING. [SEAL.]

In presence of B. WHITING. TOBIAS WYNKOOP. [SEAL.]

That the lands mentioned in the above agreement are the same that were purchased by Wynkoop, June 11th, 1842, as before stated, and the same conveyed to Cowing and Post as security for the loans aforesaid. That the $5,600, was the amount claimed to be due by Cowing from Wynkoop on account of the loan to him by Cowing, June 11th, 1842, with interest and the taxes paid by Cowing, and on account of said loan from Post to Wynkoop, including interest on the same and taxes, and the expenses of Post, and also the sum of $50 loaned by Cowing to Wynkoop, January 3rd, 1849. That immediately after the making of said agreement, and during 1849 and the first of 1850, Wynkoop endeavored to sell said lands in said agreement, and used all the means in his power so to do, but owing to the scarcity of money in Illinois, was unable to sell the same or any part thereof for any adequate consideration. That on the 15th of January, 1850, Cowing advertised in a public newspaper published in Yates county, New York, and also in one published in the city of Chicago, all of said lands for

sale, to be sold at public sale at the Geneva Hotel, in the town of Geneva, in Ontario county, New York, May 7th, 1850. That March 22nd, 1850, Cowing sold and conveyed to Julius Bull, of Seneca county, New York, all of said lands above described, for the alleged consideration of $6,000, and at the same time made, executed and delivered to Bull, a warranty deed (subject to all back taxes), of said lands. That at the time of said sale from Cowing to Bull, the cash value of said lands was $10 per acre, and that at the time of said sale from Cowing to Bull, the said agreement last above mentioned between Cowing and Wynkoop was in full force, and Bull well knew at the time of said conveyance to him, that said agreement had been made between Cowing and Wynkoop, and that it remained in the possession of Wynkoop unforfeited, and uncancelled. That about October 15th, 1850, Wynkoop called upon Bull, and informed him that he had come to fulfill the terms of the agreement above mentioned between Cowing and Wynkoop, and also told him, that he, Wynkoop, had the money, and was prepared, willing and desirous to pay him, Bull, the amount of money mentioned in said agreement, together with all interest, taxes and expenses that might be due thereon, and offered said Bull said amount, and demanded of him a deed of said premises in accordance with the terms of said agreement, and that said Bull replied that he would have nothing to do with Wynkoop. That June 3rd, 1851, Wynkoop tendered to Bull $7,000, and demanded of him a deed of said lands according to the terms of said agreement, and that Bull replied that he knew nothing about the matter, and referred Wynkoop to Cowing. That June 14th, 1851, Wynkoop tendered to Cowing $7,000 on said agreement, and demanded of him a deed in accordance with the terms of the agreement of January 3rd, 1849; that Cowing then told Wynkoop that he must go to see Bull, that he, Cowing, had nothing to do with the matter, that Bull knew all about the agreement and would do what was right. That $7,000 was the full amount due on said agreement between Cowing and Wynkoop. That Wynkoop has always since January 3rd, 1849, been ready and willing to perform on his part all of the terms of said agreement, and to pay to Cowing or to Bull the full sum that may be due on said contract. That Julius Bull commenced an action of forcible entry and detainer before a justice of Lake county, against Wynkoop, to recover possession of said premises, at which time Wynkoop was absent from Illinois, and his wife, for the fear of said action, and being driven from said premises by force, yielded and left the possession thereof, since which time Bull has remained in the possession thereof. That Wynkoop has repeatedly applied to Cowing and Bull, and requested

them specifically to perform said agreement, and that they absolutely refuse so to do. That Cowing and Bull are combining and confederating together to wrong Wynkoop in the premises. That the conveyance taken by Cowing, June 11th, 1842, was intended by Cowing and Wynkoop only as a lien upon said lands, and as security for said loan by Cowing to Wynkoop. That Cowing at the time that he purchased said lands of Post well knew, or had been informed, that the title to said lands so purchased by Cowing, was held by Post as security to him from Wynkoop for said loan from Post to Wynkoop. That the agreement of January 3rd, 1849, was only intended by Cowing and Wynkoop as a substitute for the former contract hereinbefore mentioned, between Cowing and Post and Wynkoop, and intended only to secure the payment of said loan with interest, expenses and taxes to Cowing. That Bull well knew at the time that he purchased of Cowing the interest of Wynkoop in the premises, and at the time of the conveyance from Cowing to Bull, or at the time of the payment of the purchase money for said lands, if any purchase money was paid by Bull, he well knew or had been informed, or received some intimation that Cowing had entered into said agreement with Wynkoop, and that Cowing held the title to said lands only as security for the loan of the moneys aforesaid to Wynkoop. The answer of defendants is required to be under oath, and they are interrogated specially and fully in relation to every material matter charged in the bill. The bill prays that the said agreement made between Wynkoop and Cowing of January 3rd, 1849, may be specifically performed, and that Bull surrender to Wynkoop said lands, Wynkoop being willing and ready, and offering specifically to perform said agreement in all things on his part, and for such other relief as may be necessary, etc.

Cowing and Bull asked and obtained leave to file their separate answers, and filed the same under oath, denying the charges in the bill.

At September term, 1857, of the Lake Circuit Court, MANNIERE, Judge, presiding, the bill was dismissed, and judgment for costs against Wynkoop, and in favor of defendants, and Wynkoop prayed an appeal to the Supreme Court, which was granted.

Letters referred to in the opinion of the court:

APRIL 14th, 1847.

MR. TOBIAS WYNKOOP—*Dear Sir:*—I have waited a long time to hear from you but no letter has come so I will write again, Chambers stated you had cut and sold timber for mostly two meeting houses (that is the long timber) off of mine and you out to have stated to me if it was not true, but at any rate dont cut and sell timber I had thought of coming out this Spring but I think it uncertain

whether I can before fall, therefore go on sow and plant and raise all you can so that you may be able to pay the taxes for it comes into taxin this season, and next fall it will have to be paid, there has been several wanting to bye, but if you act the fair man (I shall not sell till I see you) pay the Taxes and not cut the timber and sell it which I hope is not so for chambers has told me something else which provves not to be true at that time I believed it I wrote to you, and your not answering it looked as if it was so) let that be as it may) when I do come I can see for myself try to make arrangements to raise the money if you mean to ever redeem against I come, for I am getting old and want all things settled I was laid up all last season, but am better now I have given up bying any more in that country for tis costly running one way and the other and no great comfort in it neither I have not seen Post I think in six months and have heard nothing from him when he is coming out) I believe all you relations are well I wish you to write to me soon, Direct to Bigstream Point Yates County I think you can make more money raising flax seed than any thing else half a bushel of seed is anough to sow an acre and you will raise from 10 to 15 bushels which always fetches a dollar here and must be worth 6 shillings there and then it is ready for wheat or you can sow it every year on the same ground. Yours Respectfully,

CALEB COWING.

May 1st, 1848.

Mr. Tobias Wynkoop—I received a letter from you Stating the tax was Illegally assessed and you would not pay it I should like to hear how the matter went in your other letter you stated you would be here the first opening of Navigation and pay Post and me off, if they git Judgment the tax must be paid by somebody and I am so situated now that I have to see something to it or about it Post was determined to sell his and Lawyer Wood of Geneva offered to pay him the cash down for it but he said he had rather I would have it than him so I bought it the 11th of March 1848 and paid him $1250,00 down and Secured the rest and you have till the second day of January next to redeem in now I want you to do it if you can and if you can not I calculate to act the fair man that is if you do so, if you pay the taxes or git rid of them so that they dont touch the land or sell it for taxes nor waste nor sell timber I calculate to do what is Just and right between man man and as you told me I mean to give you a good fat slice there will be I suppose a great many medling with that that is none of their business telling lies both sides as I was told you was selling timber &c but keep cool write to me Just as you feel, I have never been in your way nor interfered in your business, I have not been there in most 5 years next Octr) so I am sure you cant fond fault with me and my buying out Post dont hinder your paying for if it is sold for taxes I can redeem in two years by paying double and interest but of course you will see to that as it is for your benefit to have the taxes paid, we are all well I was at Seneca Saturday 29th Posts folks and Fiero's are well Post feels very lonely he lost his wife my best respects to you and wife and family and all friends there.

CALEB COWING.

The season is very cold and dry
neither grass nor pasture yet
Wheat has dried up a good deel but looks better than last year, write soon act friendly, I am direct to Big Stream Point Seneca Lake how much is my land worth on Fort Hill near Morses I have 120 acres there please state to me

CALEB COWING.

Wynkoop *v.* Cowing et al.

July 21, 1848.

Mr. Tobias Wynkoop—*Dear Sir:*—Since I heard last fall of your cutting and Selling timber off my land I wrote you at the time of advertising) about it wishing you to write me whether it was so or not but you have not took the trouble to write to let me know whether it was or not. If you was innocent I should supposed you would have as much as Stated it in a letter to me to that effect Huson was out there this summer and States since he came back that the report is you sware you will kill me and bury me Seven foot under ground I would ask what you would kill me *for I have done you no injury have given you all the time to redeem we agreed on* and have never interrupted you, in your business farmed Just as you pleased and have not dictated you at all in any thing, only in cutting timber and said nothing about that till your time was out, and I think you are verry unreasonable to threaten of killing folks, that has been your friend, if I had not *bought at the time I did some one else would and you would had no chance to redeem you* had your four years and done nothing and now it is over five years and the land is taxed and that has got to be paid by somebody this fall and I suppose it will be high also I thought when you was here, I should never sell till I saw you but I have been unable all last season to do a days work and have not been able to come out and see you (I have not sold any of it yet) *I have had a number of* applicants to bye but thought would first *write to you, to let you know how it stands* and now want money I have been without it for over 5 years, you have not paid a cent and even then threaten to kill me because you cut and sell timber and I dont like it, when you know it is not right and I have been so creditably informed that I believe it, because you did not deny it, if it had not been true, why did you not like an honest man and a friend write to me all about it I will now State to you the facts which are these if you ever mean to pay me for that land I want you to do it, before the first day of September next, or ever after hold your piece, you told me you could git the money there at any time so now git it and fetch it on it is not anything you have said about me or any thing else, that I care any thing about, but the cutting and Selling timber, to try to waste and destroy the property which if you was trusty and I could depend on your not destroying and making the place less valuable and pay *the taxes I perhaps should let you have a far longer swing but if true what I hear you will most likely come and pay me for the land before the first of September next which will be near 5 Years and three months, which is a long time to be out of* my money and get nothing and worse than that it seems to do you no good I cant hear as you have sowed much wheat, or raised much of any thing, so you are no better off for making money than when I was there last which will be 4 years this fall, I have not seen Post since I wrote you before I think or have not this season, he is lame with the rheumatism and wrote me a while ago that he wanted to see me before I go west and he would try to come out with me, I suppose he thinks there will be taxes to pay, *I cant see your object to want so much land and occupy* so little, you have had time with that tract to have *raised a good many thousand bushels of Wheat and to have paid the most for all of it if you had* worked as hard at that as you have for building Parks and Dams all to no purpose, do you remember of going into a nine acre field once at my house in Starkey and after you got to Fiero's you said by God it was so small you could not turn round and had to back out if you had occupied them large lots at your country as well as we have that you would cash *anough on hand to pay all off* for we have raised several hundred dollars off of that lot have had as high as 30 bushels of Wheat to the acre and had several crops and the same little lot is there now, covered with Barley and Wheat, I wish you to write to me as soon as you receive this and how

matters stand and are in that country I cant tell when I shall be there to be killed, but if you don't come, I shall have to come or sell, for I want my cash I cant see any cause why you should blow about me as you do but I am not affronted at you at all, or all you have said but I dont like to have the timber cut for that will reduce the value of the property and if the property must run down by *obliging you and giving you a long time* I had better by far sell all out at a low rate, and git my cash, for if a man obliges another and he goes right on, to injure him by wasting timber, when it is as valuable as it is in that country what motive could a man have in letting such a one stay and destroy when the intention was to do him good you see it is unjust and I would not thought it of you.

Yours Respectfully, CALEB COWING.

MR. TOBIAS WYNKOOP.

please write Immediately, write Just as you feel and Just as it is and direct to Big stream Point Seneca Lake Yates County State how is the crops and how much that land is worth, or what it could be sold for.

OCT. 4th, 1848.

MR. TOBIAS WYNKOOP—*Dear Sir:*—I received your friendly letter August 12th '48 Stating they had you in Bonds or you would have been down and ajusted matters with me but after court you would be right down which was about the 5th September past you have not yet come nor have I heard anything from you or any one else how matter went about that scrape of cattle and I feel verry anxious to hear all about it and also if you still intend to come and *redeem the Post tract of land* before the close of navigation, if so I want to know about the time, so I can be at home for I have some inducements to go a Journey and if you are really a coming I shall not go, and also whether the land is assessed to you, or me, or and what part is to me and if you know how much the tax is this season, and if you mean to pay the tax all or a part, if only part what part you pay on, for it must be paid this season by some one it cant be put off any longer Just State what I may depend on so to not deceive me, and if *you cant redeem, dont let that hinder your coming down* I want to see you verry much, on some other matters as well as that, I am pretty hard run for money, I dont know when I can pay Post the remainder and he must have his interest by the day and principal by the time my bying in that country has drained me so I have been in real want of money and have to work like an old Negro to git along, it is now over six years since I bout and have never received a cent from it and have to pay out a good deal to go out and back and would you pay out all your moneye and wait on any one 7 years (do as you would be done by) do oblige me by writing all the particulars right off, so I may know what to depend on and the time you certainly will be here. Wheat is now 9 shillings pr Bush Barley 5 shillings Oats 2 shillings My horse fell with me the other day and come verry near killing me and almost broke my left shoulder and am so lame I cant put on my coat alone, dont fail to come, I think it will be for your advantage, but write immediately whether you will or not and when you will be here if you come.

Yours Respectfully, CALEB COWING.

My Respects to your wife and family Your friends I believe are all well

W. B. Scates, Smith & Williams, and Blodgett & Upton, for Appellant.

Goodwin, Larned & Goodwin, and Ferry & Searls, for Appellees.

Breese, J. The question presented by the record in this case is, were the transactions between these parties of such a character, in relation to these lands, as to operate as a security for the loan of money merely, and to constitute in effect, a mortgage of the lands.

The maxim of equity is, once a mortgage always a mortgage, and the true character of every conveyance of land, is open to inquiry and investigation, no matter what form the parties may have given the transaction. *Ferguson* v. *Sutphen*, 3 Gilm. R. 565; *Miller et al.* v. *Thomas et al.*, 14 Ill. R. 428; *Smith et al.* v. *Sacket et al.*, 15 Ill. R. 528; *Williams* v. *Bishop et al.*, ib. 553; *Davis et al.* v. *Hopkins*, ib. 519.

The scope of the bill is, to establish the transaction between complainant and Cowing as a mortgage, notice of which, Bull, who is made defendant with Cowing, is alleged to have possessed, when he purchased of Cowing. The defendants were required to put in their answers under oath, and they both most emphatically deny the existence at any time, of any mortgage.

Full proof is required, in such cases, to countervail two sworn answers. The issue is one of fact, and we must determine it from the proofs submitted. They consist for the most part, of letters from Cowing to the complainant, written before and after the patents were issued to Cowing for the lands, all which we have examined with care.

It is insisted there are expressions in these letters, alluding to the terms of the original parol transaction of 1842, which determine it to be a loan, and the land taken in the name of Cowing as security, and that such should be the conclusion of the court thereon.

These letters do not purport to give the nature or character of that agreement, nor do any of the witnesses called to detail conversations with Cowing, attempt to state it. All that has been produced as to the terms, conditions and nature of this contract, consist of detatched parcels, incidentally stated in connection with other subjects, and they may all, with few exceptions, as well be referred to a sale as a loan and mortgage. Those exceptions are to be found in the letters of Cowing, of April 14, 1847, and May 1, July 21, and October 4, 1848.

In that of April 14, he complains of cutting timber on the land—hopes plaintiff will "act the fair man, pay the taxes and

not cut the timber and sell it," and says " try to make arrangements to raise the money if you mean to ever redeem against I come. I have given up buying any more in that country."

In the letter of May 1, 1848, he refers to a promise of plaintiff to come to New York and pay him and Post off—informs him of his purchase of Post's interest, and tells him he can have " until the second day of January next to redeem in,"—hopes he will keep the taxes paid and not waste or sell timber, and that he shall have, if he does right, " a good fat slice " of the land. In that of July 21, he refers again to his cutting and selling timber, and complains that he had not explained the matter to him—speaks of a report that plaintiff had threatened to kill him, and asks why he would kill him " for I have done you no injury—have given you all the time to redeem we agreed on,"—but says " if I had not bought at the time I did, some one else would, and you would had no chance to redeem." He then complains that he had had four years and done nothing—had not paid one cent, and the taxes were due—that he must have money and will sell, and reiterates the complaint of cutting and selling timber—says " if you ever mean to pay me for that land, I want you to do it before the first day of September next, or ever after hold your peace."

In the letter of Oct. 4, he inquires if he intends " to redeem the Post tract of land,"—wants to know to whom the land is assessed for taxes, and if he means to pay the tax—desires him to state what he can depend on, and if he can't redeem don't let that hinder your coming down—says it is now over six years since he bought and has never received a cent from it, etc.

If we were obliged to treat expressions and phrases used in conversation or in letters, and the language of unprofessional men in their extensive intercourse and various negotiations, in a technical sense, we should often violate their true intent and meaning. These letters afford an instance in which expressions, if technically understood, would refer to a mortgage, but which it is very clear from the whole letter, its purport and object, the writer never intended should have such a meaning. The solitary word, redeem, is explained by the phrase in the same letters, that he had bought the land, but that, it was understood always, that the plaintiff should have it, in preference to all others, if he paid for it, and a time of payment is specified.

The term, redemption of land, can only apply, technically, when the land is held in pledge or mortgage, and is not descriptive of the acquisition of land by purchase, nor of the re-payment of a loan, whereby land in pledge is relieved from its liability for the loan.

We must endeavor in this case, as in all others, to arrive at

the very truth, and the true intent of the parties unless prevented by some act of the party—here no estoppel interferes to shut out the truth. If we were guided alone by the light afforded by these passages in the several letters referred to, and by what Cowing said as to having purchased the land for the plaintiff, in the hearing of witnesses, we might possibly, arrive at the conclusion, that there was a mortgage; yet on a view of the whole case, as it really exists in the record, we find the most conclusive proof that the original transaction was a sale, and not a mortgage. The defendants most positively deny, and that under oath, which was required of them, the existence, at any time, of any mortgage. These sworn answers cannot be overcome by resorting to a technical meaning of certain phrases in the letters and conversations of Cowing, especially when other portions of the same letters most clearly show that he claimed the land as absolute owner, and as such, makes frequent complaint of acts of waste in cutting and selling timber by one long indulged with extended opportunities of paying for it, and becoming himself the owner.

Any doubt that might rest upon the mind, arising from these passages and expressions in his letters and conversations, is completely removed by the written agreement of January 3, 1849. In that no intention to mortgage, or any recognition of such having been the nature of the original agreement between the parties, can be discovered. On the contrary, the parties have set forth by way of *recital*, as clearly as language can express it, that the first transaction was a sale, and not a loan and mortgage. The bill of complaint insists upon this agreement as a valid and subsisting agreement, and claims to have it enforced as such. The agreement recites, "That said Cowing is the owner of one thousand five hundred and twenty acres of land in township number forty-four north, of range eleven east in Lake county in the State of Illinois, now in possession of said Wynkoop under a forfeited contract for the purchase of the same." There is no suggestion in the bill that there was any fraud or circumvention used in drawing, or executing this agreement, and for anything alleged or proved, it fairly and fully expresses the intention of the parties. We must regard it as their deliberate act, and as expressing truly their meaning. In it reference is made to the real character and nature of the original transaction, and the then condition and position of the parties under it, as being that of "a forfeited *contract* for the *purchase* of the same." The parties have, by this recital shown an intention to declare by that instrument, the nature and character of the former transaction, and have so declared it, in the recital. It is done, too, in language not susceptible of two

meanings, and clearly shows that the first contract was one of purchase and not of loan. A mortgage is not, in any sense, common or technical, a purchase, and language cannot be so forced as to make this to mean a loan or a mortgage. Nor is there in any part of this instrument any language used or intent shown, repugnant to this recital, or importing, in the smallest degree, any other or different fact.

If this agreement is to be regarded—and it is referred to and made part of the bill as an exhibit—it is admitted by the answer, and offered in evidence by the plaintiff—it must be conclusive upon the issue of fact, whether the parol agreement of 1842, was a loan secured by taking the title in fee, direct from the United States to Cowing, in the nature of a mortgage as between Cowing and the plaintiff, or whether it was a sale by Cowing to the plaintiff. We cannot but regard it as a sale, and this conclusion seems perfectly consistent, with all the testimony, whether by letters of Cowing's or by witnesses sworn in the cause. But we might go further and say, even if the evidence was clear, that a loan and mortgage had been made in 1842, that agreement was merged in the agreement of January 3, 1849. If not so, then this last agreement must be treated as void because of its repugnance to the first, for no court could hold it valid to secure the mortgagor the extended credit provided in it, and at the same time relieve him from all its effect upon his own right and interests.

Although parties may not at the same time, and by the same instrument, stipulate for converting a loan and mortgage into an absolute purchase upon the happening of a subsequent event, yet it is also true, that a subsequent *bona fide* and fair agreement for the purchase and extinguishment of the equity of redemption for a valuable consideration, will be sustained, and such this appears to have been. The plaintiff, has all along, treated the first transaction as a mortgage, and has set it up and insists upon all his rights under it. But he has mistaken the true character of the last agreement. As the first was a mortgage, as he insists, so also he assumes this last agreement is in the nature of a security for the debt and must therefore partake of the original transaction. This is so, as a principle, for the unrestricted right of redemption will be extended to transactions between the parties, in the nature of security for the debt, subsequent to the original mortgage. 1 Hilliard on Mortgages, 48, sec. 18; *Bloodgood* v. *Zeily*, 2 Caines' Cases in Error, 124. But it is of no avail to speculate on this topic, for we have already expressed the opinion, that the whole evidence shows the first transaction was a sale, and we look to the recitals of the last agreement to ascertain the real terms and conditions and true character of the first. Both

parties are estopped by the recitals in it, and must be bound by their own admissions of the facts stated in it. They must be taken to be true, else, the agreement would not have been executed. 1 Greenl. Ev., sec. 23; *Crisman et al.* v. *Matthews*, 1 Scam. R. 148; *Cowen* v. *Jackson et al.*, 4 Peters, 85.

Although it be true, that courts will not be estopped from looking into all the facts and circumstances, by a deed absolute on its face, to ascertain whether a loan of and security for money was really intended, yet if there be no fraud, or circumvention in procuring it, parties must be bound by, and be estopped from averring anything against their own deliberate recitals, admissions and agreements, especially when such averments would prejudice and work injury to others who have acted in good faith upon the existing or supposed state of facts, in such a manner as would produce wrong and injury to be now overturned.

Such would be the condition of both Cowing and Bull.

Cowing forbore to assert his rights, during the long credit given, and when he did assert them, he did it upon terms of being rid of the agreement, by making time in its performance of its essence. Bull purchased upon the faith of the existing facts, rights and powers, as recited and provided in the agreement of January 3, 1849, and has paid his money relying upon their truth and binding obligation upon the parties to the instrument.

To allow the plaintiff to avail of the time and terms of that agreement, and on failure to comply with its provisions, and after an innocent party had purchased in good faith and paid his money relying upon the plaintiff's own written admissions, now to avoid them, or construe them into a mere defeasance, would enable him to perpetrate a fraud upon both defendants.

Admitting in its fullest legal extent, the doctrine of notice of all plaintiff's equities, as properly chargeable upon Bull, yet those equities must be limited to plaintiff's rights as fixed by the agreement of January 3, 1849, and we cannot apply the doctrine of notice, simply from possession in its general sense, and send Bull to the plaintiff to make inquiry, for that doctrine cannot apply where possession is declared to be under a written instrument. The instrument itself explains the possession, and it is no more open to contradiction or explanation, than any other obligation contained in it. What does this instrument tell Mr. Bull and all others? In the second article it is declared—

2. "The said Wynkoop hereby surrenders to the said Cowing, the actual possession of the said lands and every part thereof, and acknowledges himself to occupy the same as a

tenant at will of the said Cowing and liable to be removed from such occupancy at the will of said Cowing."

Bull being notified of this agreement, as fixing and controlling the rights of both parties, and the condition and character of the estate, took the land subject to all the equities of the plaintiff as they existed and appeared under that agreement, and he cannot now be made to yield to a state of facts wholly inconsistent with the provisions of this agreement, and depending too, upon parol proof to show them.

We cannot imagine a case, wherein the doctrine of estoppel, was more necessary to protect the innocent, even if the truth was, as is alleged, that the original agreement was a mortgage, for if it were so, it was by parol only, and nothing existing but the plaintiff's possession to operate as notice to put incumbrancers and purchasers upon inquiry. When therefore, such a mortgagor deliberately enters into a written agreement with his mortgagee, in which he recites that his possession was under a forfeited contract to purchase—that he had surrendered the possession and then held as a tenant at will with a right to sell within a limited period so much of the land as would pay a certain sum, and thereby become owner of the residue if any, we cannot hesitate to apply the doctrine of estoppel in all its cogency, for the protection of a purchaser from the alleged mortgagee, unless the mortgagor shall show, by incontestible proof, that there was a mortgage in fact, and not a sale, and that such purchaser had *actual* notice of it, and not merely constructive, by such possession.

Finding then, no evidence of a mortgage, or previous mortgage relation between the plaintiff and Cowing in that agreement, nor anything squinting towards it, but on the contrary, evidence quite conclusive that both transactions amounted to a sale of the lands, all the equities are clearly with the defendant Bull.

The essential fact, that of the existence of a mortgage being wanting, we might dismiss the case, without comment upon the question of performance of the agreement in its true spirit, but as the proofs were taken and argument and authorities adduced upon this question, we will notice the evidence to that point.

Treating the agreement of January 3, 1849, as a contract of purchase—the most favorable view for the plaintiff—we find that the time of performance is made of the essence of the contract, and is one of the most essential conditions on which the rights of the plaintiff depend.

Parties may make the time for the performance, one of the conditions of the contract, and when they do, courts of equity will not relieve a party from default, where the other party has

not waived it or acquiesced in it. *Smith* v. *Brown*, 5 Gilm. R. 314; *Glover* v. *Fisher*, 11 Ill. R. 673; *Kemp* v. *Humphreys*, 13 ib. 573; *Chrisman* v. *Miller*, *ante*, 227.

They can annex their own condition to their deeds or contracts, so that they be not against the policy of the law. A condition in a deed may be annexed to every species of estate and interest in real property—to an estate in fee, in tail, for life or years, in any lands or tenements. 2 Cruise's Dig., Title 13, chap. 1, sec. 9; 1 Hilliard on Real Estate, chap. 27, sec. 11. This principle is not questioned.

The condition in this agreement, reserved the right in the vendor to sell and dispose of one-third of the lands, after the first day of June, 1849, and the residue during the year 1850, if the plaintiff did not sell enough to pay the consideration agreed on by the first named day; and there was this proviso, that Cowing would not exercise such right during either year, if the plaintiff should proceed with reasonable diligence to make sales. Admitting that this proviso qualifies and restrains the reserved power, still, the phrase "shall proceed with reasonable diligence in the sale of said lands," must have a reasonable construction in order to carry out the intent, which was to make a sale, or raise the money in some way, to pay the agreed consideration. The agreement does not provide that the plaintiff may sell a part before the first of June, 1849, and the remainder afterwards, unless the restriction upon the power of sale reserved to Cowing is to be construed, as carrying that intent. We think it was a reservation rather, of a right in Cowing to make partial sales at different periods of time, to be exercised, on plaintiff's inability to make a sale for the whole sum designed to be raised, before the first of June, 1849.

But giving it the largest sense in favor of the plaintiff, still he fails to bring himself within its provisions. It may be admitted that Cowing's right was limited to one-third in 1849, and the power remained in the plaintiff to sell that third at any time before a sale should be effected by Cowing; and so during the year 1850, not only of that third, but of the residue, yet the plaintiff failed to make any such sale at any time, nor did he make a tender of money raised, no matter how, as a substitute.

Had the plaintiff made such a sale or sales, or tendered the money during the year 1850, he would then be in a position to raise the question he has raised upon the construction of this agreement.

But there is no real ground to contend, that the provisions of this agreement would render a sale made by Cowing in 1850, void or voidable at the instance of the plaintiff, although he had neither sold any part of the land, nor made a tender of any

money in fulfillment of the agreement until June, 1851. Such a construction of the agreement, would be in disregard of the condition as to the time of performance, which qualified the plaintiff's rights as a purchaser, and reserved the vendor's right to rescind the contract by a resale of the premises. The sale was good as between Cowing and Bull, whether made before or after June 1st, 1849, and it must also be good as between the plaintiff and the defendants, unless the plaintiff can avoid it by showing a compliance on his part with the agreement.

This he cannot do without showing a tender of the consideration money within the time, as he has failed to show any sale, unless we construe the contract as suspending Cowing's power by that kind of diligence set up here, consisting of inquiries after purchasers, and offering the lands to those known not to desire to purchase. Diligence of this kind, might suspend Cowing's right to rescind by a resale, to an indefinite period. We apprehend the diligence contemplated by the parties, was a successful sale bearing solid fruit, and not unsuccessful efforts, and abortive attempts to make sales.

As to the tender, both defendants positively deny it. The plaintiff shows by one witness only, that he and his witness went to Bull in November, 1850, when he informed Bull that he had come to fulfill the contract, and offered him the first payment—then the first two payments, and finally, the full amount with interest. It is not stated that any money was exhibited, or, indeed, that he had any money to make good his offers, and if so, what kind of money, coin or currency.

The testimony of one witness uncorroborated, cannot prevail against a sworn answer, even if we could understand the offer as including a tender or actual exhibition of the money. A count of the money may not be necessary where the party absolutely refuses to receive it, or have anything to do with it. But all these may not dispense with the existing ability to make the payment, that is, the actual possession of the money, or having it within convenient reach.

The proof of tender in June, 1851, is equally insufficient and unsatisfactory. It was proved by one witness only, and not corroborated by a single circumstance. It was also too late. It is shown to have been on the 3rd of June, 1851, to Bull, and on the 4th of June to Cowing. Cowing admits an offer of paper money, but denies a tender of money, he objecting to anything but gold or silver coin. The plaintiff has offered no explanation or contradiction of this statement. Neither the proof of time, or kind of money is sufficient to sustain these acts as a tender in June, 1851.

The evidence of performance or readiness to perform by the plaintiff, is insufficient to entitle him to a decree for a specific performance, was that the scope of the bill, as he has shown neither a compliance with the terms of the agreement, nor proved a tender of the purchase money. A tender is *stricti juris*, (*Buchenan* v. *Horney*, 12 Ill. R. 336,) and the money must be in sight, and capable of immediate delivery, and the tender must be absolute, (2 Greenl. Ev., sec. 601–2–5,) unless the production of the money be dispensed with by the absolute refusal of the creditor to receive it. 3 Stark. Ev. 1067. Nor would it be in our power to give relief by a decree for a specific performance, on a bill framed solely upon the ground of a right of redemption as a mortgagor as this is.

The decree of the Circuit Court is affirmed.

Decree affirmed.

John Handyside, Appellant, *v.* John Cameron, Appellee.

APPEAL FROM PEORIA COUNTY COURT.

One man may authorize another to sign his name, or make his mark, and he will be bound by it.

This was an action of assumpsit brought by the plaintiff, John Handyside, to the March term of the Peoria County Court, A. D. 1858, against John Cameron, the defendant, to recover the price of four yoke of work oxen, alleged to be of the value of $400.

The declaration contained one special count, and usual common counts. The first count states, in substance, that the defendant, on the 31st day of October, A. D. 1857, at Peoria, bought of the plaintiff four yoke of oxen, at one hundred dollars per yoke.

Defendant pleaded the general issue, upon which plaintiff took issue to the country.

The defendant also filed two special pleas, upon which issue was joined.

At the August term, A. D. 1858, of said court, a trial of said cause was had by a jury, and verdict rendered against the defendant for the sum of two hundred and fifty dollars. From which this appeal is taken.

Upon the trial of the cause, the plaintiff introduced *Charles D. Eaton*, who testified that in the month of December, A. D.

1857, the plaintiff sold to defendant four yoke of work oxen, and that he saw defendant take away said oxen; and that he did not know what defendant agreed to give for said cattle; but that they were worth about one hundred dollars per yoke.

And the plaintiff then rested.

Whereupon the defendant introduced one *William Cameron*, as a witness, who testified that he was present when the defendant purchased said oxen from plaintiff. That the defendant bought four yoke of cattle from plaintiff, and gave plaintiff two notes on John and Jonathan Sowards, one for $65, the other for $260, both bearing date 12th October, 1857, due one year after date; and one note on the plaintiff for $26, amounting, interest and all, to $30, which, together with seven dollars in money, the plaintiff then and there received in full for all of said oxen.

That said plaintiff at that time asked said defendant how it was that both the names of John and Jonathan Sowards, were in the same hand-writing, and defendant told the plaintiff that John Sowards, who is the son of Jonathan Sowards, told his brother-in-law, George Schalenberger, to sign his name and also the old man's, Jonathan Sowards, and that Jonathan Sowards was in the room at the time, and the said Schalenberger handed said notes after he had signed them according to request, to John Sowards, and that John Sowards read the notes aloud, and said that they were all right, and that the old man, Jonathan Sowards, was present.

There was other testimony of like effect.

The court then gave the following instructions on behalf of the plaintiff:

1st. That if the defendant gave the plaintiff notes on John and Jonathan Sowards, in payment for the cattle, and that plaintiff took the notes on the faith and belief that said notes were genuine, then if they believe, from the evidence, that Jonathan Sowards never signed his name to the said notes, nor directed Schalenberger to sign them for him, then such are and were not genuine, and the taking of said notes was no payment of said cattle.

2nd. The jury are instructed that to make a note genuine and valid, the signature must be in the hand-writing of the party executing it, or be executed by his mark.

To which said instructions, and the giving thereof, the said defendant excepted.

And the said defendant asked the court to give on his behalf, the following instructions, to wit:

1st. The court instructs the jury that where a person makes his mark, it is good even without an attesting witness.

2nd. If a person, who cannot write, consents that another person shall sign his name for him, and authorizes him to do so, and he does sign his name in the presence of the person authorizing it, it is good.

Both of which instructions the court refused to give, to which, and the refusal of each, the said defendant then and there excepted.

The defendant then and there moved the court for a new trial, which motion was by the court overruled, and judgment was entered in accordance with the verdict.

Ingersoll Brothers, for Appellant.

Lindsay & Fowler, for Appellee.

Walker, J. Upon the trial the court at the instance of the plaintiff instructed the jury as follows:

"The jury are instructed that to make a note genuine and valid, the signature must be in the hand-writing of the party executing it, or be executed by his mark." And refused to give the following, asked by the defendant:

"1st. The court instructs the jury that where a person makes his mark, it is good even without an attesting witness.

"2nd. If a person, who cannot write, consents that another person shall sign his name for him, and authorizes him to do so, and he does sign his name in the presence of the person authorizing it, it is good."

To which decisions exceptions were taken. These decisions of the court below were all wrong. One man may authorize another to sign a note or other paper for him by parol, whether he can write his name or not. And if a note is so signed, with such authority, it is as much the principal's note as if signed with his own hand by writing his name in full or by placing his cross or other mark to the note. These are principles too familiar to require or even justify discussion.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Allen Hunter and Cyrus Reed, Appellants, *v.* William Bryden, Appellee.

APPEAL FROM PEORIA.

A party who executes a note is estopped, and cannot deny his signature, though he does not write plainly.

This action was commenced in the County Court of Peoria county.

The plaintiff filed a declaration in assumpsit on the following promissory note:

$694.71. *Chillicothe, Jan.* 26, 1858.

Thirty-six days after date, we or either of us, promise to pay to the order of William Bryden, six hundred and ninety-four and 71-100 dollars, value received, with half of current rates of exchange on New York.

ALLEN HUNTER.
CYRUS REED.

To this declaration the defendants pleaded the general issue.

On the trial the plaintiff offered the note in evidence.

The defendants' attorneys moved to exclude said note from the consideration of the jury, upon the ground of variance between the said note and the declaration, as the said note, as they alleged, was signed by Allen Hunte and Cyrus Reed, and the one set out in the declaration was described as being signed by Allen Hunter and Cyrus Reed.

The plaintiff then introduced one *Harding*, as a witness, to prove that said note was signed by Allen Hunter instead of Allen Hunte; and said Harding testified that said Allen Hunter signed said note, as it was in his hand-writing. He had seen him write several times, and knew his hand-writing well; and that he made that kind of an "r" to his name.

The defendants then moved to exclude from the consideration of the jury the evidence of said Harding, upon the ground that a variance between the note and declaration existed; that the note should be excluded as evidence, and could not be established by proof of the hand-writing of defendant. All of which motions were overruled by the court and excepted to by defendants.

The jury rendered a verdict for the sum of seven hundred and six dollars and eighty-four cents, and the court rendered a judgment against defendants for that amount. Whereupon defendants entered a motion for a new trial, which was denied.

LINDSAY & FOWLER, for Appellants.

PURPLE & PRATT, for Appellee.

CATON, C. J. We have rarely met with a case manifesting more effrontery than this. Hunter was sued by his right name. He executed the note on which he was sued with his own hand, and now objects to the introduction of the note, on account of a variance, because he wrote his own name badly;—because he did not make the final letter as distinctly as a better scrivener would have done, although a witness, who has often seen him write his name, swears that he always writes it that way. He is estopped to deny, that he wrote his name properly and that he put in all the letters. If he could not read his own name properly, as he wrote it, the court and jury below, it seems had no difficulty in doing so, nor do we have any difficulty in that regard, although the last letter seems to have been but imperfectly made, judging from the copy sent up by the clerk. It is sufficient, that he made it for an r, which affords conclusive evidence that that is the letter. The witness tells us that he always makes that letter in that way.

The judgment must be affirmed.

Judgment affirmed.

HENRY ROBINSON, Plaintiff in Error, *v.* IRAM NYE, HENRY M. MATTHEWS, WILLIAM W. HULBUT, PHILLIP VAN VOLKENBURG, WILLIAM B. LEONARD and ISAAC W. FRENCH, Defendants in Error.

ERROR TO PEORIA.

An assignment for the benefit of creditors, which declares that the assignee shall only be liable for loss or damage, except the same shall arise through his own willful default, is fraudulent and void.

THIS was an action of trespass *de bonis asportatis*.

The declaration was in the usual form in such cases, and contains four counts. The first count is in the usual form for trespass *de bonis*, etc. The second count alleged the existence of a partnership between Andrew S. and George W. Anderson, in Chillicothe, under the name and style of "A. S. Anderson & Bro." That said firm, on, to wit, the 8th day of November, 1856, made an assignment of their goods and effects to the

plaintiff, and that the goods in this count mentioned were conveyed and delivered to plaintiff by said firm, under and by virtue of said assignment, on the said 8th November, 1856, and that defendants seized, took and carried away, etc., (following the usual form.) The third count alleges the possession of a certain building, or store-house, in Chillicothe, and that defendants broke into said store-house, when, etc., and seized, took, etc. The fourth count alleges that the plaintiff was, when, etc., in possession of a certain lot and store-house situated thereon, in Chillicothe; that defendants, when, etc., broke in with force and arms and took possession of the same, and ejected and expelled plaintiff therefrom, and kept said plaintiff expelled and out of the use and occupation of the same for a long time, from thence hitherto, and during all that time said plaintiff lost the use and occupation of the same, which use and occupation was worth, etc.

To the declaration the defendant filed three several pleas. 1st, the general issue; 2nd, a special plea to the first, second, third and fourth counts of plaintiff's declaration, stating that Wm. W. Hulbut, Phillip Van Volkenburg, and Wm. B. Leonard, partners trading under the name and style of Hulbut, Van Volkenburg & Co., before the time when, etc., sued out a writ of execution from the United States Circuit Court for the Northern District of Illinois, on the 3rd day of January, A. D. 1857, directed to the marshal of said district, commanding, etc., of the goods and chattels of Andrew S. Anderson, impleaded with George W. Anderson, he make the sum of $959.59, on a judgment in said United States Court before that time recovered by Hulbut, Van Volkenburg & Co., against said Andrew S. Anderson, impleaded with George W. Anderson; that the goods and chattels in plaintiff's declaration mentioned, were the goods and chattels of said Andrew S. and Geo. W. Anderson, partners under the name and style of A. S. Anderson & Bro.; that said Nye was the United States Marshal before and at the time of issuing said writ of execution, and took and seized said goods, etc., as said marshal, by virtue of said writ; that the other defendants entered, took and seized, etc., as the servants of said Nye, for purpose aforesaid, etc.

The third plea alleges that Andrew S. and Geo. W. Anderson owned the goods and chattels mentioned in plaintiff's declaration, and not by the plaintiff.

Issue was filed to defendants' first plea.

Leave was obtained of court to reply double to defendants' first plea, and filed, first, a replication denying the several facts in said second plea, and defendants joined issue thereon. The second replication to second plea of defendants denied that the

goods and chattels in plaintiff's declaration mentioned, were the goods and chattels of Andrew S. and George W. Anderson, partners, etc., but the goods and chattels of plaintiff, and defendants joined issue upon the same.

The replication to defendants' third plea denied that Andrew S. and George W. Anderson owned the goods, etc., but that plaintiff owned the same, and defendants joined issue upon the same.

A jury being impanneled, plaintiff called *Andrew S. Anderson*, who testified that he knew George W. Anderson; that George W. and witness were equal partners in buying and selling goods at Chillicothe from April 1, 1856, to November 8, 1856; that George left September 8, 1856, with $1,600 in money belonging to said firm; that the name of the firm was A. S. Anderson & Bro.; that George went *via* Virginia (to raise more money) to New York, in the State of New York; that he went to New York to pay debts and buy goods for said firm; that when George left, he told witness to do what he thought best for the firm; that George never returned, and witness never heard of him until the spring of 1857, and knew nothing as to his whereabouts until the spring of 1857; that when George left, he expected to be absent about four weeks at most; that George being absent, and witness not being able to consult with George, and not knowing where George was, and having the sole management of the firm affairs, on the 8th day of November, A. D. 1856, executed the assignment and schedules to plaintiff, and plaintiff took possession of the property assigned on the 10th day of November, 1856; that at the time the assignment was executed, the firm was largely indebted, and between $4,000 and $5,000 was due, and creditors whose claims were due were pressing for payment; that one debt of between $200 and $300 was sued, and all wanted their pay; that at the time the assignment was made, witness and the firm had not money enough to pay any one of their creditors. The plaintiff then offered an assignment and additions thereto in evidence. The assignment contains this provision: "Provided always, and it is hereby agreed, that the said trustee for the time being, his substitute or executors or administrators, shall not be liable for more money or effects than he shall receive, nor for any loss or damage which may happen thereto except the same shall arise through his own willful default, and the said respective creditors, parties hereto, do, and each and every one of them for himself and herself severally and respectively, and for their several and respective executors, administrators, partners and assigns, doth hereby accept and take the estate and effects hereon assigned in full payment, satisfaction and discharge of all their respective debts and

demands aforesaid, and all loss and damage sustained or to be sustained by reason of any liability aforesaid, and do and each and every one of them doth absolutely remise, release, discharge and quit claim the said party of the first part of and from all demands which they, or any or either of them, now have, ever had or hereafter may have, claim or demand against the said party of the first part. And it is understood that any additions, corrections and alterations may be made in the schedules hereto annexed for the more full and accurate specification of the matters and things therein contained or intended to be contained."

THIS INDENTURE, AGREEMENT, DECLARATION AND RELEASE, Made this day at Chillicothe, by and between A. S. Anderson & Bro. of the first part, Henry Robinson, trustee, of the second part, and the several creditors of said A. S. Anderson & Bro. of the third part, witnesseth, That in the assignment this day executed by the said A. S. Anderson & Bro. to the said Henry Robinson, for the benefit of said creditors, as in said assignment mentioned and set forth, it was not the intention of the parties executing said assignment to require, compel or to induce any creditor of said firm of A. S. Anderson & Bro. to execute or release said firm of A. S. Anderson & Bro. from the claim of said creditors, or either of them, as a condition upon which such creditors could or should receive their share of the proceeds of the property assigned. And the said A. S. Anderson & Bro. hereby release and discharge all and every of their said creditors from and of all conditions, if such should be found in said assignment, and authorize and empower each of said creditors to receive from said Henry Robinson, trustee, etc., the share or part of such creditor or creditors of the property assigned, or the proceeds thereof, in the order in which they and each are preferred and mentioned in said assignment, without executing any release or instrument whatever as a condition upon which they shall be entitled to receive their dividend. And the said A. S. Anderson & Bro. further stipulate, declare and agree, that said trustee shall at once, without delay, proceed to convert the property assigned into money, and pay over the same to the creditors of said firm, first paying the creditors preferred the full amount of their respective claims, and the remaining creditors of said firm pro rata; and this instrument is made part and parcel of the assignment hereto attached, and is to be considered as a part and parcel thereof.

A. S. ANDERSON & BRO. [SEAL.]
HENRY ROBINSON. [SEAL.]

WE, A. S. Anderson & Bro., hereby sell, assign, transfer and deliver to Henry Robinson, (in consideration of the trusts hereinbefore mentioned, and of one dollar to us in hand paid,) all the goods, wares, merchandise, property and estate mentioned in and described in the schedules hereto annexed, for the purposes and upon the trusts in said instruments, schedules, etc., hereto annexed, mentioned and declared, and which instruments and schedules, etc., we adopt and make part of this instrument.

A. S. ANDERSON & BRO.

No question was made to the signature or execution of the assignments and additions. The plaintiff admitted that the

additions were executed on Thanksgiving Day, being November 25, A. D. 1856, and after the original assignment was executed.

The defendants objected to assignment and additions going in evidence, (but not on the ground that the execution thereof was not proved.)

And the court sustained the objection, and excluded the assignments, additions and schedules from the jury; to which decision of the court sustaining said objection, and excluding said assignment and schedules, the plaintiff then and there, at the time, objected and excepted.

The plaintiff then proved to the jury that the plaintiff took possession of the goods in plaintiff's declaration mentioned, under said assignment and addenda, and kept and retained full and sole possession of the same, for the space of over a month, and proceeded in good faith to execute the trusts and convert the property into money; and while the plaintiff was in possession of the goods, executing the trusts, the defendants entered in such possession, and with force and arms, took and carried away thirty-five hundred dollars worth of said goods, and converted the same to their own use.

It was admitted by plaintiff that Matthews and French were acting as the deputies of Nye, the marshal, when they seized the goods.

The jury found for the defendants.

The plaintiff entered a motion for a new trial, for the following reasons:

1. The court erred in excluding proper evidence offered by the plaintiff.
2. The court erred in excluding the assignment and additions thereto, offered in evidence by the plaintiff.
3. The court erred in admiting improper evidence offered by defendants.
4. The verdict is against the weight of evidence.
5. The verdict is against law.
6. The verdict should have been for the plaintiff.

But the court overruled said motion, and refused to grant a new trial.

The cause was tried before Powell, Judge, and a jury.

Grove & Davidson, for Plaintiff in Error.

H. M. Wead, for Defendants in Error.

Breese, J. The assignment of Anderson under which the plaintiff claims the goods in controversy is fraudulent and void on its face, as we have already decided in the case of *McIntire*

v. *Benson*, 20 Ill. R. 500. On its face, the assignee is made liable only for willful defaults. We will not go over the ground traversed in the case above cited, but refer to it as decisive of this case.

The plaintiff here however insists that this objectionable feature of the deed of assignment has been remedied by the second amendment made by the assignor himself to the deed without the concurrence of the assignee.

This we think does not validate the assignment, for by the amendment, the property is subject to the same trusts as in the original deed.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Eli H. Kennedy, Plaintiff in Error, *v.* David W. Pennick, Defendant in Error.

ERROR TO COUNTY COURT OF CARROLL COUNTY.

A justice of the peace has not jurisdiction, to render judgment for a breach of covenant, nor has the County Court on appeal, any larger jurisdiction than had the justice of the peace.

Pennick sued Kennedy before a justice of the peace on an account for $96.50, for medicines, services, etc. Pennick filed an account for $98, as a set-off. Kennedy recovered a judgment for eight dollars and costs, from which Pennick appealed to the County Court.

In the County Court, Pennick filed an account against Kennedy for $204.50, which the County Court permitted him to sustain by proof. This account was made up of damages done to growing crops, on a farm leased by Kennedy to Pennick; in which lease Kennedy covenanted to build and keep certain fences, which he had neglected to do,—and for a breach of this covenant, the damages ensued, etc.

Leland & Leland, for Plaintiff in Error.

B. C. Cook, for Defendant in Error.

Caton, C. J. As developed on the trial, this was an action for a breach of covenant, brought before a justice of the peace, which was appealed to the County Court, where it was tried,

and the defendant obtained a judgment for ninety-nine dollars and eighty cents. This was all wrong. The justice had no jurisdiction to render a judgment for either party for a breach of covenant. After allowing the plaintiff to prove damages for a breach of the covenant by the defendant, it was well to allow the defendant to prove damages which had resulted to him by the breach of the covenant, by the plaintiff to an equal amount, and thus defeat the plaintiff's action. Thus one error would have cured or at least concealed the other. But the court allowed the defendant to go further, and to recover a judgment against the plaintiff. This he could not do unless the court would have had jurisdiction to render the judgment for a breach of covenant, had he been the plaintiff. When proving damages resulting from a breach of the covenant by the plaintiff, he occupied the position of a plaintiff in a cross-action. The County Court had no greater jurisdiction than the justice had, from whom the appeal was taken.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

John Crittenden *et al.*, Appellants, *v.* Charles R. French, Appellee.

APPEAL FROM BUREAU.

A contract should be correctly stated in the pleadings; if the evidence differ from the statement, the contract as evidence will be rejected.

A plaintiff should state no more than the legal effect of the contract he declares on. The proof should conform substantially to this statement.

The law will not so construe a contract as to make it illegal, when it will bear a different construction making it legal.

The omission of the words "or order" "or bearer," in the declaration upon a promissory note, does not constitute a variance.

The facts of this case are stated in the opinion of Mr. Justice Walker.

Stipp & Starling, for Appellants.

W. H. L. Wallace, for Appellee.

Walker, J. This cause was tried at the January term, 1859, of the Bureau Circuit Court. It was assumpsit on a promissory

note. The declaration contains one count only—is special upon the note, and describes it as follows:

"For that whereas the defendants, on the 5th day of November, A. D. 1855, at Princeton, in the county of Bureau and State of Illinois, made their promissory note in writing, bearing date on that day, and delivered the same to the plaintiff, and thereby, eighteen months after the date thereof, for value received, promised to pay to the plaintiff or bearer, by and under their names of John Crittenden, Jas. Fitzmaurice and Wm. Converse, the sum of two hundred and eighty-seven dollars and fifty cents, *with interest thereon at the rate of ten per cent. per annum from the date thereof until paid*, which period hath now elapsed," etc.

The defendants pleaded the general issue.

The bill of exceptions shows that a jury was waived, and trial had by the court.

Plaintiff offered in evidence the following note: "Princeton, November 5th, 1855. Eighteen months after date, for value received, we promise to pay Charles R. French or bearer, two hundred eighty-seven dollars fifty cents, *with interest at ten per cent.*" To which the defendants objected, because of a variance; the objection was overruled, and note read—which was all the evidence—and judgment rendered in favor of plaintiff, against defendants; to the rendition of which judgment defendants excepted, and bring the cause to this court by appeal, and assign the following errors:

1st. The court erred in overruling the objection of defendants to the note, and in permitting plaintiff to read the same in evidence.

2nd. The court erred in rendering judgment in favor of plaintiff and against defendants.

It is one of the long established and uniform rules based upon the very principles of the system of pleading, that the contract should be correctly stated. If the evidence differ from the statement, it is a variance which requires it to be rejected, and the party must fail in sustaining his allegation. "It is laid down on this subject, that a contract or written instrument should be stated *according to its legal effect.* This rule is very extensive in its operation, and applies not only to the statement of contracts in *assumpsit*, but also to the statement by either party of contracts and obligations of every description, whether verbal, written, or specialty, in any form of action. The party is not *compelled* to follow the precise form of words in which the contract was made; it suffices if he state its true legal effect and operation; and it has been observed that a deed may be declared on, without using a word which was contained therein, except the names of the parties and the sums. Indeed, in some

cases it has been held absolutely necessary to depart from the terms of the contract, and a party has been defeated on the ground of variance, when he has used the precise words of the contract, but misstated its legal operation." 1 Chit. Plead., 6 Am. from 4 Lond. Ed. 334. The plaintiff is not to state more than the substance and legal effect of the contract he declares on; and except when the allegation of the contract is descriptive of a written instrument, he is not bound to prove his declaration literally, but substantially. If the evidence is precisely the same in substance with the declaration, although some immaterial term may have been omitted or added in the latter, there is no variance.

The note described in the declaration in this case, is payable "with interest at the rate of ten per cent. per annum from the date thereof until paid;" while the note read in evidence, was for the same amount, "with interest at ten per cent." The legal effect of the note read in evidence was that it should draw interest from date, and as the note fixes no other than an annual interest, the presumption is, that such was intended. The law will not give the construction that the parties intended to violate its requirements, by reserving more than ten per cent. per annum, when the instrument will bear a different construction, making it legal, when it will as well bear that as the other construction. It then follows that the note as declared upon, and as read in evidence, in legal effect is precisely the same. The additional words used in the declaration were not used as descriptive of the instrument, but as descriptive of the legal obligation of the note, and they described it truly.

This court has held that in declaring upon a promissory note or bond payable to a person, "or order," "or bearer," these words may be omitted in the declaration, and by doing so there will be no variance between the declaration and proof; and that it is sufficiently described according to its legal effect. *Sappington* v. *Pulliam*, 3 Scam. R. 385. It has been repeatedly held that the omission, to insert the words "for value received," in the description of the note in the declaration, constitutes no variance, when it is declared on according to its legal effect.

The judgment of the court below should therefore be affirmed.

Judgment affirmed.

Jonathan R. Anderson *et al.*, Appellants, *v.* The Chicago Marine and Fire Insurance Company, Appellee.

APPEAL FROM COOK COUNTY COURT OF COMMON PLEAS.

Although a tenant evicted from a part of demised premises, is not under obligation to pay rent for the part he occupies; yet if the tenant at the expiration of the term gives his note for the rent of the premises, it will be presumed that his moral obligation was so impressive as to induce him to give the note in ease of his conscience, and the note may be collected.

This action was assumpsit, brought in the Cook County Court of Common Pleas, and tried at the June term, A. D. 1858, before J. M. Wilson, judge, without a jury.

The suit was founded upon a promissory note made by the plaintiffs in error, and given to the defendants in error, for three hundred dollars, payable in sixty days, dated the 9th day of April, A. D. 1856.

The declaration contained two special counts upon this note, and the common counts.

To this declaration the defendants below pleaded the general issue, and four special pleas to the first two counts thereof.

The first and fourth special pleas are the only ones upon which any questions arise.

The first is a plea of want of consideration, and is as follows: "And for a further plea in this behalf, as to the first and second counts, etc., defendants say *actio non*, because they say, that on, to wit, the 31st day of March, A. D. 1855, to wit, at Chicago aforesaid, the said The Chicago Marine and Fire Insurance Company, by a lease, in writing, under the seal thereof, and the hand of its president (which said lease, the date whereof is the day and year aforesaid, the said defendants now bring here into court) demised and leased to the said defendants the room looking west, numbered nine, in the third story above the basement of the Marine Bank Building, corner of Lake and La Salle streets, in the city of Chicago, *together with the closets*, safe and inner room connected therewith, to have and to hold the said premises with the appurtenances, from the first day of April, A. D. 1855, for and during and until the first day of April, A. D. 1857, the said defendants rendering yearly rent therefor, of four hundred dollars, payable, one hundred dollars on the first days of July and September, A. D. 1855, January, April, July and October, A. D. 1856, and January and March, A. D. 1857, respectively. By virtue of which said demise, they, the said defendants, on, to wit, the said first day of April, A. D. 1855, entered as well into the said room, numbered nine, and the said safe and inner room connected therewith, *as into*

the said closets connected therewith, and were thereof possessed, and being so thereof possessed, they, the said defendants, say that the said plaintiff afterwards and before the first day of July A. D. 1855, to wit, on the first day of April, A. D. 1855, entered into the said closets, parcel of the said premises so demised to the said defendants as aforesaid, upon the possession of the said defendants thereof, and expelled and removed them, the said defendants, from the possession thereof, and kept out them, the said defendants, from the possession thereof always from thence until after the first day of April, A. D. 1856, and after the time of the giving of said promissory note in said counts mentioned.

"And the said defendants further say, that the said promissory notes mentioned and described in said first and second counts in said declaration, are one and the same note, and the said cause of action mentioned in said second count is identically the same as that mentioned in the first count of said declaration. That the said promissory note in said counts mentioned was made by the said defendants, endorsed by the said Frank Parmelee, and delivered by defendants to the plaintiff, for the supposed rents payable under and by virtue of said lease, on the first day of September, A. D. 1855, on the first day of January, A. D. 1856, and on the first day of April, A. D. 1856, and being one hundred dollars each, as aforesaid, and for no other consideration whatever, of all which the said plaintiff, at the time of the making of said note, to wit, at Chicago, had notice. And this the said defendants are ready to verify, wherefore," etc.

To which plea the plaintiff replied several replications, of which the fourth was as follows:

And for further replication to said second plea, by the defendants above pleaded, special leave of the court for that purpose first had and obtained, now come the said plaintiffs, and say they ought not to be barred from having and maintaining their said action by anything in said plea secondly above contained, because they say that the defendants continued to occupy, use and enjoy all the rest of said demised premises in said plea mentioned, after they were evicted from said closets, as in said plea alleged, and this they are ready to verify. Wherefore they pray judgment, etc.

To this replication the defendants demurred, and the court overruled the demurrer.

And the said plaintiffs further replied to the plea aforesaid, as follows:

And for a further replication, etc., because they say that after the defendants had been evicted from said closets, as in said plea

alleged, the said defendants settled up *the rents of said premises*, and gave the note in said first and second counts mentioned for the same, and this the plaintiffs are ready to verify, etc.

To this replication the defendants rejoined as follows:

And the said defendants, as to the said replication of the said plaintiffs secondly above pleaded to the defendants' second plea, say that plaintiff ought not, etc., because they say that the said note was given for the said supposed installments of rent, payable in and by the lease mentioned and described in said second plea, supposed to have accrued during the time the said eviction continued, in the said plea alleged, on the first day of September, 1855, and on the first days of January and April, 1856, and not for any other rents or consideration whatever, and of this the said defendants put themselves upon the country.

To this rejoinder the plaintiff filed a demurrer, and showed for cause that the said rejoinder should have concluded with a verification.

The court sustained the demurrer, and defendants stood by their pleadings.

The defendants' fourth plea is a plea of set-off.

To this plea, the plaintiff, among other replications filed the following, as the fifth replication to the fourth plea:

And for a further replication to said fourth plea, plaintiffs say *precludi non*, because they say, that after the defendants had been evicted from said closets, as in said plea alleged, the said defendants continued to occupy and enjoy the rest of said premises so demised, and after so occupying and enjoying the same, the said defendants *settled up for said rent*, and gave the said note in said first and second counts mentioned, *for the same*. And this, etc.

To this replication the defendants demurred, and the court overruled the demurrer.

The court decided against the defendants on all of said issues of law, and gave judgment for the plaintiff against defendants, for the amount of said note and interest, and defendants appealed.

The sustaining the demurrer of the plaintiff below to the defendants' rejoinders, the overruling of the defendants' demurrers to the plaintiff's replications, and the giving judgment aforesaid for plaintiff against the defendants, are assigned for error.

W. K. McAllister, for Appellants.

Shumway, Waite & Towne, for Appellee.

CATON, C. J. The law undoubtedly is, that if the landlord evicts the tenant from a part of the demised premises, the tenant is under no legal obligation to pay rent for the balance, although he continues to enjoy them. The proof shows that the tenant in this case was excluded from the water-closet which was a part of the demised premises, and that he continued to enjoy the office, which was the balance of the demised premises, till the end of the term, after which, he gave his note for the rent of the premises thus enjoyed. Although there was no legal obligation resting upon the tenant, to pay any rent for the office which he thus enjoyed, there may have been and we think from the circumstances of the case there was, a moral obligation resting on the tenant to pay for the enjoyment of the office—and so we are bound to presume the tenant considered it, or else he would not have given this note. He knew best whether a sense of this moral obligation was resting on his conscience, and the presumption is, that he gave the note to ease his conscience of that burthen. He knew all the facts of the case. He knew when he gave the note that he had been evicted from the water-closet, and whether there was any sufficient moral reason for such a course on the part of his landlord, and he also knew that he had enjoyed the office without disturbance, which was undoubtedly the principal part of the demised premises. This moral obligation, was a sufficient consideration for the note. The judgment must be affirmed.

Judgment affirmed.

WOOD *et al. v.* GOSS *et al.*

IN this case the defendant pleaded a release of errors by one of two partners of the original judgment in favor of the firm, to which the plaintiff demurred. The demurrer was overruled. Thereupon the plaintiffs below replied, that the release was not the deed of the plaintiffs, and second, fraud and covin, without setting out in what the fraud and covin consisted. To these replications there was a demurrer.

Per Curiam. The replication of *non est factum*, is not an answer to the plea, which alleges a release by one of the plaintiffs only. The replication may be true, yet a release from one partner being sufficient, as we have already decided, on the demurrer to the plea of release, the demurrer must be sustained

to this replication. As to the second replication, the averment that the release was obtained by fraud, it should state the facts constituting fraud and covin or circumvention, which is the language of the statute. *Sims* v. *Klein*, Breese R. 235.

Demurrer sustained.

R. C. Bristol, Plaintiff in Error, *v.* City of Chicago, Defendant in Error.

This was a motion by appellant for leave to assign additional errors, after the argument of the cause had commenced.

Per Curiam. This application comes too late; after the argument is opened, additional errors cannot be assigned, against the consent of the defendant in error.

W. B. Scates, for Plaintiff in Error.

E. Anthony, for Defendant in Error.

The Town of Ottawa and Philo Lindley, Plaintiffs in Error, *v.* George E. Walker *et al.*, Defendants in Error.

ERROR TO LA SALLE.

The city of Ottawa has exclusive control over the streets, etc., within its corporate limits; and the township authorities cannot levy a tax upon the citizens of that city, for the purpose of erecting a bridge within it.

Equity will grant relief where a tax is levied without authority of law, or where it is for fraudulent purposes.

On overruling a motion to dissolve an injunction; before rendering a final decree, the parties should be heard on the merits of the bill, if a default has not been taken.

The bill in this case was directed to February term, 1859, of La Salle Circuit Court, but filed November 12th, 1858.

The bill alleges that on the 3rd day of September, 1858, there was filed in the office of the clerk of the County Court of La Salle county, a certificate in writing, in substance as follows:

"At a town meeting, held at the court house in the city of

Ottawa, on Tuesday, April 6th, 1858, George B. Macey was chosen moderator, and J. D. Pennell, clerk *pro tem.*

"At three o'clock of the same day J. D. Caton presented a petition for a tax of one-half mill on each one dollar valuation of the taxable property in the town of Ottawa, to be assessed for the purpose of repairing roads and bridges; and that the commissioners appropriate $150 of the same towards repairing or building a road or bridge, near the residence of L. Leland.

"And at four o'clock on the same day, L. B. Delano presented a petition for a tax of two mills on each dollar valuation of taxable property, to be assessed for the purpose of building a free bridge across Fox river, near the aqueduct; all of which was presented in due form and unanimously carried."

That about the hour of three o'clock, P. M., of the day on which said town meeting was held, by the direction of the electors then present, the balloting for officers of said town was suspended for the purpose of transacting the general business of the day, and thereupon, said meeting did transact such general miscellaneous business, and the petition presented by Caton was acted upon and the tax therein mentioned voted.

That the aqueduct mentioned in the said certificate is within the corporate limits of the city of Ottawa. That said city is incorporated by an act of the general assembly, approved Feb. 10th, 1853; and that, in and by said charter, exclusive power is given to the city council to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve, alter and repair streets, avenues, lanes and alleys, and other public highways, and to establish, erect and keep in repair bridges.

That by Sec. 1, Art. 5. of said charter, it is provided that "the city council shall have power and authority to levy and collect taxes upon all property, real and personal, within the limits of the city, not exceeding one-half of one per cent. per annum upon the assessed value thereof, and may enforce the payment of the same in any manner to be prescribed by ordinance, not repugnant to the constitution of the United States and of this State."

That there is no highway crossing said Fox river at or near the aqueduct, except the same be within the limits of the city of Ottawa.

That by Sec. 4 of an act to incorporate towns and cities, approved Feb. 10, 1849, it is provided that "the corporate authorities of cities, incorporated under any special act, shall have power to pass all the ordinances and by-laws, and possess all the powers authorized under the laws and amendatory acts incorporating either of the cities of Springfield or Quincy."

That by an act entitled "An act to reduce the act incorporating the city of Springfield, and the several acts amendatory thereof, into one act, and to amend the same," approved March 2nd, 1854, and by Art. 5, Sec. 4 of said act, it was provided that "the city council shall have power, within the jurisdiction of the city, by ordinance, to have the exclusive control and power over the streets, alleys and highways of the city, and to abate and remove any of the encroachments or obstructions thereon; to open, alter, abolish, widen, extend, straighten, establish, regulate, grade, clean, or otherwise improve the same, to put drains and sewers therein, and prevent the encumbering thereof in any manner, and protect the same from any encroachment or injury. To establish, erect, construct, regulate and keep in repair bridges, culverts, and sewers, sidewalks and cross-ways, and regulate the construction and use of the same, and to abate any obstructions or encroachments thereof."

That by Sec. 1, Art. 10, of said city of Ottawa, is is provided that "The inhabitants of the city of Ottawa are hereby exempt from working on any road beyond the limits of the city, and from paying any tax to procure laborers for working on the same."

That the complainants are tax-payers and property owners in the town and in the city of Ottawa.

That the board of supervisors of La Salle county, at their annual meeting, passed an order that said tax for said Fox river bridge be assessed upon said town, and that Philo Lindley, clerk of the County Court, will, unless restrained by the court, extend said tax on the collector's book of said town.

Charges that said two mill tax has never been legally assessed, and that the town meeting had no right to pass any resolution to levy said tax, at the time when the vote, mentioned in said certificate, was taken.

That said certificate does not show that said tax was voted at any town meeting of the town of Ottawa.

That no town meeting had a right to direct the building of a bridge within the city of Ottawa, or to raise any tax therefor, or to direct concerning the location or construction of any bridge or bridges within the city of Ottawa, or to direct the imposition or assessment of any tax for such purpose, but that such power is, by law, vested exclusively in the city; and that said city council of said city have never directed or permitted the construction or erection of any bridge across Fox river at the point mentioned in said certificate.

The bill prayed that said Lindley be restrained from extending said two mill tax upon the collector's book of the town of

Ottawa, and that upon the final hearing of the bill, the injunction be made perpetual.

The injunction was issued Nov. 13th, 1858, and served Nov. 15th, 1858.

At November term, A. D. 1858, defendants moved to dissolve the injunction, which motion was then and there overruled by the court; and afterwards, and at said November term, A.D. 1858, it was ordered, adjudged and decreed by the court, that the said injunction be made perpetual, and that the said Lindley, his clerks, etc., be forever enjoined from extending said tax upon said tax book.

The errors assigned are:

1st. That the bill contains no equity upon its face, and no matters or things sufficient to authorize the court to grant the injunction, or to render a final decree.

2nd. The court erred in overruling the motion to dissolve the injunction.

3rd. That the defendants were not lawfully before the court, for the purpose of a final hearing, at said Nov. term, A. D. 1858.

4th. That the defendants were not called, or in default at or before the rendition of the decree.

5th. That the court erred in rendering the final decree at a term prior to the one to which the bill was directed.

6th. That the court erred in enjoining the clerk from extending the tax upon the tax book.

7th. That the court erred in rendering said final decree, and in making said injunction perpetual.

D. P. Jones, for Plaintiffs in Error.

B. C. Cook, for Defendants in Error.

Walker, J. This was a bill filed by complainants, to enjoin the collection of a tax, levied by the town of Ottawa in its corporate capacity, for the purpose of constructing a bridge within the corporate limits of the city of Ottawa. The court below granted the relief prayed, and rendered a decree making the injunction perpetual against the collection of this tax. It is claimed that the city under its charter has the exclusive jurisdiction over roads, streets, alleys and bridges within its limits, while on the other hand it is claimed that the town under the act establishing township organization has a concurrent jurisdiction over the same subjects. The act of the legislature incorporating the city of Ottawa, approved Feb. 10, 1853, Secs. 9 and 10, Art. 5, Sess. L. 300, provides that the city shall have power "To open, alter, abolish, widen, extend, establish, grade,

pave, or otherwise improve and repair, streets, avenues, lanes and alleys, and other public highways. To establish, erect and keep in repair bridges," within the corporate limits of the city. And to enable the city to accomplish this and other objects, by their charter, the common council are authorized to levy and collect a tax, of not exceeding one half of one per cent. per annum, on all real and personal property within the city.

The power to erect, establish and keep in repair the bridges within its limits, is expressly delegated to the city authorities. And there would be no question that it was exclusive, were it not that the legislature by the first and fourth clauses of the first section of the 22nd article, of an act to establish township organization, adopted Feb. 17, 1851, (Scates' Comp. 347,) gives to the commissioners of highways the superintendence and care of roads and bridges, and requires them to give directions for the repairing the roads and bridges, and to cause bridges that have been erected over streams intersecting highways, to be kept in repair, in their respective towns. These provisions must be construed in reference to the object the legislature had in contemplation at the time of their adoption. When the charter was granted to the city, there can be no doubt, that it was the design of the legislature to confer this power upon the city authorities. The language will bear no other construction. And when it was thus conferred, it deprived all other bodies of its exercise. Its exercise is repugnant to that of other authorities, and by implication repealed all other legislation on the same subject, the exercise of which would be repugnant to the power granted to the city. And so much of the act creating township organization was thereby repealed. The power in its very nature would seem to be inconsistent with its joint or concurrent exercise by the two bodies, and even if the city charter was not subsequent in date, unless it plainly appeared from the language employed, that it was intended to be joint or concurrent, it would be held that the power was exclusive in the commissioners beyond the city limits, and exclusive in the common council within their jurisdictional limits, and neither have any power to perform any acts in reference to this subject beyond their respective limits. If the town may erect this bridge, they may by the same authority open other streets in, and grade and pave those streets and alleys already open in the city. The exercise of such a power by each of these bodies, would necessarily lead to endless strife and confusion, which the legislature never could have intended to produce by these provisions. The levy of this tax by the town was unauthorized, and was an exercise of power not possessed by them, which, for want of such authority, was void.

The question then presented is whether a court of equity has power to grant the relief sought. This court in the cases of *Merrit* v. *Farris*, and *Munson* v. *Minor*, *post*, held, that where a corporation, or an officer, or a body of individuals are vested with the power to levy a tax for a specific purpose, a court of equity will not inquire into the regularity of the exercise of the power, but leave the parties to their remedy at law, unless it is exercised for fraudulent purposes. But when the law has conferred no power to levy a tax, or in case a person or an officer not authorized by law to exercise such a power, shall levy a tax, or when the proper persons shall make the levy for purposes on the face of the levy, not authorized, or for fraudulent purposes, a court of equity may stay its collection by injunction. And this tax having been levied by a corporation, or by persons acting as such, when by law, they were not authorized to assess it, and being so unauthorized, the court had the power to restrain its collection. *Cowgill* v. *Long*, 15 Ill. R. 202; *Shirley* v. *Sabin*, 20 Ill. R. 357.

It was also urged that the court below acted prematurely in rendering a final decree in the case. The bill was entitled of February term, 1859, and was filed during the November term, 1858. The defendants to the bill at that time, entered their appearance, and moved to dissolve the injunction previously granted, the motion was overruled, and a decree rendered making the injunction perpetual. The complainants took no rule on the defendants for an answer, nor did they in any manner put them in default. The bill was not taken as confessed, and no answer or demurrer was filed. The defendant may, according to well settled practice, move to dissolve an injunction, at any stage of a cause, and its being overruled only operates to continue the injunction to a final hearing. The mere motion to dissolve an injunction does not authorize the court, on overruling it, to make the injunction perpetual. The defendant has still the right to be heard on the merits. The court can only render a decree making the injunction perpetual on a bill *pro confesso*, on overruling a demurrer to the bill, or upon a hearing on the bill, answer, exhibits and proofs. The Circuit Court, therefore, erred in rendering the decree in this case, and it must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

Caton, C. J., took no part in the decision of this case.

William D. Murphy, Appellant, *v.* Ralph Lockwood, Appellee.

APPEAL FROM MARSHALL.

In a contract for the conveyance of land, where the vendor has shown great indulgence, time not being of the essence of the contract, he may be prevented from suddenly insisting upon a forfeiture.

Time in certain cases may be considered material, though no part of the contract itself. As when one party fulfills on his part, he may demand a like performance of the other, and upon default he may rescind.

But in all cases, the fulfillment must be of such a character as will sustain a bill for specific performance.

A party claiming the benefit of a contract, must show himself prompt and eager to perform on his part.

Covenants to pay and to convey are dependent, and an action to compel payment will depend upon a previous offer to convey.

Where a party agrees to make a warrantee deed, with full covenants, free from all incumbrances, before he can exact performance or forfeiture of the vendee, the vendor must tender a deed, having covenants for seizin, that he has full right to convey, also a covenant for quiet enjoyment, and against incumbrances, also for further assurance.

The party against whom a rescission of a contract is sought, must be placed in *statu quo*, by the other party, by a tender or return of notes, money, etc.

The rule in equity is compensation, not forfeiture.

This is a bill in chancery for specific performance, filed by Lockwood against Murphy, in the Marshall Circuit Court.

The bill charges that Murphy and Lockwood, on the 5th day of April, 1851, entered into a sealed agreement for the sale by Murphy to Lockwood of certain real estate in Marshall county.

The agreement shows that the sale was for eight hundred acres of land, which is described therein; that Lockwood paid down $100, and agreed to pay $806.80 in four months, and $2,140 in one year from the date of the agreement; that for the last two sums of money Lockwood gave his notes to Murphy, and that upon the payment of all that should be due upon the contract, Murphy and his wife should make and execute to Lockwood their warranty deed, with full covenants, except as against the taxes of the year 1851.

That the contract was executed by Murphy and Lockwood only, and that at the time of the purchase, Lockwood contracted to pay the full value of the land.

That soon after the making of the contract, Lockwood became embarrassed in his pecuniary affairs, and could not *conveniently* make payment according to the terms of the contract, and that Murphy did not exact prompt payment.

The bill further charges that on the 8th day of August, 1851, Lockwood paid Murphy $100 on the contract, and that Murphy endorsed the same on the notes due at that time.

That on the 3rd day of May, 1855, Lockwood paid the further sum of $100 on the contract, and that he had paid all the taxes assessed upon the land, since the making the contract, which in the aggregate amounted to about $100.

That since the making of the contract Lockwood had entered upon and taken possession of the land and made improvements thereon to the value of $800.

That Murphy still holds the said notes; that he had never delivered, or offered to deliver to Lockwood, a deed for the land, according to the contract, and that the parties to the contract, nor either of them, had ever in any manner rescinded the same.

That on the 8th day of October, 1855, Lockwood tendered to Murphy $3,617.50, being the entire sum of money, of principal and interest, due upon the said notes.

That Murphy, in order to cheat and defraud Lockwood out of what he had paid on the contract, and out of the money he had paid for the taxes assessed on said land, and out of his improvements made thereon, refused to receive the money tendered and make a deed for the land; that a deed was then demanded; that the land had, within a year previous to the filing the bill, increased in value four thousand dollars, which the bill charges was the reason why Murphy would not convey; that but for the pecuniary embarrassments of Lockwood, he would have paid the notes, and insists that time is not of the essence of the contract.

The bill waives an answer under oath, and prays that Murphy may be compelled to specifically perform the contract.

The answer of Murphy admits the making the contract as charged in the bill; the payment of the $100 down, and making and delivering to him of the notes for the balance of the purchase money.

It denies that Lockwood contracted to pay all the land was worth when the contract was made, but admits the pecuniary embarrassments of Lockwood, and insists that he was bankrupt, and refers to, and makes exhibits of transcripts of judgments rendered against him in New York city, and to an examination of Lockwood under his oath, before the city court of Brooklyn, New York, as an insolvent debtor, which took place in October, 1854, at which examination, Lockwood admitted under oath, that he had no interest in any lands in the State of Illinois.

The answer admits the payment of the $100 on the 8th of August, 1851, and the like sum on the 3rd day of May, 1855.

The answer charges that on the 2nd day of May, 1855, Murphy tendered to Lockwood a full covenant warranty deed for the land, as required by the contract, at his office, 107 South street, New York city, executed by himself and wife, and duly acknowledged, and then demanded immediate payment from

Lockwood, of all that was due upon the contract, and exhibits and makes a copy of said deed a part of the answer; that Lockwood made no objection to the deed or acknowledgment, but refused to receive the same and pay the balance of the purchase money, but requested time until the next day to get the money.; that the next day Lockwood called upon Murphy, and informed Murphy that he could not get the money, but offered to pay then $100, on the contract, if Murphy would postpone the payment of the balance of the money, until the 3rd day of July, 1855; that Murphy assented to the offer and received the $100, and that all the purchase money was due, and unpaid, on the 1st day of July, 1855, except the said $200.

That on the 5th day of July, 1855, Murphy again tendered to Lockwood said deed, and again demanded payment from him of the balance of the purchase money; that Lockwood refused to pay the same; that Murphy then had the notes ready to be delivered to Lockwood, that Lockwood then said that he was poor, and could not get the money, and that he was entirely insolvent.

That thereupon, Murphy caused the affidavit of Orlando B. Lewis, (a copy of which was attached to the answer, and made a part thereof) of the tender of the deed, and demands of payment of the purchase money, to be recorded in the office of the recorder, of Marshall county, Illinois, to show that default had been made by Lockwood, and that the contract was rescinded; that Murphy received the $100 in the month of May, previous, upon the ground, and consideration, only, that prompt payment should be made, of the balance of the money, and that he never, in any other manner, extended the time of payment.

That Lockwood had never paid any taxes on the land, but that since the making the contract, other persons had paid them, although Murphy had always looked after them, with a view of paying them; that Lockwood had never entered upon the lands or made any improvements thereon; that Murphy still held the notes, which were negotiable.

The answer denies that the contract is still in force, and binding on Murphy, but insists that the defaults and vexatious delays of payment of the purchase money released him from performing the same.

It denies the tender of money, and demand of a deed on the 8th of October, 1855. It denies that he ever intended to defraud or cheat Lockwood, or that he had ever refused a deed, and refused to receive the purchase money, or that he had threatened to sell the land.

It admits that the land ever since the making the contract had steadily increased in value, and charges that Murphy well knew the same when he tendered the deed to Lockwood, and

demanded payment of the money, and charges that Murphy had repeatedly notified Lockwood that the contract was rescinded; that he did so May 2nd, and July 5th, 1855, by reason of Lockwood not complying with the terms thereof, and of Murphy's offers so to do, and insists that there had been, on part of Lockwood, unreasonable and vexatious delays of payment; and offers to refund to Lockwood all the money he had paid on the contract, and all the taxes he had paid on the lands, if any, and to bring into court the notes, and surrender up the same to Lockwood, and insists that Murphy had been greatly injured by reason of the non-payment of the purchase money when due, and charges that Lockwood suffered the notes to be protested, and exhibits the protests.

Lockwood files a general replication to the answer.

The proofs of Lockwood show the making the contract, and the terms thereof as set forth in the bill and admitted in the answer.

John W. Hubbard testified, that on the 8th October, 1855, Lockwood, at the office of Murphy, 107 South street, New York, tendered to Murphy over $3,600, over $3,500 of which was gold, and the balance in bills; that the tender was made on a land contract made between the parties for land in Illinois; that Murphy refused to receive the money as tendered, but insisted that the contract was at an end, and had been since the 3rd of July, 1855, which Lockwood denied, and claimed that the contract was in full force.

Wm. B. Green testified, that after the assignment of the interest of Lockwood in the land was made to him, he relinquished his interest in the lands to Lockwood, and that he had often paid Lockwood's taxes, on his lands in Marshall county, as his agent.

The testimony of *S. L. Fleming* was taken orally in court, and he testified, that he saw Murphy at his office in August, 1855; that Murphy told him that the 3rd or 5th of July previous, he demanded of Lockwood payment for the land; that Lockwood told him (Murphy) that he was poor, and had no money to pay at that time; that between the time he had demanded the money, and the time of the conversation between Murphy and Fleming, Lockwood had been to Murphy and told him that he had a house in Brooklyn which he would like to trade to him (Murphy) on the land contract; that he (Murphy) said he did not take it on account of the price, or the title, witness did not remember which; that Murphy said he considered the contract rescinded and at an end, and had notified Lockwood to that effect the July previous; that he (Fleming) knew the three prairie quarters of the land, and had a general knowledge of

the balance; that in 1851 he thought the land might have been worth from $3 to $5 per acre; that about one-half the land was barrens, which was not worth much at that time; that in 1855 the same lands were worth ten dollars per acre on an average; that there was a gradual rise in the value of land, from April 5th, 1851, to 5th April, 1855.

By the decree the court required that Murphy, within sixty days from the adjournment of the Circuit Court of Marshall county, execute and deliver to Lockwood, a warranty deed, for the land described in the bill, with covenants against all incumbrances, except the taxes of the year 1851, and with release of dower by the wife of the said Murphy, provided Lockwood paid or tendered to Murphy the sum of three thousand six hundred and seventeen dollars and fifty cents, within the said sixy days, and appointed a commissioner to make such deed, in case Murphy should make default in making the same.

Upon the filing of which decree, the defendant, Murphy, entered his motion to set aside the decree and to grant a new trial, which was overruled by the court, whereupon Murphy prayed an appeal, which was granted.

The errors assigned are as follows:

1st. The court erred in decreeing a specific performance of the contract referred to in the bill.

2nd. The court ought to have rendered a decree dismissing the bill.

W. B. Scates, and Burns & Richmond, for Appellant.

N. H. Purple, for Appellee.

Breese, J. This was a suit in equity to compel the specific performance of a contract under seal, to convey certain lands lying in Marshall county, purchased on credit in part. The contract bears date April 5, 1851, and stipulates that the last payment shall be due April 5, 1852.

The proofs show that the vendee paid down at the time of the purchase, one hundred dollars. On the eighth day of August, 1851, he paid another hundred dollars. He also paid all the taxes assessed upon the land from the time of the purchase, until the time of filing the bill, and also, took possession of the lands, and made valuable improvements on them.

From the time the last installment became due, no payment was made on the contract until the second of May, 1855, when the vendee paid an additional hundred dollars, which seems to have been fully accepted by the vendor. During all this period, the vendor manifested the utmost kindness and indulgence

towards the vendee, who, it appears had become very much embarrassed in his finances, which resulted in a failure in his business. He was not importuned to pay, nor threatened with extreme measures in case he did not pay. At the time of this payment, the vendor extended the credit two months, until the second day of July, 1855. On the expiration of this credit, the vendor demanded full payment of the residue of the purchase money, and tendered a conveyance of the lands, describing them erroneously as lying and being in Putnam county, but correctly as to township, range and sections, but did not tender the notes given by the vendee, or offer to return the money paid on the contract, or to reimburse him for the taxes and improvements made on the land. On failure of the vendee to comply, the vendor proceeded to declare the contract forfeited, and caused an affidavit to that effect to be made and recorded in Marshall county.

After the receipt of the payment in May, 1855, the vendor in August following, entertained a proposition made by the vendee, to convey to him certain real estate in the city of Brooklyn, New York, as a payment on the contract, which, for some reason not fully explained, was not acceded to. This failing, vendee obtained the money, and on the eighth of October, 1855, some eight weeks thereafter, tendered to the vendor the balance of the purchase money with the interest due, and demanded a deed according to the contract, which being refused, this bill was filed.

These are the prominent facts in the case, and the question is, does the complainant, the vendee, occupy such a position, under all the circumstances, as to entitle him to a decree for a specific performance.

It will be seen that the contract does not in terms, make the time of performance, or punctuality in the payments, an essential condition, nor is there any provision in it, authorizing the vendor to declare the contract forfeited for a failure to make punctual payments, nor does it authorize him to retain any portion of the purchase money paid; and it stipulates for a deed with full covenants.

It must be conceded that the vendee did not pay promptly, that a long time elapsed within which he should have performed on his part, or offered to perform, and which, under ordinary circumstances, would justify a rescission of such a contract. But it is apparent, in this case, the delay in payment, was not chargeable to any unwillingness to pay, or to a desire to take any advantage of the vendor, but a disposition was manifested throughout to perform the contract. The remissness we think, was overlooked by the vendor and is to be considered as waived,

by him, he having taken no steps during that long interim between 2nd April, 1852, and the 2nd May, 1855, when he accepted a further payment of one hundred dollars, to declare the contract forfeited. His silence and inaction, under such circumstances, must be regarded as acquiescence on his part in the delay, and should preclude him from insisting upon a forfeiture. Time does not seem to have been regarded by the parties, as of the essence of this contract, and we must take it, as they regarded it. Parties may make time material, and so it may be considered as material, though no part of the contract itself. As when one party fulfills all the conditions of a contract, he may demand a like performance of the other party within a reasonable time, or on the day named for performance, and upon default may rescind. But in all cases, the fulfillment must be of such a character as will sustain a bill for specific performance, otherwise it may not be sufficient to lay the foundation for a rescission upon the mere ground of delay. The circumstances attending such contracts serve to show whether time is material, and of the essence of the contract or not, and equity will not relieve the negligent party from the consequence of his own laches, the rule being, that the party claiming the benefit of the contract must show himself ready, desirous, prompt and eager to perform on his part. Nothing of this kind is shown by the parties to this contract. The delay in the payments was acquiesced in by the vendor, and no laches is now justly imputable to the vendee, but that which occurred between the payment on the second of May, 1855, and the eighth of October following when he tendered the whole amount due. Before July, 1855, the vendor had given no intimation of any kind, that he desired or intended, to rescind the contract, but seemed to be content with the conduct of the vendee in delaying payment.

It is insisted by the appellant, that his tender of a deed, and demand of payment, was a complete fulfillment on his part, and rendered prompt compliance on the part of the appellee indispensable.

Was this tender, a compliance with the terms of the contract?

The contract provides, that "on the payment of all the herein described amounts as they become due and payable, the said William D. Murphy and his wife, agree to make and execute a warranty deed with full covenants free from all incumbrances except the taxes of 1851, for all of the described lands to the said Ralph Lockwood his heirs or assigns."

These covenants are mutual and dependent, and the rule, in such case is, that neither party can bring an action without first performing, or offering to perform on his part. Platt on Covenants, 86 to 90, and case referred to in notes.

So a covenant by the vendee to pay, and of the vendor to convey upon payment are dependent covenants, and an action to compel payment cannot be maintained without proof of a previous tender of a conveyance. 2 Hilliard on Vendors, 2, chap. 26; *Mc Cullough* v. *Dawson*, 1 Carter (Ind.) R. 413; *Adams* v. *Williams*, 2 Watts and Serg. 227.

Being then a mutual dependent covenant, the vendor should have accompanied his demand of payment with a tender of such a deed as was stipulated in the contract. Did he tender such a deed? The covenants in the deed tendered were as follows: "And the said parties of the first part do hereby covenant and agree with the said party of the second part, that at the time of delivery hereof, the said parties of the first part are the lawful owners of the premises above granted, and seized thereof in fee simple absolute, and that they will warrant and defend the above granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever."

The contract, as we have seen, provided for a deed with full covenants. A deed with such covenants should contain, first, a covenant that the grantor was seized of the very estate which he purported to transfer, called the covenant for seizin; second, that he had a good and perfect right so to transfer it; third, that the grantee should quietly possess and enjoy the premises without interruption, called the covenant for quiet enjoyment; fourth, that such should be the case free and clear from all incumbrances, leases, trusts, etc., called the covenant against incumbrances; fifth, that such other deeds or instruments should be thereafter executed as might be necessary to perfect or confirm the title, called the covenant for further assurance; and sixth, the covenant of warranty. Rawle on Cov. for Title, 28.

In the deed tendered, three important covenants are omitted, namely, the one against incumbrances, and for further assurance, and of general warranty of title, and also the covenant of a right to convey, unless that can be comprehended under the phrase, "are the lawful owners thereof in fee simple absolute," which we are inclined to think amounts to such a covenant. Our statute covenant of title, embraced in the words "grant, bargain and sell," seems to have been left out of the deed.

The deed tendered therefore, was not such a deed as the contract stipulates, and could not fulfill the mutual dependent covenant therein, and could not be the ground-work of a suit to rescind, it not amounting to a performance, or an offer to perform on the part of the vendor. It is not a literal nor even a substantial compliance with the terms of the contract.

Another objection equally fatal to the offer of performance by the vendor, is found in the fact, that the contract, nowhere

imposes a forfeiture on default in any of the payments, and therefore, the vendor before he could rescind, should put the vendee in the same condition, as before the making the contract. Had the deed tendered, been such an one as the contract required, the vendor, in addition should have returned the notes given for the purchase money and the several advances of money, or at least have offered to return them, before he could be permitted to rescind. This is understood to be the universal rule in such cases. The party against whom a rescision is sought, must be placed *in statu quo*. 1 Hilliard on Vendors, 33, and *seq.* 1 Sug. on Vendors, 306; *Johnson* v. *Jackson*, 27 Mississippi, 498; *Buchenan* v. *Horney*, 12 Ill. R. 336.

Time not having been made of the essence of this contract by the express stipulation of the parties themselves, nor by the nature of the contract itself, or from the conduct and circumstances of the parties and no gross *laches* or vexatious delay changing the relative situation of the parties, or one of them, affecting the character or justice of the contract, courts of equity have not hesitated to decree a specific performance. 1 Sug. on Vendors, 306; 2 Story Eq. Jurisprudence, 102. The doctrine of equity is compensation, not forfeiture. *Morgan* v. *Herrick*, *ante*, 481; *Andrews* v. *Sullivan*, 2 Gilm. R. 327.

It is true in this case, the property, during this delay of payment, had greatly increased in value, but it must be observed, that the appreciation took place before the receipt of the payment of the second of May, 1855, and the entertaining the proposition to take Brooklyn property in August following. In justice then, the real delay, should be computed from July, 1855, up to October 8, of that year, the date of the tender of the purchase money, about three months. This is all the delay shown to be without the consent, and in defiance of the vendor, and it does not seem to us, to be vexatious or unreasonable under all the circumstances. The vendee was very much embarrassed and struggling to make his payments. The vendor was unusually indulgent, and should not now desire to convert his generous forbearance into seeming injustice and oppression. He has the vendee's money, and his negotiable notes and has been offered in good faith, the whole amount due on the contract, and which he will receive before the execution of this decree. Receiving the payment on the contract in May, 1855, manifested not only the vendor's consent to the previous delay, but also his understanding at least, that the contract was then in full force. It would neither be fair nor just, and would operate as a surprise and a fraud upon the vendee, to receive this payment on the contract, and then for the vendor to turn around, and without any previous warning or notice, exact the final payment to the

very day, on penalty of a forfeiture of all previous payments, and without tendering such a deed as he had contracted to execute and deliver. It would be a harsh proceeding thus to drive him to the wall.

We are satisfied, the vendor could not rescind this contract without tendering such a deed, substantially, as the contract stipulated, and also returning or offering to return the advanced payments together with the notes.

The ground for rescinding, failing, the case is left on the question of the vendee's having shown such a performance as will entitle him to a decree. Of this, we cannot doubt, and accordingly affirm the decree.

Decree affirmed.

Frank Parmelee *et al.*, Appellants, *v.* Alvira F. Smith, Appellee.

APPEAL FROM COOK.

A verdict of guilty in an action of assumpsit, though not strictly technical, may be put in form by the court, or, if not objected to, will be held sufficient.

The parent of a minor is the owner of the clothing furnished for the use of the child, and may recover for its loss or destruction.

This was an action of assumpsit brought against Frank Parmelee and others, as common carriers, to the October term, 1857, and was tried before Manniere, Circuit Judge, and a jury, at the June special term of said court, 1858.

The declaration contains four counts, charging the defendants as common carriers, and the common counts.

The first count alleges in substance, that the defendants were common carriers in the city of Chicago, of goods, etc., for hire, in and by certain carriages and omnibuses, from a certain place, to wit: the Michigan Southern and Northern Indiana Railroad Depot, to a certain other place, to wit: the Milwaukee Boat. That the plaintiff, Alvira F. Smith, on the 1st day of September, 1856, certain goods and chattels, to wit: one silk dress, two colored muslin dresses, two Swiss muslin dresses, one barege dress, two basques, one white merino cape, one bonnet, one embroidered handkerchief, one plain handkerchief, one fan, twelve pairs of stockings, one lot of underclothes, twelve collars, etc., of the plaintiff, of the value five hundred dollars, to be taken care of and safely, etc., carried and conveyed by the

defendants to the Milwaukee boat aforesaid, and safely delivered to the plaintiff, and in consideration thereof, etc., the defendants undertook and faithfully promised the plaintiff safely, etc., to carry said goods and chattels from said Michigan Southern and Northern Indiana depot to the Milwaukee boat, and there safely deliver the same to said plaintiff; that defendants did not take care of said goods, or deliver the same, and that they became lost, etc.

The other counts are similar to the first, and for goods of the same description.

Defendants pleaded *non assumpsit.*

On the trial of the said cause the plaintiff's counsel read in evidence the deposition of *Kate C. Smith*, who testified in substance as follows:

That she was the daughter of plaintiff, and that in the latter part of August, 1856, she resided with her brother, Winfield Smith, in Milwaukee, and the fore part with her mother in Michigan; that in the fore part of August, she (witness) started from her mother's house in the city of Monroe, Michigan, and had with her, as baggage, a common sized leather russet trunk filled with wearing apparel and some school books, and traveled by the Michigan Southern road to Chicago; that she had a check for her trunk from the said railroad, and gave it up to the agent of the omnibus line in Chicago.

That she received an omnibus line ticket from the agent of the omnibus line, and gave him her railroad check; that the baggage she did not find on the steamboat, nor receive at any time afterwards.

She further testified that she was fifteen years of age.

In answer to cross-interrogatories, she said that she was going to Milwaukee alone; that the articles were put into said trunk at her mother's house, the day and evening before she started for Milwaukee, and that the last she saw of the trunk was the next day at Adrian, Michigan, where it was changed from the Monroe train, which stopped at Adrian, on to the train from Adrian to Chicago.

That the articles were mostly purchased for her, and were generally used by her, and were exclusively in her possession after leaving home. The articles were generally clothing and necessary articles of wearing apparel in traveling, except the few school books named in the list. There was no merchandize or other property in the trunk, except as stated, and nothing she could recollect except those enumerated in said list, *and nothing belonging to any one except herself, as stated.*

Plaintiff also read the deposition of *Evaline Smith*, who testified that she was a sister of Kate C. Smith.

That Kate left Monroe, in Michigan, in August, 1856, to go to Milwaukee, taking her baggage, being clothing and other articles in a trunk; that witness packed the trunk and testified to the value of the articles. That Kate C. Smith was fifteen years old, and that the plaintiff was her mother.

In answer to the third cross-interrogatory this witness further testified, she (Kate) had the articles above described, besides some in her carpet bag; *and they were all, or mostly all made or purchased for her use;* the pictures were family Daguerreotypes. I cannot state how long the different articles had been used; *all the articles had been used by Kate, my sister, more or less, and they were exclusively in her charge, and were generally articles of apparel and ornament, for her, necessary in traveling;* none of them were merchandize or other property, carried or had in charge for any body besides herself.

The plaintiff was in Milwaukee and witness in Monroe, when Kate left.

There was no other evidence given.

The following was the verdict of the jury:

"We, the jury, find the defendants guilty, and assess her damages at one hundred and forty-six dollars and ninety-one cents."

The defendants thereupon moved the court to set aside the said verdict, and for a new trial; which motion the court denied, and the defendants excepted.

Judgment was rendered upon the verdict, and defendants appealed to this court.

Errors assigned:

First—The court erred in refusing the said instruction.

Secondly—The court erred in refusing to set aside said verdict and to grant a new trial.

Thirdly—The court erred in giving judgment against the defendants.

Scates, McAllister & Jewett, for Appellants.

E. and J. Van Buren, for Appellee.

Walker, J. It is insisted that it is error to render judgment on a verdict in an action of assumpsit which finds the defendant *guilty*, and assesses the plaintiff's damages. The verdict is not strictly formal and technical, but is it substantially sufficient to support the judgment? As a general rule, a verdict, although not formal, will be held sufficient if the court can, from its language, ascertain what was found, and it is in substance responsive to the issue tried, and it will be put in form so as to serve

the justice of the case. In this case it is apparent that the jury intended to find, and supposed they had found, the issue of assumpsit for the plaintiff. And although not in form, it substantially finds that the defendants did promise, and had failed to pay, as alleged in the declaration. When they "find the defendants guilty," and assess the plaintiff's damages the verdict could only refer to the alleged promise and failure to pay, for which they were sued, and is, we think substantially a sufficient finding. Had the attention of the court been called to the verdict, the clerk would have been required to reduce it to form, and by doing so, no error would have been committed. But no objection was taken to the verdict on the motion for a new trial, in the court below, and the objection comes too late when made for the first time in this court. *Schlenker* v. *Risley*, 3 Scam. R. 483.

The refusal of the court below to give this instruction, is assigned as error:

"If the jury believe, from the evidence, that the plaintiff is the mother of the witness, Kate Smith, and the clothing and apparel in question had been furnished by the plaintiff, and given to and put into the possession of the said Kate, to be kept by her, for her use as her own, and were so in the use of said Kate, at the time of delivering the same to the defendants, and that the plaintiff was not present, at the time of such delivery, and was not carried by the defendants, or agreed to be carried by them, then the plaintiff cannot maintain this action for the loss of the same articles, although the jury also believe that the said Kate was a minor at the time of such delivery."

This instruction is based upon the hypothesis, that wearing apparel furnished by the parent to his child, for its support, becomes the absolute property of the latter. That a minor may hold property by donation, by devise, or by legacy, there can be no doubt. But the property to become vested in the minor, must be given with the intention, and for the purpose of having that effect. If only given for a limited or specific purpose, it cannot be otherwise appropriated. So the use alone, may be given for a temporary purpose, with the right of resuming its possession at pleasure. And the intention with which it was given, may be shown by circumstances. When parents furnish their minor children with clothing, it is not that they shall have the absolute, unlimited control of it, to sell, give away, or destroy at pleasure, but it is, that they may enjoy the use of it during the will of the parent. The right of property and possession still remains in the parent, and its possession may be resumed at any time, when desired. The duty of a parent to support his minor child, most clearly gives the right to control

the means which he may see proper to employ. And in discharging that obligation, the means he may employ still remain his, and when employed for that end, they do not thereby become the property of the child. Not only the wearing apparel thus furnished, but the services and earnings of the minor child, belong to the parent. His obligation to support his offspring, entitles him to these, and it is inseparable from the duty, and it has existed, and been fully recognized in all conditions of society, and in every stage of the civilization of our race. The duty of supporting the idle and prodigal child, without the power of controling the means, has never been recognized either as a moral or legal duty. We have been referred to no adjudged case which sustains the position contended for, and it is believed that none exists. But property given to a minor by the parent or any other person, with the intention that the ownership of the child should be absolute, would be governed by different principles.

The evidence in this case shows that the property sued for, was the wearing apparel and school books, used by the child for the usual and ordinary purposes. There is no evidence in the record, tending to show, that those articles were not furnished by the appellee, and the child having left the home of her mother on this occasion, the presumption is that they had been furnished by the mother. And if the daughter was under the control of, and resided with her mother, she must be presumed to own the property, and have had the right of reducing it to her actual possession at will, and the child in placing the property in the hands of appellant to transport to the place desired, only acted as the agent of the mother, and she was entitled to recover for its loss. The instruction was properly refused, and no error is perceived in the record.

The judgment of the court below is affirmed.

Judgment affirmed.

Benjamin P. Van Court, impleaded with Jared C. Hunt *et al.*, Plaintiff in Error, *v.* Alvin W. Bushnell and David McKinney, Defendants in Error.

ERROR TO PEORIA.

A note, unless it is taken in payment absolutely, will not discharge a mechanics' lien.

If but one of several persons who purchased materials for a building, own the land, the lien will be good.

Van Court, impl., etc., *v.* Bushnell et al.

A variance between the proof and the contract described in the petition for the lien, as if it is alleged that the money was to be paid in April, and it appears that the money was to be paid on the delivery of the material, will be fatal.

THIS was a petition for a mechanics' lien, stating contract with Hunt & Bailey in latter part of October, 1857, for sale and delivery of lumber for dwelling-houses on lot one, block thirty-five, in Underhill's addition to Peoria, which lumber was to be delivered at customary market price, as Hunt & Bailey might want it, and was to be paid for on the first day of April, 1858. Pursuant to said contract, complainants sold and delivered, between November 2nd and December 12th, 1857, lumber to the amount of $415.53. Hunt & Bailey paid $15.53. January, 23rd, 1858, said Jared C. Hunt gave *his* promissory note for balance of $400, due on or before April 1, 1858, with interest at *ten* per cent. Firm of Hunt & Co. dissolved January 2, 1858. The lumber was received by Hunt & Bailey and used on said lot. Charges title in Underhill, bond for deed from him to Houghton, and in some manner to Hunt, and in some manner from Hunt to Van Court. Six months not elapsed since last lumber furnished and price became due. Note has become due, but not paid. Prayer for process, sale of premises, etc.

A demurrer was filed by Van Court, assigning that,

1. The settlement and taking the note of Hunt discharged the lien, if any had attached.

2. The contract which the court is asked to enforce is unknown to the statute of mechanics' lien.

3. The petition is otherwise defective.

This demurrer was overruled.

Van Court in his answer sets up that he is owner of lot by bond from Underhill to Houghton, February 1, 1857, assigned to Hunt, October 26th, 1857, and assigned to Van Court, January 11, 1858. Admits, as petitioners allege, a contract with Hunt & Bailey jointly. Don't know whether any lumber was used on premises, and calls for proof. If any, not more than $200 worth was used. Charges that the price of lumber was due December 12th, 1857, and that extending the time of payment and taking note at ten per cent. discharged the lien, if any had attached. Van Court purchased the premises in good faith, January 11th, 1859, and has paid about $400, and has undertaken to pay about $800 more. Knew of no lien when he purchased, etc. Hunt assured him there was no incumbrance.

Sworn to in usual form.

The bill was dismissed as to Houghton, and taken *pro confesso* as to Hunt, Bailey and Underhill. Trial by jury as to Van Court. Verdict as follows: "We, the jury, find for complain-

ants, and assess their *damages* at four hundred and twenty-seven dollars, and sustain the lien as against Van Court." Decree that Hunt & Bailey pay $400 and costs by June 1, 1859, and in default that all the title, etc., of Hunt, Bailey *and Van Court*, and each of them, in the premises, be sold, without redemption, and possession given, etc.

A motion for a new trial was overruled.

Motion to vacate decree, because not warranted by or in accordance with the verdict, was heard and overruled.

De Witt C. House testified, that Hunt and Bailey got lumber of complainants in November and December, 1857, to use on said lot; heard Hunt say they couldn't pay down for it. Hunt and Bailey were in partnership; I understood from them both that they got lumber from complainants. The lumber was used on the lot; understood from them that they were not to pay as they got it; they told me that they were to pay as they could through the winter, and the balance in the spring.

George Clark testified, that Hunt & Bailey put up the buildings House described; never made any measurement, but should think $300 to $400 worth of lumber *might* have been used. Know nothing about the contract.

Anthony Kunzon testified, that in November, 1857, Hunt got 12,000 feet of lumber from complainants' yard; they also delivered "considerable more;" the last was delivered about the 10th or 12th December.

Van Court then called *John O. Petrie*, who testified, that in October, 1858, he heard complainant McKinney say that, "*no time was specified for the payment of the price or value of the lumber that Hunt or Hunt & Bailey had from him and Bushnell in November and December*, 1857*; that they expected to get their money as the lumber was delivered; that they tried to do so, but failed, and afterwards gave Hunt time, and took his note and an assignment of a policy of insurance on the buildings*," etc. I was present when Van Court purchased. Hunt told him there was no incumbrance on the premises; Bailey was not present. This sale was between the 11th and 16th December, 1857.

Charles C. Bonney, for Plaintiff in Error.

Jonathan K. Cooper, for Defendants in Error.

Caton, C. J. Unless the note in this case was taken in absolute payment of the debt, it did not discharge the lien. It served but to liquidate the demand, and left the party to seek his satisfaction upon the original contract. The law is the same in

this case as it is in any other, where a note has been taken and an action afterwards brought on the original consideration, and the note merely used to show the amount at which the debt had been liquidated.

Nor did the fact, that but one of the parties who purchased the lumber and built the house, owned the land, deprive the party of the lien. In our opinion, in such a case the statute creates the lien. It might however be different, if Bailey only joined in the contract as security for the payment of the price of the lumber, and this was understood and known to the creditors.

But the fatal difficulty in this case is, a variance between the contract as alleged in the petition, and the one proved on the trial. In the petition, it is alleged, that by the contract the lumber was to be paid for on the first of April,—by the contract, as proved by the witness House, they were to pay for the lumber as they could through the winter, and the balance in the spring. Now the first of April might be a very equitable time for the parties to agree to a settlement under so loose a contract as this, but it is not the time fixed by the terms of the contract for the payment. By the terms of the contract, the creditors could not be legally called on for the money till the expiration of the ensuing spring. Although they had a right to pay at least a part of it before that time, they had also the right to take the whole of the spring to pay the money in. This was a fatal variance. If we take the testimony of Petrie as giving the true terms of the contract, then there was no credit given, and the money was due on delivery of the lumber, and the variance was as fatal as in the other case. There is no evidence showing such a contract as is alleged.

The judgment must be reversed and the cause remanded.

Judgment reversed.

The Michigan Southern and Northern Indiana Railroad Company, Appellant, *v.* John Meyres, Appellee.

APPEAL FROM COOK.

A railroad corporation will not be held liable for lost baggage, unless it is shown to have been in its possession, or that the company had contracted in some way to transport the baggage.

Voluntary assistance by the agents of the company in looking for the baggage, or an offer by way of gratuity, to pay on account of it, will not render the company liable.

Michigan Southern and Northern Indiana Railroad Co. *v.* Meyres.

THIS was a suit in assumpsit, by Meyres against the company. The declaration alleged defendant to be a common carrier from Cleveland *via* Toledo to Chicago; that on the fourth day of May, 1855, at Cleveland, plaintiff delivered to defendant certain goods and chattels, containing the baggage of the plaintiff, to wit: one trunk and one package, marked John Meyres, Chicago, Illinois, of the value of $419.59, to be delivered to him at Chicago; the defendant so negligently carried the same, that they were lost. The count was a count in trover for the same goods.

The plea of general issue was filed.

On the trial the plaintiff offered a deposition of *William Daily*, to the reading of which defendant objected for its irrelevancy; objection overruled, exception taken. Said Daily testified that he was baggage-master for Cleveland and Pittsburgh Railroad Company, in June, 1855, June 25th. A paper shown was written by me, which paper is as follows:

This is to certify, that I sent Mr. Johu Meyres' baggage to Chicago, in May last; the baggage was lost by him at Cleveland, on his way from New York to Chicago; the baggage was double checked for Chicago from this place, on or about the middle of May. (Signed) WILLIAM DAILY.

Mr. Meyres was here at that time, in search of his baggage, which he claimed to have been lost. Exhibit B. is a letter written by me to the then baggage-master of the Southern Michigan and Northern Indiana Railroad Company at Chicago, as follows:

Dear Sir:—I have received some five or six letters about that baggage of Mr. Meyres; I supposed that he had it long ago; it was double checked and sent to Chicago four or five weeks ago. If it has not got to Chicago yet, it must be at Toledo. Dated June 14th, 1855.

Exhibit C. is a telegraph reply to a dispatch received by me from Mr. Meyres, inquiring about his baggage, as follows:

John Meyres, sent your things to Chicago two days ago.

WILLIAM DAILY.

The baggage consisted of two or more chests; the letter exhibit B. was written in answer to a letter from the baggage-master of defendant at Chicago, making inquiries in relation to Mr. Meyres' baggage. The luggage claimed by Meyres, was in my possession in May, 1855; it came in on the train from Pittsburgh, and was unclaimed at the depot. Mr. Meyres went on without claiming it; it was in my care a short time, probably one day. Meyres telegraphed from Toledo inquiring about it, and I then sent it on checked to Chicago. I received the dispatch

in the course of my employment at the depot, and forwarded the luggage upon receiving the dispatch.

De Witt Robinson, called by plaintiff, testified as follows:

I reside in Chicago; have been employed by defendants two years. Am now in their employ; I recognize Mrs. Meyres; I am in defendant's office, Dearborn street; she was there frequently, inquired for baggage several times in the summer of 1855.

I recollect of Mrs. Meyres coming with a witness; I never knew the baggage was burnt, or that it was in possession of the company, and I could not have made the answer; all I said was, that we had made inquiry after the baggage; I was all this time making an effort to find it; she was in six or eight times to see about the baggage; I don't know that the baggage was ever in defendant's possession; I have made frequent inquiries about it at our depot in Toledo, but could never hear anything of it; I gave instructions to the baggage-master to look out for it, and frequently made inquiries about it of him. I wrote about the baggage at the request of Mrs. Meyers; Toledo is the eastern terminus of defendant's road. From that place east, the Cleveland and Toledo Railroad runs; it is an independent corporation; defendant has no agent in Cleveland to receive baggage that I know of.

I know Mrs. Meyres; I had a conversation with her in presence of the witness; it was in regard to finding baggage; at that time I may have talked to her about her losing it; there may have been other parts of her conversation that I do not remember; the defendant checks baggage over the Cleveland and Toledo road to Cleveland and Buffalo; I can only speak of baggage, I have no knowledge of the freight; my impression is that goods are shipped from Cleveland for Chicago, over the Cleveland and Toledo road, and on reaching Toledo, the charges are paid by defendant's company who collect the whole here; when baggage is mislaid, we put two checks on it for its destination; the object is to designate it as stray baggage, and secure extra care.

Plaintiff's counsel called *John Meyres*, who testified: I am plaintiff in this suit. Defendant objected to witness testifying in his own case; first because he had not established the fact of delivery of his baggage to defendant, and secondly, objected to witness stating the contents of his baggage, because said contents are not specifically set out in the declaration, which objections were overruled by the court, and exceptions then and there taken by defendant. Meyres was allowed to testify, and proved the quantity and value of things in the trunks and boxes.

George M. Gray testified, that he was agent of defendant, and had been for five years; Toledo is the eastern, and Chicago

the western terminus of defendant's road; the Cleveland and Toledo Railroad runs east from Toledo; defendant has no other business connection with that company; we run to and from them, giving them business and taking business from them, both passengers and freight; defendant has no agent in Cleveland for receiving baggage; the baggage-master at Cleveland, whose deposition has been read, is not authorized to receive baggage for defendant; he is not subject to their orders; he is not an employee of defendant; I know nothing of this baggage having been in possession of defendant; I have made inquiries for it and written for it; in my absence, Mr. Robinson acts for me.

I am general agent of defendant at Chicago; don't know William Daily—may have had some letters from him; I made inquiries because Mrs. Meyres came to my office in great distress; inquired at the depot and wrote to Cleveland; I never offered to settle with Mrs. Meyres by way of compensation; I have offered her $30; I wrote a receipt; it was not a written acknowledgment of any claim; do not remember the exact wording of the receipt; I think it was simply a receipt of $30 on account of charity, she claiming damage on account of lost baggage at that time; we are in the habit of giving sums frequently; we use the word charity in such cases.

The jury found for the plaintiff, $400; defendant moved for a new trial; the court overruled the same on the condition that the plaintiff would remit one hundred and twenty-eight dollars and forty-seven cents, which he did; motion overruled; defendant excepted; judgment for plaintiff, $271.53.

The errors assigned are that—

1. The court erred in admitting the deposition of William Daily.
2. The court erred in admitting the testimony of the plaintiff.
3. The court erred in overruling the defendant's motion to strike out all the testimony in the case, where plaintiff rested.
4. The court erred in refusing each of the aforesaid instructions as asked.
5. The court erred in qualifying the aforesaid instructions of the defendant severally.
6. The court erred in overruling the motion for a new trial.
7. The court erred in rendering the judgment aforesaid in manner and form aforesaid.

N. B. Judd, and B. C. Cook, for Appellant.

G. F. Crocker, for Appellee.

WALKER, J. The evidence in this case shows that Daily was the baggage-master and agent of the Cleveland and Pittsburgh Railroad Company. That as such he received the baggage in question from the appellee, and checked it for Chicago. It fails to appear that this baggage ever came into the possession of appellants. Nor does the evidence show that Daily was their agent, or was in any manner acting for them. The road of which Daily was the agent, did not even connect with the road of appellants, and for aught appearing, the baggage may never have reached their road, but may have been lost on the Cleveland and Toledo road, which formed the connection between the Cleveland and Pittsburgh road and appellants' road. And if the loss occurred before the baggage reached appellants' road, there is no evidence in the record which tends in the slightest degree to render appellants liable. To create such a liability, the property should have been shown to have come to their possession, and to have been lost by them, or that, they had by contract at Cleveland, undertaken to transport this baggage to Chicago, and neither appears from the evidence.

The company have not recognized the justice of appellee's claim. It is true, that the agents of the company made efforts to find the lost baggage, but they when doing so, did not admit, that it was done as a duty, or to avoid liability. The effort was made to ascertain whether the baggage ever came into the possession of the road, and to accommodate appellee as a matter of kindness on the part of the officers, as they testify. There is no principle of law or rule of evidence that would authorize an inference, of the acknowledgment of liability by the company, from such acts. When such deductions shall be made from such premises, and sanctioned by courts, an effectual bar will be interposed to the extension of kindly assistance by the officers of these roads, which is of such great value to the traveling public. If such acts are to be construed into a recognition of their liability, when loss occurs, the roads would be deterred from rendering any assistance in its recovery, and leave the unfortunate loser to recover his property as best he might. But such is not the law.

It was urged that appellants recognized their liability by the offer of thirty dollars to appellee. The agent of the road who made the offer, testifies that it was made as a gratuity, and for the purpose of a compromise, but that no liability was admitted or intended to be recognized. Such an offer could by no rule of evidence be held to amount to an admission of a liability by appellants. An offer made by way of compromise of differences has never been held to establish any recognition of

the liability for the claim being asserted, but has always been treated, as it is, an offer to buy peace and to end strife.

The evidence in the case does not justify the finding of the jury, and the court below erred in overruling the motion for a new trial.

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

Judgment reversed.

Loyal L. Case, Appellant, *v.* Luther Hall, Appellee.

APPEAL FROM OGLE.

In an action of trespass for taking twelve hogs, if defendant wishes to justify the taking by reason of his being an officer, he must allege and prove that fact.

If the ordinance of the town, which is offended by the running at large of the hogs, declares it shall not be lawful to "suffer" hogs to run at large, the plea should aver, that they were at large by sufferance of the owner.

This was an action of trespass. Declaration in usual form—two counts for taking twelve hogs.

First plea, general issue.

Second plea as follows:

"And for a further plea in this behalf, the said defendant says, as to the said trespass and conversion of the hogs and swine in the first and second counts of the said plaintiff's declaration set forth, *actio non*, because he says, that at the time when, etc., he was lawfully possessed of a certain close, with the appurtenances, situate in the town of Byron, in the county and State aforesaid, and because the hogs and swine in the first and second counts mentioned, before and at the same time when, etc., in the first and second counts mentioned, were wrongfully and unlawfully, and contrary to the ordinance of the said town of Byron, in the said close of the said defendant, eating and destroying the corn, grass and herbage of the said defendant, there then growing, and doing great damage to the said defendant, he, the said defendant, seized and took the said swine and hogs, in the first and second counts of the plaintiff's declaration mentioned, in the said close of the said defendant so doing damage therein as aforesaid, as a distress for the penalty by the said ordinance of the said town of Byron, made and provided for suffering hogs, swine and pigs to run at large, and drove the said swine and hogs away from out the said close to a pound in

said pound district of the said town of Byron, which pound aforesaid was within one mile of the aforesaid close of the plaintiff, and then and there impounded the same, as he lawfully ought to do by the ordinance aforesaid, and immediately thereafter, and within twenty-four hours after the impounding aforesaid, notified the said plaintiff, of the impounding of the said swine and hogs, mentioned in the first and second counts of the said plaintiff's declaration, and continued the said impounding for the space of five days, and until the said plaintiff should have paid the penalty as provided by said ordinance, to wit: the sum of eight dollars and forty cents, to have had the said swine and hogs released and discharged, and the said plaintiff having failed to pay the sum within the time aforesaid, the said defendant, after advertising the same, as required by the said ordinance, for the space of ten days, sold the same at public vendue for the purposes aforesaid, and which was lawful for the said defendant to do, for the causes aforesaid, and which is all the same supposed trespass in the said plaintiff's first and second counts of his said declaration mentioned; all of which the said defendant is ready to verify. Wherefore he prays judgment."

Third plea as follows:

"And for a further plea in this behalf, the defendant says, *actio non*, because he says, that at the annual town meeting of the town of Byron, in the county of Ogle and State of Illinois, held in pursuance of statute in such case provided, the voters of said town at said annual town meeting, did pass and adopt certain regulations for restraining and preventing the running at large of swine in the said town, by which said regulations and ordinances it was provided, that it should not be lawful to suffer any swine to run at large in the said town of Byron, and it was further provided by said regulations, that any inhabitant of said town finding any swine running at large, might take up the same and cause them to be delivered to the nearest pound-master, whose duty it shall be to receive the same in the pound of which he, the said pound-master, has charge, and furnish said swine with suitable feed and water till the same shall be discharged.

"And the said defendant further avers, that it was further provided by said regulations, that the person so taking up said swine should, within twenty-four hours thereafter, give notice to the owner or owners of said swine, of the taking up and impounding of the same as aforesaid.

"And the said defendant avers, that it was further provided by said regulations, that if within five days thereafter any person shall claim and prove to be the owner thereof, to the satisfaction of the taker up or pound-master, and pay the legal fees and reasonable charges to which the pound-master may be en-

titled, and for the use of the town, as a penalty, the sum of one dollar for each swine, such owner shall be entitled to immediately take away the same.

"And the defendant further avers, that it was further provided by said regulations, that if such claimant should not appear within five days after such claim, pay the aforesaid fees, charges and penalty, and no person shall within the same time claim and prove the owner of such swine as aforesaid, then the pound-master shall advertise such swine for sale, by giving at least five days' notice by posting up written notices of the time, place, and property to be sold, on the school house in said pound district, and at two other places in the town, which the said pound-master may consider the most public, and shall sell the same to the highest bidder, for cash, and the proceeds of such sale shall be applied for the payment of such fees, charges and penalty, and expenses of sale, and the surplus, if any there be, shall be paid to the owner, if any appear.

"And the said defendant further avers, that the said swine in the said plaintiff's declaration mentioned, were at the said time, etc., running at large in said town of Byron, aforesaid, and in violation of the regulations and ordinances of the said town, adopted as aforesaid, and that he, the said defendant, was at the said time when, etc., an inhabitant of the said town aforesaid, and being such inhabitant and finding the said hogs and swine in the plaintiff's declaration mentioned at the time when, etc., running at large, and in violation of the said regulations and ordinances of the said town, he the said defendant did take up the said swine, and did drive and cause to be driven the same to the nearest pound in said town, and the said defendant did deliver the said swine to the pound-master of said pound, which said pound-master did then and there receive the said swine and impound them in the said pound.

"And the said defendant further avers, that the said defendant did immediately and within twenty-four hours after the taking up and impounding of the said swine as aforesaid, give notice to the said plaintiff that he the said defendant had taken up and impounded the said swine in the said pound in said town as aforesaid, and the said defendant avers that the said plaintiff did not, within five days after the said impounding and giving of the notice aforesaid, claim and prove to the satisfaction of the taker up or pound-master, that the said swine so impounded, were the property of the said plaintiff, neither did he pay the legal fees, and reasonable charges to which the pound-master was entitled, to wit: the sum of one dollar for each swine, all of which the said plaintiff neglected to do, neither did any other person within the space of five days, claim and prove the owner-

ship of said swine, nor did they pay and tender the fees and charges aforesaid; therefore, the said defendant did, as pound-master of said pound district, being the defendant, advertise the said swine for sale by giving five days' notice by posting up written notices therefor, one of which was placed upon the school house in said pound district, and two other notices in two of the most public places in the said town of Byron, that he would, on the day mentioned in said notices, sell the same to the highest bidder, for cash, and that in pursuance of the said notice, the said defendant did, on the day appointed for said sale in the said notices, proceed to sell the same at public sale for cash, and after the payment of the legal fees, charges and penalty, and expenses of said sale, paid the overplus of the said sale money to the plaintiff, and which is the same trespass complained of by the said plaintiff in the first and second counts of his said declaration, all of which the defendant is ready to verify.

"Wherefore he prays judgment," etc.

Similiter to first plea, and demurrer to second and third pleas; demurrer sustained to said second and third pleas.

Trial by jury, and verdict for plaintiff; damages assessed at $102.40.

Motions in arrest of judgment, and for a new trial, overruled, and appeal taken. Judgment rendered upon the verdict.

Errors assigned are:

1st. The court erred in sustaining the demurrer to defendant's second and third pleas—severally.

2nd. The court erred in overruling the motion in arrest of judgment and for a new trial.

3rd. The court erred in rendering judgment aforesaid in manner and form aforesaid.

Glover & Cook, for Appellant.

Leland & Leland, for Appellee.

Breese, J. There are two manifest objections to the third plea. The first is, the defendant does not allege he was duly elected and qualified to the office under which he justifies the trespass. The rule is, where an officer himself attempts to justify his acts done by virtue of his office, he must allege and prove himself an officer *de jure*. *Schlenker* v. *Risley*, 3 Scam. R. 483. We know of no different rule anywhere, and the reason is, that being the party exercising the office, his right to do so or the evidence of it, is in his own possession and power.

The next objection is, that the plea nowhere alleges that the

hogs were running at large by sufferance of the owner. This is indispensable. The ordinance provides that it shall not be lawful to *suffer* any swine to run at large. That they were at large contrary to the ordinance as in the plea, is not equivalent to an allegation that the owner suffered them to run at large. This knowledge and sufferance is the *gist* of the offense. The penalty is not to be enforced because the hogs were running at large, but because the owner suffered them to run at large. As to the other question made, that the act is unconstitutional, see *King et al.* v. *The Town of Jacksonville*, 2 Scam. R. 305.

The judgment of the court below is affirmed.

Judgment affirmed.

Sylvanus B. Hance, Plaintiff in Error, *v.* William G. Miller, Defendant in Error.

ERROR TO McLEAN.

A party who endorses a note in blank, gives the holder of it a right to fill up the assignment at any time before it is offered in evidence, with any character of assignment that is usual and customary.

A contract of guaranty depends upon different principles, and the guarantor may, if he chooses, limit his liability; if he does not do so, the general liability attaches, and protest or suit is unnecessary. The holder may recover under the general assignment, or under the guaranty, as he chooses.

Whether an authorized guaranty written over a blank endorsement would vitiate an assignment, the court not prepared to hold.

A bill of exceptions filed two months and a half after the trial of a cause, without any order or leave of the court, does not make any part of the record.

This case was tried before Davis, Judge, at December term, 1859, of the McLean Circuit Court, without a jury. The case is fully stated by Mr. Justice Walker, in the opinion of the court.

Scates, McAllister & Jewett, for Plaintiff in Error.

Williams & Packard, for Defendant in Error.

Walker, J. This was an action of assumpsit instituted by Miller against Hance, in the McLean Circuit Court. The declaration contained two special counts; the first is upon a contract of guaranty; the second was against defendant as endorser of a note, and contained an averment that owing to the insolvency of the maker, a suit against him at the first term

3 Scam 437
80 Ills 146

of the court after it became due would have been unavailing. The common counts were also added. The defendant plead the general issue, and a special plea that he did not execute the supposed assignment, and guarantee the payment of the note described in the declaration, and a further plea traversing the allegation that a suit would have been unavailing at the first term of the court after the maturity of the note. The first and second pleas were verified by affidavit. Plaintiff entered a *nolle prosequi* to the first count, and a trial was had by the court under the remaining counts, when plaintiff introduced in evidence this note:

"$500. *Bloomington*, Oct. 31st, 1857.

Fifteen days after date, I promise to pay to the order of S. B. Hance, Five hundred dollars at the Lafayette Bank, value received.

A. B. SHAFFER."

Also the following endorsement on the back of the note:

"For value received, I guarantee the payment of the within note at maturity, and assign the same to Wm. Miller. S. B. HANCE."

It was admitted by the parties that the defendant executed the endorsement in blank, and that the writing above defendant's signature, had been written and filled up by the plaintiff after the note came into his possession. The defendant excepted to the reading of the note and endorsement. The objection was overruled. The plaintiff then proved by the production of executions against Shaffer returned *nulla bona*, and by witnesses, that he was insolvent at the time the note became due. Upon this evidence the court found for the plaintiff, and assessed his damages at $504.35, and rendered judgment against the defendant for that amount. To reverse which he prosecutes this writ of error.

The endorsement on this note by its terms as well as its legal effect, was a contract of guarantee, and also a contract of assignment. The holder with general endorsement, had the right to fill up the assignment at any time before the note was read in evidence, with any character of assignment that is usual and customary. When the payee or holder, by previous assignment puts it into circulation with a general endorsement, he impliedly gives authority to the holder to fill this endorsement with the assignment usually employed in the transfer of such paper. By an ordinary assignment, made by the payee or assignee, the legal title to the instrument passes, and the law also creates the liability on the assignor to pay the holder by assignment, in the event that the money cannot be collected of the maker by due diligence in the institution and prosecution of a suit against him, or if a suit would be wholly unavailing, or the maker shall have

absconded from the State at its maturity. This liability is imposed upon the assignor by the statute, and to avoid it he should limit it by the terms of the assignment. The contract of guarantee depends upon and is governed by different principles. Any person, whether a party to the note or not, may guarantee its payment by the maker within any time specified, or may impose any terms or conditions to his guarantee which he may choose, and he will only be liable to the holder according to the terms of his agreement. If he guarantee payment at maturity to the holder, without imposing other conditions, he need not protest or give notice of non-payment, or institute legal proceedings to hold the guarantor. If such steps are necessary it is only because they have been imposed by the terms of the contract of guaranty. When the money is not paid according to the terms of the guarantee, the person holding the guarantee has a right to sue upon it and recover of the guarantor. Then if this guarantee was authorized and filled up in pursuance of the agreement of the payee and the defendant in error, at the time of the transfer of the note, he became entitled to sue and recover upon the guarantee or upon the contract of assignment as he might choose. The two contracts being separate and distinct, he by showing liability under either, might recover under that contract.

In this case, the defendant in error entered a *nolle prosequi* to the count on the contract of guaranty, and elected to proceed for a recovery under the contract of assignment. To recover under that count, he had to show that he had duly prosecuted the maker to insolvency, or that a suit at the maturity of the note would have been wholly unavailing, or that the maker had absconded from the State when the note became due. In this case, the defendant proved that a suit would have been unavailing, at the first term of the court after the note became due, on account of the insolvency of the maker. The note and assignment, together with this evidence, was properly admissible under the pleadings, and fully sustains the judgment.

It was urged that the guarantee was not authorized by the agreement of the parties, and that when the contract of guarantee was written over the payee's signature, that it was such an alteration of the contract of assignment as rendered it void, and defeated all right of recovery. The question of whether the holder was authorized to fill up the guaranty was withdrawn from the consideration of the court, and no evidence was adduced to show whether it was authorized or not, and the court in the absence of all evidence, is not authorized to presume that it was unwarranted. Even if writing a guarantee when unauthorized, in connection with an assignment which was authorized, were to

have the effect to destroy the liability under the assignment, which we are not prepared to hold, there is no evidence sustaining such a conclusion in this case.

The bill of exceptions was filed in this case two months and a half after the trial was had, and there was no agreement that it might then be filed, nor was there any order of the court, extending the time for filing the same. This was not filed in time to render it any portion of the record. *Dickhut* v. *Durrell*, 11 Ill. R. 72. The assignment of errors questions the correctness of the decision in admitting the evidence, and as the bill of exceptions was not filed in apt time, the judgment should be affirmed for the want of a proper bill of exceptions, if for no other. The presumption being that the evidence sustains the judgment.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Bela T. Hunt, impleaded with O. H. Giles, Appellant, *v.* Edward I. Tinkham, Appellee.

APPEAL FROM COOK.

The statute positively requires that notice of a motion for a change of venue shall be given.

This was an action of assumpsit, upon a note and an account.

The defendant filed the general issue, as also special pleas.

On the 16th day of July, 1857, the pleas were filed, verified by defendant. On the 23rd October, 1857, Hunt made application as follows for a change of venue:

To the Hon. John M. Wilson, Judge of the Cook County Court of Common Pleas, of the State of Illinois:

Bela T. Hunt, the above named defendant, respectfully represents that he fears that he will not receive a fair trial of this action in the Cook County Court of Common Pleas, in which this action is pending, on account of Edward I. Tinkham, the above named plaintiff, (the above party,) has an undue influence over the minds of the inhabitants of said county of Cook. Your petitioner further shows that the above fact of undue influence first came to his knowledge on the 22nd day of October, A. D. 1857. Your petitioner therefore prays for a change of venue to some county where the above causes do not exist. Sworn to on the 22nd day of October, 1857.

This application was denied.

There was a judgment for the plaintiff below, and Hunt prayed this appeal.

Barry & Beveridge, for Appellant.

Clarkson & Tree, for Appellee.

Caton, C. J. The court properly overruled the motion to change the venue. No notice of the motion was given, and the statute positively requires a notice. It is a misapprehension to say that here no notice could have been given. It is certain that at least one day's notice, could have been given, for the affidavit is made the day before the motion, and there is no excuse shown why notice was not given as the statute required.

The judgment must be affirmed.

Judgment affirmed.

Jonathan Richards *et al.*, Plaintiffs in Error, *v.* Henry C. Hyde *et al.*, Defendants in Error; and

James D. Sherman, Plaintiff in Error, *v.* Henry G. Koon *et al.*, Defendants in Error.

ERROR TO COOK.

Circuit courts have not equity jurisdiction, to set aside conveyances, in foreign counties, in aid of executions issued by a Circuit Court of one county to the sheriff of another.

This is a writ of error to correct an order of the Cook Circuit Court, dismissing the bill for want of jurisdiction.

The bill of complainants is a bill in aid of execution, stating that the complainants were co-partners, residing in Chicago, in the county of Cook, and as such co-partners, in the term of April, A. D. 1858, recovered, in said Circuit Court, a judgment against Ebenezer Hyde, one of the defendants, for ten hundred and thirty dollars and twenty cents, damages and costs; the proper issuing of an execution, on the 12th day of May, in the year 1858, directed to the sheriff of Winnebago county, the then residence of defendant, Ebenezer Hyde; a proper endorsement and delivery to the sheriff of said county, on the 19th day of said May; that on the 20th day of said May, the sheriff levied upon the interest of said Ebenezer Hyde in certain real estate mentioned in the bill, in said county of Winnebago. Also, the

endorsement of said levy upon the execution; that said execution was in full force and effect at time of levy and filing bill, and that judgment was wholly unsatisfied, and that the sheriff could not safely proceed to sell said real estate, to satisfy said execution, for the reason that the said Ebenezer Hyde, and his wife, also defendant, on the 10th day of October, 1857, for the purpose of defrauding the complainants and other creditors of said Ebenezer Hyde, conveyed said property to defendant, Lathrop, on trust, to secure a pretended indebtedness to defendant, Henry C. Hyde, a son of Ebenezer, which transaction is charged to be entirely fraudulent, and the facts showing that they are fraudulent, are stated in the bill. All the defendants, except Lathrop, are averred to reside in Iowa, and Lathrop in said Winnebago county. Which bill is duly verified.

Afterwards the defendants, by their solicitor, appeared and moved the court to dismiss the bill of complaint in this case, for want of jurisdiction of this court.

And on the 26th day of October, 1858, the court, MANNIERE, Judge, presiding, on this motion dismissed the bill with costs, from which decision the complainants brought the case to this court.

The case of *Sherman* v. *Koon et al.* corresponds in nearly all respects with the foregoing, and the same proceedings were had.

SMITH & DEWEY, and KELLOGG, for Plaintiffs in Error.

VAN BUREN & GARY, and G. SCOVILLE, for Defendants in Error.

CATON, C. J. This bill was filed under a misapprehension of the principle upon which our courts are organized. The Circuit Court possesses and exercises a two-fold jurisdiction. It exercises both a common law and a chancery jurisdiction. When exercising the first, it is a court of common law, and when exercising the other it is a court of chancery. Although these jurisdictions are exercised in the same tribunal they are never blended. They are as distinct as if the two courts were presided over by different judges. The fact then that the execution issued from the Cook Circuit Court, gave that court, when exercising its chancery powers, no more jurisdiction to entertain the bill than it would have had if the execution had been issued by the Circuit Court of Winnebago, to which county the execution was sent. If the Circuit Court of Cook county, in the exercise of its chancery jurisdiction, could entertain this bill, then it might entertain a bill to set aside a fraudulent conveyance, in aid of an execution issued by the Circuit Court of a foreign county,

against a party in a foreign county, and levied upon land in a foreign county. Such a jurisdiction cannot be pretended; equally untenable would be the position that this court could entertain jurisdiction of this bill as a common law court, in aid of its legal process. While the courts of law may, to a certain extent, exercise equity powers over their own judgments and in control of their own process, no case can be found where they have entertained a bill to set aside a fraudulent conveyance. Besides, this bill was not addressed to a court of law, but to the court of chancery. The decree dismissing the bill must be affirmed in each case.

Decree affirmed.

Jacob H. Gutchins, Plaintiff in Error, *v.* The People, Defendants in Error.

ERROR TO THE RECORDER'S COURT OF THE CITY OF CHICAGO.

A conviction cannot be sustained under an indictment, which charges the uttering of a bill of a bank of some other State, of a less denomination than five dollars, with intent to defraud an individual; it being a penal offense, to pass or to receive such bills.

Where an offense charged, differs from that proved, the conviction will not stand. An indictment framed upon the 73rd section of the criminal code, will not be sustained by proof of an offense against the 77th section.

Gutchins was indicted at the April term, 1859, of the Recorder's Court for the city of Chicago, before R. S. Wilson, for having in his possession a certain false, forged and counterfeited bank bill, which said false, forged and counterfeited bank bill, is there set out and described, purporting to be a two dollar bill of the Delaware City Bank of Kansas, which he feloniously passed to one Jeremiah Clowry, as true and genuine, with intent to defraud, etc., Gutchins knowing the same to be false, forged, etc.

On the trial the proof showed, that the bill was fraudulent as a bill of a bank in Kansas, there not being any such bank. That there was not any bank of the same name in this State. That if it purported to be issued from the Delaware City Bank of the State of Delaware, it was counterfeit.

The following instructions, asked on behalf of the accused, were refused by the court:

That all persons transacting or doing business within the State of Illinois, are bound to know and obey her laws. Hence,

if the jury believe, from the evidence, that the complainant in this case, Jeremiah Clowry, took and received of and from the prisoner the bill in question, being of a less denomination than five dollars, that the said Jeremiah Clowry has not, in a legal sense, been defrauded, and the prisoner cannot, therefore, be convicted on this indictment.

If the jury believe, from the evidence, that the bill in question is a false, forged and counterfeit bill of some bank of some other State or Territory of the United States, then the prisoner cannot be convicted of passing such bill in this State, with the intent to cheat and defraud the taker.

The fraudulent intent being the gist of the charge in this cause, that intent cannot be gathered from the uttering or passing of the bill in question, when the complainant, Clowry, as well as the prisoner, was bound to know that it was, and is, unlawful to pass or receive a foreign bill of the denomination of the bill in question, in this State for the purpose of payment or circulation.

To constitute a fraudulent uttering of the bank note in question, it must not only have been put away as true, but it must have been innocently received by the taker.

To find the defendant guilty, the jury must find from the evidence, that at the time defendant passed the bill, he knew it to be a counterfeit, that it was in fact a counterfeit bill, and that he so passed it with such knowledge, with intent to cheat and defraud Jeremiah Clowry, and that it was received by said Clowry, and he, at the time believing it to be genuine.

The following instructions for the People were given and excepted to by defendant:

If from the evidence, the jury believe the note in question is counterfeit, and that the prisoner passed it as charged, upon Jeremiah Clowry, knowing it to be counterfeit, and with intent to defraud said Clowry, then he is guilty of the offense charged in the indictment.

In our State, the fact that a note is of less denomination than five dollars, issued by a bank out of this State, does not change the nature of the offense; and it is as much forgery to make, pass, utter, or publish such a note, as though the note had been issued by a bank of this State, and had been over the denomination of five dollars.

The errors assigned are:

1st. The verdict is contrary to law and evidence.

2nd. The court erred in overruling the defendant's objections and exceptions to the introduction of irrelevant and improper testimony to the jury.

3rd. The court erred in refusing to give to the jury defendant's instructions.

4th. The court erred in giving the instructions in behalf of the People.

5th. The court erred in overruling defendant's motion for a new trial.

6th. The bill said to be counterfeit, is of less denomination than five dollars, and on its face purports to be a foreign bank bill.

7th. And verdict and judgment was against defendant, when it should have been in his favor, and indictment does not show a crime as charged therein.

Garrison & Hudson, for Plaintiff in Error.

C. Haven, for the People.

Walker, J. The plaintiff in error, was indicted and convicted for uttering and passing as genuine, a two dollar bill on "The Delaware City Bank" with intent to defraud Jeremiah Clowry. The indictment contained but one count. And the evidence on the trial shows, that the bill in question was not on any bank incorporated by, or within the limits, of this State. It also shows that this bill was fictitious, there being no such bank in existence.

We are asked to reverse this conviction, first, because under our statute it is made a penal offense to pass or to receive, any bank bill of a less denomination than five dollars, on any bank not incorporated under the laws of this State. And secondly, because the indictment charged the offense, of passing a bill purporting to be on a bank having an existence, when the evidence shows that there is no such bank.

The Supreme Court of the State of New York, in the case of *The People* v. *Wilson*, 6 Johnson's R. 320, under a similar statute to ours, say, that "It cannot therefore, be felony to utter and publish, in this State, such a forged bill; because no person can be *defrauded*, as every person is bound to know, that it is unlawful to accept in payment, or circulate such a bill. The fraudulent intent is the *gist* of the charge, and that intent cannot be inferred from uttering the bill, when every person knows that it is unlawful to receive it, and that it is void as to the purposes of payment and circulation. The opinion of all the judges in England in *Maffit's Case*, Leach, 337, was that the forging of a bill of exchange, which if real would not have been valid or negotiable, but void under the statute, was not a capital offense."

The principle of that case was again recognized by the same court in the case of *The People* v. *Rathbon*, 21 Wend. 521. And the case of *Rex* v. *Maffit*, 2 Leach, 483, above referred to, seems to be the leading case on this question. And it is believed that it has been recognized as the law, by the courts generally both in this country and Great Britain, whenever the question has been presented for adjudication. And it is for the plain and obvious reason, that no legal fraud could be perpetrated upon a person, by passing to him a bill, which if genuine, he could not receive as money, or of any value, without incurring a penalty. A person so receiving such a bill, is guilty of a violation of the law, incurs a penalty, and when it is in his hands is worthless. If he utters it, or even attempts to do so, it subjects him to a like penalty. Such a bill in this State has no legal value, and under the law purports to have none, and when the uttering such with intent to defraud an individual, is the offense charged, it is insufficient to sustain a conviction. Whether if the offense charged, was the uttering it with the intent to defraud the bank upon which it purports to be a bill, would constitute a crime, is not presented by this record, and need not be here discussed.

As to the second question, presented; the indictment charges the passing a counterfeit bill, of a bank having an existence, and is framed under the 73rd Sec. of Chap. 30, R. S. p. 163. It creates, and provides for the punishment of the crime, of uttering forged and counterfeit bills and instruments, on persons and corporations, having an existence either within or without this State. While the 77th Sec. of the same act creates and provides for the punishment of the crime of making or uttering, with intent to defraud, any fictitious bill, check or other instrument, for the payment of money or property of some bank, corporation, co-partnership or individual, when in fact there is no such bank, corporation, co-partnership or individual in existence. The evidence in this case shows that this was a fictitious bill, purporting to be on a bank which had no existence. This being the case, even if the circulation of bills of that denomination, were not prohibited from circulating by law, a conviction could not be supported under this indictment, because the offense charged and that proved, are different and distinct. The proof of an offense under one of these sections, cannot support a conviction under the other. That would be to violate the rules of pleading and evidence, and is too plain to require discussion.

We for these reasons, are of the opinion that the conviction in this case was wrong; and that the judgment of conviction, of the court below, must be reversed and the prisoner discharged.

Judgment reversed.

The Illinois Central Railroad Company, Appellant, *v.* John Finnigan and James Finnigan, Appellees.

APPEAL FROM LA SALLE.

Where parties suing in case, for damages for killing cattle, claim as joint owners, they should be held to reasonably strict proof of ownership.

Where it appears that animals fit for beef, are not killed, nor so injured, but that they are of value for food, it is the duty of the owner to dispose of them to the best advantage; he has no right to abandon them wantonly, and then claim their full value. The criterion of damages in such a case, is the value of the cattle as injured, and their value before the injury.

Although a locomotive with a train, may be operated by others under a contract, that does not release the company owning the property from liability.

This was an action in case for killing cattle, brought by appellees against appellant, Nov. 27th, 1857.

The amended declaration contains the following counts:

First count—That defendant was an incorporated company, operating a railroad for more than six months before the time when, etc.; that it was the duty of defendant to keep and maintain fences on sides of road, sufficient, etc.; that defendant negligently and carelessly omitted so to do; that the cattle of plaintiffs for that reason were upon said road, and the cars of said defendant then running on said road, then run upon said cattle and killed them. Damages claimed, $1,000.

Second and third counts in substance like the first, with this additional averment, that the cars of defendant were then and there so negligently, carelessly governed and operated, that by the mere carelessness and negligence of the agents and servants of defendant, the cars were driven against the cattle of plaintiffs, and they were thereby killed.

Plea, general issue.

Cause tried at September term, 1858.

Plaintiffs called as a witness, *P. Reiley*, who testified: I know the plaintiffs; they reside near Illinois Central Railroad; railroad runs across the premises; one steer and some other cattle which plaintiffs claimed were killed on the road. This was not in any town, city or village, nor at any crossing; steer was worth $10; I saw the steer beside the track, with three legs broken; it was not then dead; think it was about the last of September; a cow was killed in October next; she was worth $25; she was in Finnigan's possession; she had a fore and hind leg broke; she was alive and ten rods away from the track on the east side of it. There was a culvert there, and railroad track was twenty feet high above the place where the cow was; there was no fence on the road at that time; the road had been

in operation two years; cattle could not be kept off without a fence.

That steer was fat; worth $10; only had his hind legs broke; cow was fat; worth as much for beef as anything; can't swear that cattle were killed in the night; I saw them in the morning.

I saw the colt with three legs broke by the road-side a year ago; he was worth $90; this was near where the cattle were killed.

Finnigans live together; don't know which one owned the cow.

Hugh Morgan testified as follows: I saw a colt which was killed there in October last; its legs were broken; saw it dead two or three days afterward; this was about forty rods from plaintiffs' house; I saw the cars pass, and saw the colt on the track with other horses, and saw him in the ditch with his legs broken after cars had passed; road crosses the track about twenty rods from where colt was killed.

Both of the Finnigans claimed the colt; saw both of them ride him.

Daniel Conway testified, that James Finnigan came to get him to value two cattle near the track; valued them at $20 each, a cow and a steer; they were both dead; this was half a mile from plaintiffs' residence on the west side of railroad; no fence on the east and bad on the west side; Finnigan lived at next crossing; fence was necessary to keep cattle off; I valued the cattle at six cents a pound.

George W. Armstrong, called by defendant, testified that he had been dealing in cattle nine or ten years past; usually paid from $2 to $2.50 per hundred; under 1,000 pounds about $2; over, $2.50; a three-year-old heifer is worth from eighteen to twenty dollars; a steer, from twenty-two to twenty-five dollars.

Isaac Hardy testified, that he had been acquainted with the work of Illinois Central Railroad since the commencement of the same; Kieth & Snell were contractors on said road at that time; they had entire control of a construction train, and were running it past that point, and a lot of fat cattle were killed near where they were at work.

The defendant asked the court to instruct the jury as follows:

"If the jury believe, from the evidence, that Keith & Snell were at the time and place of the injury to said stock, operating and controlling a locomotive and cars upon said Illinois Central Railway track for their own use and benefit, and over which the Illinois Central Railroad Company had no control, then the jury must find for the defendant, unless they believe, from the evidence, that the injury to said stock was occasioned

by some other means than the engine or train so operated by said Kieth & Snell."

Which said instruction was refused, and defendant excepted.

The jury found for plaintiff, $127.50.

Defendant moved the court for a new trial, which the court overruled, and defendant excepted.

Errors assigned are:

1st. The court erred in refusing the said instruction asked by defendants.

2nd. The court erred in overruling the motion for a new trial.

3rd. The court erred in rendering judgment aforesaid in manner and form aforesaid.

B. C. Cook, for Appellant.

Strain & Ball, for Appellees.

Breese, J. This is an action brought by two plaintiffs, declaring upon their joint ownership of the property killed. The declaration contains three counts. The first is for a liability arising out of neglect in fencing the road, whereby the plaintiff's cattle straying upon the road, were killed. The second and third counts aver negligence and carelessness in running the trains. There is no proof whatever in support of these counts, as the train was not seen to run over the cattle, and it is only from circumstances it is inferred they were injured and killed by the train.

The first objection is, that there is no proof in the record of a joint ownership of the property by the plaintiffs below. We have examined the evidence preserved in the record, and cannot find such proof. One of the witnesses states, one steer and some other cattle which they claimed, were killed on the road; the steer was worth ten dollars; saw the steer by the side of the track, with three legs broken, not dead; this was the last of September; a cow was killed some time in October, worth twenty-five dollars; she was in Finnigan's possession; she had a fore and hind leg broken; was alive; was ten rods away from the track; the steer was fat; worth ten dollars for beef; only had its legs broken; the cow was fat; worth as much for beef as anything; saw the colt, three legs broken, by the road side, a year ago; worth ninety dollars; don't know which Finnigan owned the cow.

Another witness stated he knew the colt and it was worth from ninety to one hundred dollars; both of the Finnigans claimed the colt; could not swear that he belonged to either of them.

In such cases as these, it is the duty of courts and juries to hold parties claiming damages for killing or injuring stock, to reasonably strict proof of ownership. The first witness states that the cow was in Finnigan's possession, of which one he does not say; and so of the colt, the proof is that both of them claimed it. There is an absence of proof of a joint ownership such as they have declared on. There is no proof of negligence in running the train, and there was no proof that a fence was required by law to be made at the place where the animals were killed. The proof shows that the cow and steer were both fat and worth, one, ten dollars, and the other twenty dollars, for beef, and were good for beef, they having only been injured in the legs. We hold under such facts, that it was the duty of the owner to have disposed of them to the best advantage, if practicable. He should have made some effort to make them available, and had no right to abandon them wantonly, and then claim their full value. The company had a just claim on the owner to do so, and thus reduce as much as possible the damage and injury. The criterion of damages in this case is, the value of the cattle as injured, and their value before the injury. If, after the injury, they were as valuable for beef, as the proof shows, as before the injury, and the owner wantonly abandoned them, he ought not to recover their value. If one leaves the gate of another open, by which some slight injury is done the owner of the gate, the owner has no right to leave it open in order that he may thereby charge the delinquent party for any and all injury he may suffer thereby. He should shut the gate.

The instructions asked for by the defendant, were properly refused, for though Keith and Snell were operating the locomotive and cars under a contract with the company, that does not release the company from liability. *Ohio & Mississippi Railroad Company* v. *Dunbar*, 20 Ill. R. 623.

We think a new trial should have been awarded, and accordingly reverse the judgment and remand the cause for that purpose.

Judgment reversed.

George T. Pearson, Appellant, *v.* Emily Chapman, Appellee.

APPEAL FROM COOK.

In an action of assumpsit for board and lodging, if the plea alleges that such board and lodging was a gratuity and received at special instance and request of plaintiff, a replication denying that the boarding and lodging was a gratuity, is sufficient; it is not necessary to negate the special instance and request.

If a party is presented with a bill, and admits it correct, but states that he has a bill on his part, against the claimant, which he wishes to have settled, the whole conversation may be left to the jury, to believe or reject what they think proper.

This was an action of assumpsit, brought by the appellee against the appellant.

The declaration contains five counts:

The first for the use of apartments, etc., meats, drinks, fuel, etc.

The second, for washing, mending, nursing and attendance.

Third, for money lent.

The fourth, for money collected as agent.

The fifth, indebitatus assumpsit, for boarding and lodging, washing and ironing, attendance in sickness, money loaned, goods and chattels, and money found to be due the plaintiff.

The defendant pleaded non-assumpsit; set-off; payment; accord and satisfaction.

To the first count the defendant pleaded specially, that prior to and at the time when he first commenced to use and occupy the premises, furniture, etc., and to eat the meats and drink the drinks, and to sit by the fire made from, by and out of the fuel furnished by the plaintiff, and during the whole period of his continuing to use and occupy the premises, furniture, etc., of the said plaintiff, and to eat the meat, and drink the drinks, and sit by the fire made by, from and out of the aforesaid fuel furnished by the plaintiff, he did so at the especial instance and request of the plaintiff, and for her accommodation, edification, entertainment and benefit; and that said defendant, during the whole of said period that he used and occupied the premises and furniture of the said plaintiff, and ate the meat, and drank the drinks, or sat by the fire made from the fuel furnished and provided by the plaintiff, used, occupied, ate, drunk, and sat by said fire as a gratuity from the said plaintiff to the said defendant; and that the said plaintiff, as a gratuity from her to said defendant, suffered, permitted and requested the said defendant to use and occupy said premises, furniture, etc., and as a gratuity furnished and provided the said defendant with meats, drinks and fuel, which the defendant ate, drank, and sat by the

fire made from said fuel, at the request of the said plaintiff, and for her benefit and behoof, and to the great loss of time, hazard and detriment of the health of the defendant; and this the defendant is ready to verify, etc.

To the second count the defendant pleaded specially, that said nursing of and attendance upon the said defendant, while he was sick as aforesaid, was done and performed by the said plaintiff at her own especial instance and request, and for her own especial gratification, pleasure and benefit, and as a gratuity from her to said defendant, and not at the instance or request, or for the gratification, pleasure or benefit of this defendant; and that said defendant suffered and permitted the said plaintiff to nurse him and attend upon him, inasmuch as such nursing and attendance afforded her gratification and was pleasing to her and of great benefit to her, and also inasmuch as the same was a gratuity and was to be done and performed by her without any charge to this defendant, and not for any benefit, gratification or pleasure which might possibly be derived by this defendant therefrom; and this the defendant is ready to verify, etc.

To the fifth plea the plaintiff replied, "that the board and lodging, etc., in said declaration mentioned, were not furnished at the special instance and request of the said plaintiff, but as in said declaration averred;" and concludes to the country.

To the sixth plea the plaintiff replied, "that the said nursing was done at the especial instance and request of the said defendant;" and concludes to the country.

The cause was tried before MANIERRE, Circuit Judge, and a jury, on the 28th day of December, 1857.

Before the offering of any evidence, the defendant, by leave of the court, withdrew his second, third and fourth pleas.

Henry Winders was introduced to prove admissions of the defendant, to which defendant objected. The witness then said, I married the daughter of the plaintiff. I have been in Chicago two years last August. Commenced visiting the plaintiff's house in November, 1855. Defendant was there then, and I saw him there down to November, 1856. I heard him acknowledge having fifty-six dollars borrowed of her by him at Niagara Falls.

The witness being shown a note, in the words and figures following:

"Due Mrs. Chapman, for money borrowed, one hundred dollars, to be returned in thirty days.

"Nov. 3, '56. GEO. T. PEARSON.

"30 days."

Said, the signature to this is in the hand-writing of the de-

fendant. I have seen him write and know his hand-writing. The note was then read in evidence.

The plaintiff now proposed to prove admissions made by the defendant to witness, to which the defendant objected, on the ground that if any such were made, they were made pending negotiations for a settlement.

Whereupon the court allowed the defendant to examine the witness as to the time, place and circumstances of the alleged admissions. And the witness thereupon testified: The plaintiff, and self, and wife, at the time, occupied rooms at the Revere House; defendant came there and spoke of settling a demand of his against Mrs. Chapman; I told him I had nothing to do with it; he must go to Mrs. Chapman's lawyer; but he would talk; we sat down at the table; we did not have any negotiations for a settlement; he did not deny Mrs. Chapman's account; he said that was all right; that he wanted to talk about his own account against Mrs. Chapman; he professed a desire to have all their matters settled.

Defendant thereupon objected to any evidence being offered as to said alleged admissions, because the same, if made, were made pending a negotiation for a settlement, which objection the court then and there overruled, to which decision the defendant excepted.

The witness then testified: The defendant, at such interview, admitted the board, washing and mending, as charged in the bill; also admitted nursing and attendance, and the money loaned, fifty-six dollars, in November, 1855. Also admitted had been paid one hundred dollars for Freer, and afterwards had obtained one hundred dollars out of plaintiff's money in his hands.

This conversation was in our rooms, at the Revere House. Defendant said would like to settle if he could; said so when he first came in; he looked at the plaintiff's account; he had no papers; did not see his bills; I showed him her bill (the bill in proof); we talked over items; said it was right; said he had a bill; I spoke to him about Freer—refreshed his recollection; said he recollected receiving it; he said he could not dispute the plaintiff's bill for nursing; whatever charges she made he would agree to; he admitted the board at five dollars per week.

He then proposed that we should examine his bill and agree upon it; I told him I would have nothing to do with it, because it was in court, and that I was not authorized to settle his claim against Mrs. Chapman; this was after he had looked over the bill of Mrs. Chapman; he then presented his bill for services, and I told him Mrs. Chapman would have nothing to do with it, and would leave that matter to the court; that she had trouble enough with him in trying to arrange their matters; that she would let the court settle it for them.

The defendant moved to strike out the evidence of witness, on the ground that it was not proof of an independent fact, but such admissions of a general character which a person would make who was honestly trying to treat for a settlement, and were made with a view and expectation that his own counter claim would be allowed. The court overruled the motion, and the defendant excepted.

The cause was then submitted to the jury, who found for the plaintiff, and assessed the damages at $947.

The defendant then moved for a new trial, on the ground that the court erred in refusing to give the instructions asked by the defendant, and in allowing the plaintiff to prove the evidence objected to by the defendant; also on the ground that the verdict is contrary to law, contrary to evidence and excessive; and on the ground, also, of new discovered evidence.

Which motion the court overruled, and the defendant excepted.

The defendant then moved for judgment on the special pleas, notwithstanding the verdict, on the grounds that the matters averred therein were admitted by the replication, and the plaintiff not entitled to recover for the board, nursing, fuel, use of apartments, etc., and that the amount thereof should be deducted from the verdict.

Which motion the court denied, and the defendant's counsel duly excepted, and prayed an appeal, which was granted.

A. Garrison, for Appellant.

M. W. Fuller, for Appellee.

Breese, J. Several objections are taken to the recovery in this case. The first is the failure of the plaintiff, as is alleged, to deny by her replication the allegation in the defendant's plea that the board, lodging, etc., declared for, was given and received as a gratuity, and by not so denying it the allegation was admitted, and the judgment should have been for the defendant *non obstante veredicto.*

There is nothing in this objection. The allegation in the plea that he boarded, lodged, etc., at the house of the plaintiff at her special instance and request and for her accommodation and benefit, is the main allegation of the plea, to be met by the replication. The other allegation that the plaintiff as a gratuity from her to the defendant furnished and provided this board, etc., is but a corollary from the fact first stated that it was at her instance and request. It was only necessary then, for the plaintiff to meet this fact and put it in issue by her replication,

which was properly done. That is the only material fact in the plea and presents a triable issue.

It is objected that the court allowed certain admissions of defendant made to one Winders to be given to the jury. Winders was acting as agent of the plaintiff to collect this claim, and presented a bill to defendant for payment. Defendant said it was right, and that he had a bill against the plaintiff which he wanted the witness to settle. This Winders refused, protesting that he had nothing to do with it, was not authorized to settle it—that he must see plaintiff's lawyer, and arrange the matter with him. From this it is contended, that defendant's admissions must be considered as admissions with a view to an amicable settlement of the differences between the parties, and by way of compromising those differences. They are nothing of the kind; they are full and distinct admissions and are to go to the jury with the further statement of the defendant made at the time, that he also had a bill against the plaintiff. All that was said at that time must go to the jury, but they are not bound to believe it all. They are not bound to believe, that although the defendant had a bill against the plaintiff equal or greater in amount to her bill against him, that such bill was just. It is for the jury to consider under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him, and this is the whole extent of the rule. 1 Greenleaf Ev., section 201. There is nothing in Winder's testimony to show the parties were on a compromise. He was the agent of the plaintiff to collect her bill, and when he presented it, the defendant had the honesty not to deny it, and from all the testimony, it would seem the plaintiff had maintained the defendant, at her own expense, for several years, and has a just claim on him for remuneration.

The evidence fully sustains the finding, and the judgment is affirmed.

Judgment affirmed.

Bradley Folliott, Appellant, *v.* Carlton C. Hunt, Appellee.

APPEAL FROM PEORIA.

If work is done under a special contract, the price to be paid must be governed by the stipulations of the contract, even where it is abandoned for justifiable reasons.

Folliott *v.* Hunt.

THIS was an appeal from the judgment of a justice of the peace in the county of Peoria, to the Circuit Court of that county.

There was a trial by jury, before POWELL, Judge, and a verdict and judgment for Hunt against Folliott for $102.20, from which Folliott appealed to this court.

About the first of July, 1856, Folliott agreed with Hunt, that if he would carry the mail from Farmington to Burlington, for the period of two years, that Hunt should receive therefor, quarterly, from Folliott the post office and treasury orders, from the government to Folliott, for performing that service, Folliott being the contractor with the government. Hunt carried the mail for about four months, when not receiving the compensation quarterly therefor, as promised, he abandoned the contract, and sued Folliott on a *quantum meruit*.

On the trial, the court gave the following instructions at the instance of plaintiff below, which are excepted to:

1st. If the jury find, from the evidence, that the plaintiff rendered the services for the defendant, as charged, for an agreed price, they will render a verdict for such amount.

2nd. If the jury find the services charged, were rendered upon a contract for a longer time, and the defendant was to make quarterly payments for such services as a part of said contract, and failed to make such payment as stipulated, the plaintiff would then have a right to abandon the service, and collect of the defendant what his services rendered were really worth.

3rd. If the jury find it was the duty of the defendant under the contract, when he received the orders or drafts, to pay them over to the plaintiff, then the plaintiff would be excused from making any demand for the same, on the defendant.

A motion for a new trial was overruled.

It is assigned for error, that the court gave improper instructions at the instance of the plaintiff; that the verdict is contrary to law; that the verdict is clearly against the evidence, and that the court erred in overruling the motion for a new trial.

C. BONNEY, for Appellant.

E. G. JOHNSON, for Appellee.

CATON, C. J. The second instruction given for the plaintiff below was wrong. We have repeatedly decided that where work is done under a special contract, the price of the work must be governed by the stipulations of the contract, although the party may be justified in abandoning the contract, and bringing his action for the *quantum meruit* of the work. If under

the circumstances, the plaintiff has suffered damages by the breach of the contract, over and above the price of the work fixed by it, he must recover for such breach, but that cannot influence the price he shall recover for the work he has done.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Francis W. Smith, use of Alexander Allison, Plaintiff in Error, *v.* Henry Pries *et al.*, Defendant in Error.

ERROR TO PEORIA.

It is error in an action upon a replevin bond, to refuse to let the plaintiff prove that the property has not been returned, as the condition of the bond required.

This was an action on a replevin bond. The declaration contains two counts; several breeches are assigned, and among them, one that Pries, defendant in error, did not, nor would, make return of the goods and chattels to Allison, nor to any other person for him. On the trial, plaintiff below asked a witness if the property replevied, had ever been returned to Allison. And the court, Powell, Judge, presiding, refused to allow him to answer, because it did not appear that a writ of *returno habendo* had been issued and returned, in the case of *Pries* v. *Allison.*

H. Grove, for Plaintiff in Error.

C. C. Bonney, for Defendant in Error.

Caton, C. J. This was an action on a replevin bond. Condition, that the plaintiff in the action of replevin should return the property, if he should be so ordered by the court. He was ordered to return the property as was contemplated by the condition of the bond. In this state of the case, the plaintiff offered to prove that the property had not been returned according to the exigency of the bond, and the court refused to allow it. In this the court erred.

The judgment must be reversed and the cause remanded.

Judgment reversed.

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* See note in the Index, to this case, under the head of "Breach of Promise of Marriage."

† On 50th page, in third line from bottom, in the opinion in this case, the word "kin" should read "heirs."

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See CONTRACT, 18, 19.

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BANKS AND BANKING.

* In this case the following errors are noted, in printing the separate opinion of Mr. Justice BREESE, on the 326th page. The period after the word "inflicted" in the 20th line from the top, should be a comma, and the following word, "considering," should commence without a capital C, and that sentence should end at the word "breach."

See TRUST DEEDS.

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See Homestead Exemption, 7.

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See Claim and Color of Title. Taxes and Tax Title.

ERROR.

1. Where a similiter has been added to a special plea, concluding with a verification, and the parties proceeded to trial without objection, it is too late to object in this court, although the similiter was a nullity, and no answer to the plea. *Spencer* v. *Langdon, etc.* 192.
2. Such a defect in pleading is cured by the sixth section of the statute of Jeofails. Ibid. 192.
3. If a plea of release of errors, in this court, is sustained by the proof, the judgment of the court below will stand affirmed. *Smucker* v. *Larimore,* 267.
4. A release of errors, by one of several defendants to a record, where the error only relates to the party who executes the release, is good. *Henrickson* v. *Van Winkle,* 274.
5. A party to a record cannot release an error which is personal to another party, nor can one party urge an error which is personal to another. Ibid. 274.
6. Where one of several defendants was not served with process, but judgment was nevertheless entered against him with the others, he may release the error. Ibid. 274.
7. Error will lie from an order approving or disapproving the report of a guardian empowered to sell the land of his ward. *In re J. M. Guernsey,* 443.
8. It is error to render a decree for a divorce by default, when there has not been any service of process. *Townsand* v. *Townsand,* 540.
9. Where the parties, by consent, dispense with formal written issues, and submit the cause for decision, by agreement, they will be estopped from assigning for error, the want of joinder or replication to pleas. *Kelsey* v. *Lamb,* 559.
10. Errors cannot be assigned after argument commenced. *Bristol* v. *City of Chicago,* 605.
11. It is error in an action upon a replevin bond, to refuse to let the plaintiff prove that the property has not been returned, as the condition of the bond required. *Smith* v. *Pries et al.* 656.

See Instructions. Interest, 3. Judgment, 4, 5. Mortgage, 4. Release of Errors.

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See Contract, 28.

EVICTION.

1. An eviction in fact or in effect, which renders the premises useless, may prevent a recovery of rent. *Halligan* v. *Wade,* 470.
2. Where an eviction is by another than the landlord, under paramount title, the rent is discharged. But an eviction of only a part of the premises, by a stranger, will authorize an apportionment of the rent; but if the eviction is by the landlord, and the tenant is kept out of possession, the whole rent will be discharged. Ibid. 470.
3. If a railroad company should enter into the possession of a part of the premises leased, by permission of the landlord, it would amount to an eviction of that part; although the company was not justified by taking the possession. Ibid. 470.
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1. Where a note offered in evidence differed in amount a half a cent from the one declared on, it was held to be a variance, and that it could not be received in evidence. *Spangler* v. *Pugh*, 85.
2. Matters of substance may be substantially proved, but matters of essential description, such as names, sums, magnitudes, dates, durations, and terms, must be precisely proved. Ibid. 85.
3. Where a judgment by default is entered on a promissory note, payable in currency, the clerk may assess the damages; it is not necessary to call a jury for that purpose. *Trowbridge* v. *Seaman*, 101.
4. Adding the words "$10 dollars and fifty interest," immediately after the words "value received," in a promissory note, is not a material alteration; such words would be construed to mean that a portion of the value received by the makers, consisted of ten dollars and fifty cents of interest. *Gardiner* v. *Harback*, 129.
5. Where a party had purchased a reaper, which had been in his use, for a less price than the value of a new machine, and gave his note for the purchase money, he cannot defeat the payment of the note on the ground that a subsequent promise was made by an agent of the vendor, to do some repairs to the machine. *Buntain* v. *Dutton*, 190.
6. Where an action is brought by the wife, upon a promissory note made payable to the wife or the husband, the proper mode of taking advantage of the fault, is by plea in abatement. *Young et al.* v. *Ward*, 223.
7. On such an obligation the suit should be brought either in the name of the husband, or by the husband and wife. Ibid. 223.
8. Upon an obligation made to a wife during coverture, the husband and wife may join in an action for a recovery upon it. Ibid. 223.
9. Husband and wife being but one person in law, the legal effect of a note made payable to the wife, or to the husband and wife in the alternative, is, that the husband is payee. Ibid. 223.
10. If a party signs a blank, and delivers it to another person, with authority to write over his name a negotiable obligation, if the person receiving the blank, makes the obligation for a larger amount than was intended by the signer, it will be good against him, in the hands of an innocent purchaser. So of negotiable paper, given for one purpose but used for another. Ibid. 223.
11. One man may authorize another to sign his name, or make his mark, and he will be bound by it. *Handyside* v. *Cameron*, 588.
12. A party who executes a note is estopped, and cannot deny his signature, though he does not write plainly. *Hunter et al.* v. *Bryden*, 591.
13. Although a tenant evicted from a part of demised premises, is not under obligation to pay rent for the part he occupies, yet if the tenant at the expiration of the term gives his note for the rent of the premises, it will be presumed that his moral obligation was so impressive as to induce him to give the note in ease of his conscience, and the note may be collected. *Anderson* v. *Chicago Marine and Fire Insurance Co.* 601.
14. A note, unless it is taken in payment absolutely, will not discharge a mechanic's lien. *Van Court* v. *Bushnell et al.* 624.
15. A party who endorses a note in blank, gives the holder of it a right to fill up the assignment at any time before it is offered in evidence, with any character of assignment that is usual and customary. *Hance* v. *Miller*, 636.

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SECURITY FOR COSTS.

1. A security for costs is good, if it can be identified with the record; and need not be marked filed as of any term; and if inadvertently marked as of one term, when it should have been of another, the mistake may be corrected. *Himes et al.* v. *Blakesley*, 509.
2. If the officer whose duty it is to receive and approve a bond for costs, accepts it, it is then *prima facie* good until it is adjudged insufficient, and it is not error for the court to allow the party to amend it, or to file a new bond. *Shaw* v. *Havekluft*, 127.

See BILL OF EXCEPTIONS.

SEDUCTION.

1. An action on the case for seduction may be sustained, not only by a parent, but by a guardian, master or other person, (or brother-in-law) standing in *loco parentis* to the person seduced. *Ball* v. *Bruce*, 161.
2. If the person seduced is a minor, the action will be sustained, whether she resided with the plaintiff or elsewhere, at the time of the seduction; if she was legally under the control of, or might be required to perform service for the plaintiff. Ibid. 161.
3. If the person seduced is not a minor, she must reside with and render service for the plaintiff; but slight acts of service will be sufficient to sustain the action. Ibid. 161.
4. The damages need not be measured by the services rendered, but may be exemplary. Ibid. 161.

SERVANTS.

1. Where competent servants have been selected to perform a duty, one of them cannot recover against the master for the carelessness of a fellow-servant. *Illinois Central Railroad Co.* v. *Cox*, 20.
2. It will be understood that each servant who engages in a particular business, calculates the hazards incident to it, and contracts accordingly. Ibid. 20.
3. Where A. contracts to deliver wood to a railroad company, the company to furnish the equipment to move it, the men on the train to obey the orders of the contractor, one of the servants employed by him to load wood upon the car having been thrown off and killed: Held, that the parties were all servants of the company, and that no recovery could be had by the administratrix for his death. Ibid. 20.

SERVICE OF PROCESS.

A return to a service of summons is good, if signed by the sheriff, although the signature has not to it anything to indicate by what authority he served the process. *Thompson* v. *Haskell*, 215.

See MORTGAGE, 6.

SET-OFF.

See CONTRACT.

SHERIFF.

1. Sheriffs cannot offer rewards, and render county liable. *County of Crawford* v. *Spenney*, 288.
2. A court is presumed to know its own officers, and especially the sheriff. *Thompson* v. *Haskell*, 215.

See MORTGAGE, 6. SERVICE OF PROCESS.

SIGNATURES.

STATE BANK.

STATUTE OF FRAUDS.

See Frauds and Perjuries.

STAKEHOLDER.

STOCKHOLDERS.

See Railroads, 6, 7, 8, 9, 10, 11, 12.

STOCK SUBSCRIPTIONS.

See Corporations. Railroads, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21.

SUPREME COURT.

SURETY.

TAXES AND TAX TITLE.

TENANT—TENANTS IN COMMON.

TENDER OF MONEY.

TRESPASS.

See EXECUTION.

TROVER AND CONVERSION.

TRUSTS AND TRUSTEES.

TRUST DEEDS.